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REPORTERS

Supreme Court of India

Shri Surjit Singh Chadha, Advocate,
Supreme Court of India.

Allahabad

Shri A. D. Prabhakar, M.A., LL.B., Advocate.

LUCKNOW BENCH

Shri Kashi Prasad Sakseena, M.A., LL.B.,
Advocate.

Andhra Pradesh

Shri P. Sitarama Raju, B.A., B.L., Advocate.

Shri M. Ranga Raju, B.A., B.L., Advocate.

Assam & Nagaland

Shri Nagendra Mohan Ganguly,
Advocate, Gauhati.

Bombay

Shri K. J. Kale, B.A., LL.B., Advocate.

Calcutta

Shri Subodh Chandra Basak, M.A., LL.B.,
Advocate.

Shri H. N. Ghosh, M.A., LL.B., Bar-at-law.

Shri Aniya Lal Chatterji, Advocate.

Shri Gauri Prasad Mukherji, Advocate.

Shri Janendra Coomarr Dutt, Advocate,
Supreme Court of India.

Delhi

Shri Surjit Singh Chadha, Advocate,
Supreme Court of India.

HIMACHAL PRADESH BENCH

Shri A. C. Mehta, B.A., LL.B., D. G. P.,
Advocate, Supreme Court of India.

Goa

Shri Shridhar Tambe, Advocate.

Gujarat

Shri Damodar Khimchand Shah, B.Sc., LL.B.,
Advocate.

Jammu & Kashmir

JAMMU

Shri Bakshi Ishwar Singh, Advocate,
Supreme Court of India.

Kerala

Shri K. V. B. Shenoi, B.A., B.L., Advocate.

Shri E. A. Nayar, M.A., (Madr.), B.L.,
Hons. (Oxon), Bar-at-law.

Madhya Pradesh

A. — JABALPUR

Shri A. N. Mukherjee, Advocate.

B. — GWALIOR

Shri G. S. Garg, Advocate.

C. — INDORE

Shri M. P. Avadhooti, B.Sc., LL.B., Advocate.

Madras

Shri C. R. Krishna Rao, B.A., B.L., Advocate.

Manipur

Shri Kojam Bohini Kumar Singh,
Advocate, Imphal.

Mysore

Shri G. S. Ullal, M.A., B.L., Advocate,
Supreme Court.

Shri Anant V. Albal, Advocate,
Supreme Court.

Orissa

Shri Jagat Bandhu Kar, B.A., B.L.,
Advocate.

Patna

Shri Subhi Kumar Mazumdar, Advocate.

Punjab and Haryana

Shri Brij Mohan Khanna, Advocate.

Rajasthan

Shri Manakmal Singhvi, Advocate.

Tripura

Shri Monoranjan Chaudhury, M.A., B.L.,
Advocate.

COMMENCEMENT OF AN ACT OF PARLIAMENT (or its provision)

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district of Garo Hills; (iii) entire district of United Miker and North Cachar Hills and (iv) entire district of Mizo Hills; and 2. The whole State of West Bengal, except, (i) the area comprised within limits of Calcutta Corporation; (ii) area comprised within limits of Howrah Municipality; (iii) Fort William; and (iv) area comprised within limits of Cantonments of Barrackpore, Lobong and Jalapabar. *Gaz. of India*, 25-3-1970, Pt. II-S. 3 (i), Ext. p. 377.

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—S. 45-11 — Scope — Section has not been artistically drafted — See Companies Act (1956), S. 543 Ker 131 C (C N 23)

—S. 45-H — Scope and applicability—Provisions apply to misapplication of Bank's funds — (The question whether S. 45-H covers only the cases covered by S. 543 (1) (a) of the Companies Act, 1956, and does not cover the cases contemplated by clause (1)(b) thereof left open

Ker 131 D (C N 23)

Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949)

—S. 4(1) — Offence under S. 5(2) of Prevention of Corruption Act (1947) — Offence is one prescribed under Cl. 7 of the Schedule — Case can be tried only by Special Court and not by ordinary Criminal Court, by virtue of S. 4(1) — See Prevention of Corruption Act (1947), S. 5(2)

Cal 253 (C N 52)

—Cl. 7 of the Schedule — Offence under S. 5 (2) of Prevention of Corruption Act (1947) — Offence is one prescribed under Cl. 7 of the Schedule — Case can be tried only by Special Court and not by ordinary Criminal Court, by virtue of S. 4 (1) — See Prevention of Corruption Act (1947), S. 5 (2)

Cal 253 (C N 52)

Bengal Municipal Act (15 of 1932)

See under Municipalities.

Bihar Land Reforms Act (30 of 1950)

See under Tenancy Laws.

Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939)

See under Debt Laws.

Bombay Administration of Estates Regulation (8 of 1827)

—S. 10 — Agricultural land — Occupant not known to be living — Intestate property — District Judge merely acting on report of revenue authorities appointing administrator and directing him to take possession of lands in question — Proclamation neither issued as required by S. 10 nor published in gazette — Non-compliance of provisions of S. 10 — Order of District Judge held null and void

Bom 205 A (C N 35)

—S. 10 — Bombay Land Revenue Code (5 of 1879), S. 72 — Agricultural lands — Tenants in possession — Person shown as occupant in record of rights, a Hindu, dying or presumed to be dead intestate — Government's right to take possession of property under S. 29, Hindu Succession

Bombay Administration of Estates Regulation (contd.)

Act — Effect of S. 72, Bombay Land Revenue Code — Section 72 being a proviso contained in special legislation overrides general provisions of S. 10 of Regulation (8 of 1827)—Order of District Judge appointing administrator and directing him to take possession of lands, based merely on report of revenue authorities, held null and void — (Hindu Succession Act (1956), S. 29) Bom 205 B (C N 35)

Bombay Land Revenue Code (5 of 1879)

—S. 72 — Agricultural lands — Tenants in possession — Person shown as occupant in record of rights, a Hindu, dying or presumed to be dead intestate — Effect of S. 72, Bombay Land Revenue Code—S. 72 being a provision contained in special legislation overrides general provisions of S. 10 of Regulation (8 of 1827) — Orders of District Judge appointing administrator and directing him to take possession of lands, based merely on report of revenue authorities held null and void — See Bombay Administration of Estates Regulation (8 of 1827), S. 10

Bom 205 B (C N 35)

Bombay Village Panchayats Act (3 of 1950)

See under Panchayats.

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (90 of 1958)

See under Tenancy Laws.

Calcutta High Court Civil Rules and Orders

See under High Court Rules and Orders.

Calcutta High Court (Original Side) Rules

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Calcutta Thika Tenancy Act (2 of 1949)

See under Tenancy Laws.

Central Excise Rules (1944)

—R. 40 — Construction of — Unlawful mixing of duty-paid tobacco with non-duty-paid tobacco — Confiscation of mixture — So much of mixture representing non-duty-paid tobacco can only be confiscated—AIR 1961 Bom 48, Overruled — (Civil P. C., 1908), Preamble — Interpretation of Statutes) SC 829 (C N 178)

C. P. and Berar Industrial Disputes Settlement Act (23 of 1947)

—S. 16 — Contract Act (1872), S. 73 — Contract of service — Incidents of—Services of employee lent to third person — Original employment does not cease — Third person cannot dismiss employee.

SC 823 (C N 177)

C. P. and Berar Municipalities Act (53 of 1922)

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C. P. Tenancy Act (1 of 1920)

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City Civil Courts Act (West Bengal Act 21 of 1953)

—S 5 (4) and Sch. I, Item No. 10 (ii)—Jurisdiction of City Civil Court — Calcutta Dock Labour Board, a statutory Corporation — Suit against, by registered dock workers for wrongful dismissal — City Civil Court can try it — It is not a suit relating to 'management' of Corporation within Sch. I, Item 10 (ii) — Expression 'management' refers to internal management of Board as distinguished from acts of management of scheme under Section 3, Dock Workers (Regulation of Employment) Act Cal 227 (C N 43)

—Sch. I, Item No. 10 (ii) — Jurisdiction of City Civil Court — Calcutta Dock Labour Board a statutory Corporation — Suit against, by registered Dock Workers for wrongful dismissal — City Civil Court can try it — It is not a suit relating to 'management' of Corporation within Sch. I, Item 10 (ii) — Expression 'management' refers to internal management of Board as distinguished from acts of management of scheme under S. 3, Dock Workers (Regulation of Employment) Act — See City Civil Courts Act (West Bengal Act 21 of 1953), S. 5 (4) Cal 227 (C N 43)

Civil Procedure Code (5 of 1908)

—Preamble — Judicial precedents — Revenue Tribunal is bound to follow decision of its own High Court

Bom 232 B (C N 40) (FB)

—Preamble — Interpretation of Statutes — Penal provision — Construction of — See Central Excise Rules (1944), R. 40

SC 829 (C N 178)

—Preamble — Interpretation of Statutes — Rent Control legislation — Defective drafting — Intention of Legislature — Rule of construction — Grammatical construction to be preferred to all other rules of construction, to find out intention of Legislature SC 971 B (C N 198)

—Preamble — Interpretation of Statutes — Intention of Legislature — Interpretation of — Sec Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1943), S. 3

All 309 D (C N 49) (FB)

—Preamble — Interpretation of Statutes — Duty of Court — Intention of Legislature to be gathered only from words used in the Statute — It is only in case of some doubts extraneous aids such as Statement of Objects and Reasons and previous history of Legislation can be taken

Bom 232 C (C N 40) (FB)

—Preamble — Interpretation of Statutes — Fiscal Statutes—Rule of construction — Word 'sale' in S. 2 (1) of J. and K. General Sales Tax Act, not given extended meaning J. and K 85 D (C N 16)

—Preamble — Interpretation of Statutes — Title of an Act — Use of, in interpreting other provisions of the Act

Mad 212 A (C N 56) (FB)

Civil P. C. (contd.)

—Preamble — Interpretation of Statutes — Taxing statutes — Mode of interpretation Mad 249 G (C N 67)

—Preamble — Interpretation of Statutes — Precise and unambiguous words should be interpreted in their natural and ordinary sense — Intention of Legislature is best gathered from words used by it—Legislature must be presumed to have used the words in a rule or section deliberately and with a view to achieve some objective — A construction which will leave without effect any part of the language of statute should normally be avoided

Tripura 40 B (C N 9)

—Preamble — Precedents — Supreme Court decisions — See Constitution of India, Art. 141

—S. 9 — Auction of evacuee property—Acceptance of bid — Attornment by tenant to purchaser — Suit for ejectment of tenant — No evidence led to indicate that title did not pass to purchaser — Proviso to S. 3 and not S. 3 (a) is attracted — Civil Court is barred from entertaining suit — Decision of Delhi High Court Reversed — See Houses and Rents — Delhi Rent Control Act (59 of 1958), S. 3 (a)

SC 812 (C N 173)

—S. 9 — Stay order under S. 5 of U. P. Act (5 of 1954) — Notification under S. 4, U. P. Act (5 of 1954), during pendency of civil appeal — Fact of notification brought to notice of Court — Appellate Court holding that S. 5 did not apply to facts of case and deciding appeal — Decision allowed to become final between parties — Decree passed by Civil Court, held, was not a nullity — Assumption of jurisdiction by erroneous decision of jurisdictional facts can be set aside in appeal or revision — Even under S. 49 of U. P. Act 5 of 1954 jurisdiction of Civil Court is not absolutely barred — Sec Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 5 (as it stood in the year 1961)

All 344 (C N 52) (FB)

—S. 9 — Company Court has no exclusive jurisdiction in matters falling outside Companies Act such as suits on contracts or mortgage bonds executed by companies — See Companies Act (1956), S. 10

Andh Pra 225 A (C N 34)

—Ss. 11, 96 and Order 22, Rules 3 and 4 — Res judicata between co-defendants—Settlement of land in favour of plaintiff as tenant from deity — Suit by plaintiff for declaration of title and possession of land annexed to their land by alluvion — Deity impleaded only as pro forma defendant — Dismissal of suit — First appeal to High Court impleading deity as pro forma respondent — Dismissal of appeal against deity for failure to pay cost of guardian ad litem appointed by Court for deity — Dismissal of entire appeal not proper — No

Civil P. C. (contd.)

inconsistent decree would result

SC 809 (C N 172)

—S. 11 — Principles of res judicata — Writ petition before High Court dismissed not on merits — Subsequent writ on same grounds and on same facts before Supreme Court is not barred — See Constitution of India, Article 32 SC 893 (C N 191)

—S. 11 — Partition suit — Co-defendants — Plaintiff clearly recognizing co-defendant M's right to suit properties and, therefore, co-defendant remaining ex parte — Another suit, filed at same time by other co-defendant claiming share in property recognized as of M in plaintiff without impleading M, also tried together. Held, M' who was not aware of contentions raised by co-defendant and who, therefore, had no opportunity to contest that claim could not be said to be prevented by principle of res judicata in contesting that claim in fresh suit — Defendant in partition suit could not be deemed as a rule to be aware of possibility that other co-defendants would claim partition of their share whenever partition suit is instituted — AIR 1941 Pat 83, Dissent from — (Hindu Law — Partition suit) Mad 232 (C N 60)

—S. 47 — Decree passed by Court in ejectment suit in terms of compromise, without satisfying itself if the grounds for eviction existed — Decree is in contravention of S 13 and a nullity and cannot be executed — See Houses and Rents—Delhi and Ajmer Rent Control Act (38 of 1952), S. 13 SC 838 (C N 180)

—S. 64 — An alienation of an attached property is void only against all claims enforceable under the attachment and not against other claims

Mys 152 B (C N 35)

—S. 80 — Amendment of plaint introducing discordance between facts alleged in notice under S. 80 and those pleaded in the plaint — Although relief may be the same plaintiff has to be rejected under O. 7, R. 11 — Service agreement between President of former Manipur State and plaintiff — Ratification of agreement by successor the Union of India not mentioned in notice under Section 80 — Subsequent amendment introducing fact of ratification cannot be allowed — See Civil P. C. (1908), O. 6, R. 17 Manipur 44 (C N 13)

—S. 96 — Settlement of land in favour of plaintiff as tenants from deity — Suit by plaintiff for title and declaration of possession of land annexed to land by alluvion — Deity impleaded as pro forma defendant — Dismissal of suit — First appeal to High Court impleading deity as respondent — Dismissal of appeal against deity for failure to pay cost of guardian ad litem appointed by Court for deity — Dismissal of entire appeal — Validity — See Civil P. C. (1908), S. 11 SC 809 (C N 172)

Civil P. C. (contd.)

—S. 96 — New case — Suit against State of Rajasthan for recovery of certain amount due against former State of Kotah — Claim based on fresh agreement arrived at between parties on 18-11-1950 — Plaintiff not coming with positive assertion that his claim is based on recognition by Rajasthan State of past liability or erstwhile Kotah State — No issue on the point framed by Trial Court — At appellate stage, plaintiff cannot be allowed to raise his claim upon plea never put forward by him in course of trial Raj 118 C (C N 28)

—Ss. 100-101 — New point — Point not raised in written statement — Cannot be allowed to be raised SC 839 C (C N 181)

—Ss. 100-101 — Decree for arrears of rent, mesne profits and ejectment — Death of tenant thereafter — Competency of his heirs to file appeal — Decree, whether can be set aside in its entirety — See Civil P. C. (1908), S. 146

—S. 100 — All 309 B (C N 49) (FB) — Finding of fact based on evidence — Binding on second appellate Court Mad 226 A (C N 59)

—Ss. 100, 101 — Mining lease — Mortgage of leased property — Mortgage decree creating charge on mortgaged property — Question as to effect on lease because of the provisions of the Bihar Land Reforms Act — Question being purely a question of law can be raised for the first time in appeal Pat 167 E (C N 27)

—S. 107 — Injunction — Relief is discretionary — Discretion used in a judicial and not in a capricious manner — High Court will not interfere — Wrongful use of discretion by Lower Court — Burden of proof is on the appellant — See Civil P. C. (1908), O. 39, R. 1

—Ss. 107, 149, O. 7, R. 11 — Appeal — Time for payment of deficit court-fee — Order 7, Rule 11 does not apply to appeals — Power to extend time available under S. 149 but not by virtue of S. 107

—S. 105(2) — See Civil P. C. (1908), O. 41, R. 23

—S. 105(2) — Review of remand order falling under Section 105(2) in exercise of inherent power is erroneous. Decision of Madh Pra High Court, Reversed

—S. 112 — Practice of Supreme Court — See Constitution of India, Art. 136 SC 977 D (C N 207)

—S. 115 — Assumption of jurisdiction by erroneous decision of jurisdictional facts can be set aside in appeal or revision — See Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 5 (as it stood in the year 1961) SC 987 A (C N 204)

—S. 115 — Court exercising jurisdiction under S. 115 cannot correct errors of fact All 344 (C N 52) (FB) Assam 73 B (C N 15)

Civil P. C. (contd.)

—S. 115, Order 6, Rule 17, Order 29, Rule 1 — Order refusing application for amendment at very late stage raising technical plea (competency to sue under O. 29, Rule 1) — No material irregularity

Ker 138 E (C N 24)

—S. 115 (c) — Expressions "Illegally" and "Material irregularity" — Meaning — Interference permissible only if Subordinate Court has committed some breach of a provision of law or some error of procedure

Manipur 34 (C N 10)

—S. 115 (e) — Illegal or irregular exercise of jurisdiction — Trial Court not consolidating two similar suits — It is only error in exercise of jurisdiction — Cl. (c) is not attracted — AIR 1939 Pat 30 and AIR 1933 Pat 61, Diss.

Tripura 35 (C N 7)

—Ss. 146, 100-101 — Decree for arrears of rent, mesne profits and ejectment — Death of tenant thereafter — Competency of his heirs to file appeal — Decree, whether can be set aside in its entirety — Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3

All 309 B (C N 49) (FB)

—S. 146, O. 22, R. 10 and O. 23, R. 3 — Scope of — Settlee pendente lite of one of items of suit property not coming on record as party to suit — Application by settlee to be brought on record in appeal — On next day appellant and settlor filing compromise memo — Settlee can take benefit of Section 146 — Filing of compromise memo is no bar to entertaining application or inquiry into its merits — Application can be entertained under Section 146 notwithstanding that the truth and validity of settlement was disputed — (1951) 2 Mad LJ 26, Overruled

Andh Pra 211 A (C N 31)

—S. 149 — Appeal — Time for payment of deficit Court fee — O. 7, R. 11 does not apply to appeals — Power to extend time available under S. 149 but not by virtue of Sec. 107 — See Civil P. C. (1908), S. 107

Punj 273 A (C N 38)

—S. 151 — Inherent powers — Court cannot make use of Section where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same — Power cannot be exercised as an appellate power — Review of remand order, failing under Sec. 105 (2), in exercise of inherent power is erroneous. Decision of Madh Pra High Court. Reversed SC 997 B (C N 207)

—S. 151, O. 1, R. 10, O. 22 R. 10 and O. 41, R. 20 — R. 20 is not exhaustive — Inherent powers can be exercised in adding parties to appeals

Andh Pra 211 B (C N 31)

—S. 151, O. 9, R. 13 and O. 43, R. 1 (d) — Application to set aside ex parte decree dismissed for default — Remedy by way of appeal is not illusory — Appellant can

Civil P. C. (contd.)

canvass that there was sufficient cause for non-appearance when application was called on for hearing — High Court would not ordinarily exercise its inherent powers to set aside order when remedy of appeal is not availed of except in exceptional cases

Cal 229 B (C N 44)

—S. 151 — Proceeding under Calcutta Thika Tenancy Act, 1949 — Application by tenant for review of ejectment order dismissed for default — Tenant filing application under S. 151 for setting aside order of dismissal — Held though order was appealable, scope of appeal was limited and point of absence could not usually be considered in appeal and, therefore, in the circumstances application under S. 151 was competent — (1964) 68 Cal WN 1064, Not Foll.

Cal 240 (C N 47)

—O. 1, R. 3 — Lease and subsequent sale of property — Suit for pre-emption — Plaintiff disputing the genuineness of the lease, alleging that lease and sale are part of the same transaction — Lessee can be joined as co-defendant with the vendor and vendees

Punj 276 (C N 39)

—O. 1, R. 10 — O. 41, R. 20 is not exhaustive — Inherent powers can be exercised in adding parties to appeals — See Civil P. C. (1908), S. 151

Andh Pra 211 B (C N 31)

—O. 1, R. 10 — No addition of parties after limitation — See Motor Vehicles Act (1939), S. 110A

Pat 172 D (C N 28)

—O. 6, R. 14 — Pleadings in a suit by or against a Corporation — Signature and verification — Authority to sign a plaint on behalf of a Company — Applicability of O. 6, R. 14 — Affidavit, necessity of — See Civil P. C. (1908), O. 29, R. 1

Ker 138 D (C N 24)

—O. 6, R. 17, O. 29, R. 1 — Suit by Corporation — Amendment of written statement sought after evidence of plaintiff was taken, for raising objection to competency of, Company's Officer to sue — Amendment sought held purely technical and of no substance and should be refused

Ker 138 A (C N 24)

—O. 6, R. 17 — Amendment of pleading — Delay no ground for refusal — Exceptions

Ker 138 B (C N 24)

—O. 6, R. 17 — Order refusing application for amendment at very late stage raising technical plea — Revision — No material irregularity — See Civil P. C. (1908), S. 115

Ker 138 E (C N 24)

—O. 6, R. 17, O. 7, R. 10 — Amendment of plaint — Amendment if allowed likely to result in deprivation of jurisdiction of Court — Amendment should be allowed and plaint to be retained or returned after examining pecuniary jurisdiction of Court

Mad 247 (C N 66)

—O. 6, R. 17; O. 7, R. 11 and S. 80 — Amendment of plaint introducing discordance between facts alleged in notice under

Civil P. C. (contd.)

S. 80 and those pleaded in the plaint — Although relief may be the same plaint has to be rejected under O. 7, R. 11 — Service agreement between President of former Manipur State and plaintiff — Ratification of agreement by successor the Union of India not mentioned in notice under S. 80 — Subsequent amendment introducing fact of ratification cannot be allowed

Manipur 44 (C N 13)
—O. 6, R. 17 — No amendment to pre-judice rights accrued to opposite party — See Motor Vehicles Act (1939), S. 110-C

Pat 172 C (C N 2)
—O. 7, R. 7 — Trial Court can mould relief and grant decree as required by merits of case — Appellate Court has the same powers — See Civil P. C. (1908), O. 41, R. 33 All 307 B (C N 48)

—O. 7, R. 10 — Amendment of plaint — Amendment if allowed likely to result in deprivation of jurisdiction of Court — Amendment should be allowed and plaint to be retained or returned after examining pecuniary jurisdiction of Court — See Civil P. C. (1908), O. 6, R. 17

Mad 247 (C N 66)
—O. 7, R. 11 — Total want of cause of action — Dismissal of plaint on that ground, when permissible

All 309 C (C N 49) (FB)
—O. 7, R. 11 — Amendment of plaint introducing discordance between facts alleged in notice under S. 80 and those pleaded in the plaint — Although relief may be the same plaint has to be rejected under O. 7, R. 11 — Service agreement between President of former Manipur State and plaintiff — Ratification of agreement by successor the Union of India not mentioned in notice under S. 80 — Subsequent amendment introducing fact of ratification cannot be allowed — See Civil P. C. (1908), O. 6 R. 17

Manipur 44 (C N 13)
—O. 7, R. 11 — Appeal — Time for payment of deficit Court-fee — O. 7, R. 11 does not apply to appeals — Power to extend time available under S. 149 but not by virtue of Sec. 107 — See Civil P. C. (1908), S. 107 Punj 273 A (C N 3)

—O. 8, R. 5 — Admissions
Ker 138 C (C N 24)
—O. 9 (Gen.) — Rules 35 and 35-A of Chap. X of Original Side Rules of Calcutta High Court — Distinction between pointed out — Suit filed on Original Side — Dismissal for non-prosecution — Application for recalling and setting aside order — O. 9, Civil P. C. has no application

Cal 231 A (C N 45)
—O. 9, R. 13 and O. 43, R. 1 (d) — Application to set aside ex parte decree dismissed for default — Order is appealable under O. 43, R. 1 (d)

Cal 229 A (C N 41)
—O. 9, R. 13 — Application to set aside ex parte Decree dismissed for default

Civil P. C. (contd.)

— Remedy by way of appeal is not illusory — Appellant can canvass that there was sufficient cause for non-appearance when application was called on for hearing — High Court would not ordinarily exercise its inherent powers to set aside order when remedy of appeal is not availed of except in exceptional cases — See Civil P. C. (1908), S. 151 Cal 220 B (C N 44)

—O. 20, R. 12 — Ascertainment of mesne profits — Suit for declaration of title, for possession and for mesne profits — Held, mesne profits had to be ascertained separately on petition under O. 20, R. 12 on obtaining possession — See Specific Relief Act (1877), S. 42.

Tripura 43 F (C N 10)
—O. 21, R. 1 — Decree against tenant for arrears of rent — Service of notice under S. 3 of U. P. Act 3 of 1917 by landlord — Deposit of decretal amount in Court under O. 21, R. 1 — Amounts to payment to landlord — See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1917), S. 3

All 309 A (C N 49) (FB)
—O. 21, R. 57 — The expression "where any property has been attached in execution of a decree" — Interpretation of — Attachment before judgment — Becomes attachment in an execution — Execution application — Dismissal for decree-holder's default — Attachment before judgment ceases to subsist — (Civil Procedure Code (1908), Order 38, Rule 11)

Mys 152 A (C N 35)
—O. 21, R. 61 — Money due to judgment-debtor on attached bills — Money in possession of Government in trust for judgment-debtor — Claimant not in possession of such money — His claim to money should be disallowed

Tripura 40 A (C N 9)
—O. 22, R. 3 — Settlement of land in favour of plaintiff as tenants from deity — Suit by plaintiff for title and declaration of possession of land annexed to land by alluvion — Deity impleaded as pro forma defendant — Dismissal of suit — First appeal to High Court impleading deity as respondent — Dismissal of appeal against deity for failure to pay cost of guardian ad litem appointed by Court for deity — Dismissal of entire appeal — Validity. — See Civil P. C. (1908), S. 11

SC 809 (C N 172)
—O. 22, R. 4 — Settlement of land in favour of plaintiff as tenants from deity — Suit by plaintiff for title and declaration of possession of land annexed to land by alluvion — Deity impleaded as pro forma defendant — Dismissal of suit — First appeal to High Court impleading deity as respondent — Dismissal of appeal against deity for failure to pay cost of guardian ad litem appointed by Court for deity — Dismissal of entire

Civil P. C. (contd.)

appeal — Validity See Civil P. C. (1908), S. 11 SC 809 (C N 172)

—O. 22, R. 4 read with R. 11 — Appeal — Abatement of — Death of one of respondents — Application to bring legal representative on record made after 90 days — Delay not satisfactorily explained — Appeal abates Punj 273 B (C N 38)

—O. 22, R. 10 — Scope of — Settlee pendente lite of one of items of suit property not coming on record as party to suit — Application by settlee to be brought on record in appeal — On next day appellant and settlor filing compromise memo — Settlee can take benefit of S. 146 — (1951) 2 Mad LJ 26, Overruled — See Civil P. C. (1908), S. 146

Andh Pra 211 A (C N 31)
—O. 22, R. 10 — O. 41, R. 20 is not exhaustive — Inherent powers can be exercised in adding parties to appeals — See Civil P. C. (1908), S. 151

Andh Pra 211 B (C N 31)
—O. 23, R. 1 — "Same subject matter" — Meaning — Cause of action and relief claimed in the two suits must be same SC 987 (C N 204)

—O. 23, R. 1 — Withdrawal of suit — Right of withdrawal and right of withdrawal with liberty to file fresh suit — Distinction — Application under sub-rule (2) — Conversion of into an application under sub-rule (1) — Not permissible

Mys 155 (C N 37)
—O. 23, R. 3 — Scope of — Settlee pendente lite of one of items of suit property not coming on record as party to suit — Application by settlee to be brought on record in appeal — On next day appellant and settlor filing compromise memo — Settlee can take benefit of S. 146 — Filing of compromise memo as no bar to entertaining application or inquiry into its merits — Application can be entertained under Section 146 notwithstanding that the truth and validity of settlement was disputed—(1951) 2 Mad LJ 26, Overruled — See Civil P. C. (1908), S. 146

Andh Pra 211 A (C N 31)
—O. 29, R. 1 — Suit by Corporation — Amendment of written statement for raising objection to competency of Company's Officer to sue — Amendment held purely technical and of no substance — See Civil P. C. (1908), O. 6, R. 17

Ker 138 A (C N 24)
—Order 29, R. 1 and Order 6, Rule 14 — Order 29, Rule 1 not mandatory — Pleadings in a suit by or against a Corporation — Signature and verification — Authority to sign a plaint on behalf of a Company — Applicability of Order 6, Rule 14 — Affidavit, necessity of

Ker 138 D (C N 24)
—O. 29, R. 1 — Order refusing application for amendment at very late stage raising technical plea — Revision — No

Civil P. C. (contd.)

material irregularity — See Civil P. C. (1908), S. 115 Ker 138 E (C N 24)
—O. 38, R. 11 — Attachment before judgment — Becomes attachment in execution — No fresh attachment necessary — See Civil P. C. (1908), O. 21, R. 57

Mys 152 (C N 35)
—O. 39, R. 1, S. 107 — Injunction — Relief is discretionary — Discretion used in a judicial and not in a capricious manner — High Court will not interfere — Wrongful use of discretion by Lower Court — Burden of proof is on the appellant

Manipur 37 A (C N 11)
—O. 39, R. 1 — Injunction — Grant of — Considerations which weigh with the Court stated Manipur 37 B (C N 11)
—O. 39, R. 1 — Injunction — Grant of — Court must be satisfied that prima facie case has been made out

Manipur 37 C (C N 11)
—O. 41, R. 5 (3) (c) — Rule is mandatory — What it provides is that order on application cannot be made under security is filed and not that application itself would not be maintainable

Andh Pra 210 (C N 30)
—O. 41, R. 20 — R. 20 is not exhaustive — Inherent powers can be exercised in adding parties to appeals — See Civil P. C. (1908), Sec. 151

Andh Pra 211 A (C N 31)
—O. 41, R. 23 — Remand of case by Appellate Court — Order of remand is appealable under Order 43 — Order not appealed against — Its correctness is no more open to examination in view of Section 105(2) — Review of remand order in exercise of inherent power is erroneous. Decision of Madh Pra High Court. Reversed SC 997 A (C N 207)

—O. 41, R. 23 — Case sent back to first appellate Court to dispose of appeal on merits — Court of first appeal is competent to rehear entire matter

Assam 75 A (C N 16)
—O. 41, R. 33, O. 7, R. 7 — Trial Court can mould relief and grant decree as required by merits of case — Appellate Court has the same powers

All 307 B (C N 48)
—O. 43, R. 1 (d) — Application to set aside ex parte decree dismissed for default — Order is appealable under O. 43, R. 1 (d) — See Civil P. C. (1908), O. 9, R. 13 Cal 229 A (C N 44)

—O. 43, R. 1 (d) — Application to set aside ex parte Decree dismissed for default — Remedy by way of appeal is not illusory — Appellant can canvass that there was sufficient cause for non-appearance when application was called on for hearing — See Civil P. C. (1908), S. 151

Cal 229 B (C N 44)
—O. 47, R. 1 — Suit dismissed for non-prosecution — Application for recalling and reviewing order filed within 30 days of

Civil P. C. (contd.)

date of Order is not barred by limitation under Art. 124, Limitation Act — Even if application for review is not in the prescribed form that is not fatal to its maintainability — (Limitation Act (1963), Article 124) — Cal 231 C (C N 45)

—O. 47, Rr. 1 and 4, Proviso (b) — Grounds for review — Review on ground of discovery of new matter — Strict proof required by proviso (b) to R. 4 — Dismissal of suit for non-prosecution — Review — Plaintiff alleging his inability to place before Court certain facts owing to death of his solicitor — Review allowed on ground of any other sufficient reason — Cal 231 D (C N 45)

—O. 47, R. 4, Proviso (b) — Review on ground of discovery of new matter — Strict proof as required by proviso essential — See Civil P. C. (1908), O. 47, R. 1 — Cal 231 D (C N 45)

CIVIL SERVICES

—Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959

—S. 3 and the Andhra Pradesh Employment (Requirement as to Residence) Rules, 1959, framed thereunder are ultra vires the power of Parliament under Art. 16 (3) and violates Art. 16 (1) and (2) of Constitution — See Civil Services — Public Employment (Requirement as to Residence) Act (1957), S. 3 — Andhra Pra 236 A (C N 36)

—Civil Services Classification (Control and Appeals) Rules

—Rules 49 and 56 — Mere non-promotion to selection post without any disciplinary action does not amount to penalty within R. 49 — No appeal lies under R. 56 — Cal 225 B (C N 42)

—R. 56 — Mere non-promotion to selection post without any disciplinary action does not amount to penalty within R. 49 — No appeal lies under R. 56 — See Civil Services — Civil Services (Classification Control and Appeals) Rules, R. 49 — Cal 225 B (C N 42)

—Jammu and Kashmir Civil Service (Classification, Control and Appeal) Rules (1956)

—R. 14 (1) — Creation of temporary post of Administrative Officer — Held, R. 14 (1) was not attracted — See Civil Services — Jammu and Kashmir Civil Service (Classification, Control and Appeal) Rules (1956), R. 16 (2) — J and K 90 B (C N 17)

—Rr. 16 (2), 14 (1), 24 and 25 — Creation of temporary post of Administrative Officer — Held, R. 16 (2) was attracted and not R. 14 (1) and while filling that post question of juniority or seniority covered by R. 24 or 25 was not relevant — Scope of R. 16 (2) indicated — J and K 90 B (C N 17)

—R. 24 — Creation of temporary post of Administrative Officer — Held, while filling that post question of juniority or

Civil Services — J. and K. Civil Service (Classification, Control and Appeal) Rules (contd.)

seniority covered by R. 24 was not relevant — See Civil Services — Jammu and Kashmir Civil Service (Classification, Control and Appeal) Rules (1956), R. 16 (2) — J and K 90 B (C N 17)

—R. 25 — Creation of temporary post of Administrative Officer — Held, while filling that post question of juniority or seniority covered by R. 25 was not relevant — See Civil Services — Jammu and Kashmir Civil Service (Classification, Control and Appeal) Rules (1956), R. 16 (2) — J and K 90 B (C N 17)

—Kashmir Civil Services (Classification, Control and Appeal) Rules

—R. 52, Note 6 (added by Govt. Notification No. SRO 38 dated 11-2-66) in exercise of power under S. 124 of the Jammu and Kashmir State Constitution — Articles of Association of Jammu and Kashmir Industries do not contain such power — (Constitution of Jammu and Kashmir, Section 124) — (Jammu and Kashmir Industries Limited — Memorandum of Articles of Association, Arts. 89 and 73 (5)) — J and K 94 C (C N 18)

—R. 52, Note 6 (added by Government Notification No. S.R.O. 38 dated 11-2-66) and Art. 207 — Notification and Note 6 to R. 52 held, invalid — Notification violated S. 126 of the J and K State Constitution — Also violative of Articles 311 (2), 14 and 16 of the Constitution of India — (J and K Government Notification No. SRO. 38, dated 11-2-66) — (Constitution of Jammu and Kashmir, S. 126) — (Constitution of India, Articles 311 (2), 14, and 16) — J and K 94 D (C N 18)

—Public Employment (Requirement as to Residence) Act (44 of 1957)

—S. 3 — Section 3 and the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959, framed thereunder, are ultra vires the power of Parliament under Article 16 (3) and violates Art. 16 (1) and (2) of the Constitution — Constitution of India, Art. 16 (1), (2) and (3) — Andhra Pra 236 A (C N 36)

—S. 3 — Validity of — Delegation of power under — Amounts to abdication of legislative function by Parliament — Constitution of India, Articles 16 (3) and 245 — Andhra Pra 236 B (C N 36)

—Punjab Government Services (War Amendment) Rules (1943)

—R. 3 — Appointment of persons rendering war service on temporary basis — Appointment cannot be regarded as one under R. 3 — See Government of India Act (1935), S. 241 (1) (b) — Punjab 241 A (C N 34) (FB)

—R. 3 — Confirmation of Government servant owing to wrong interpretation of rules — Government can revise its decision at subsequent stage when mistake comes to

Punjab Government Services (War Amendment) Rules (contd.)

its notice — See Constitution of India, Art. 311 — Punjab 241 B (C N 34) (FB)

—R. 4 — Interpretation — Rule 6 Forms integral part of entire set of rules and cannot be singled out for taking benefit under — See Government of India Act (1935), Section 241 (1) (b)

Punj 241 A (C N 34) (FB)

—R. 5 — Interpretation — R. 6 Forms integral part of entire set of rules and cannot be singled out for taking benefit under — See Government of India Act (1935), Section 241 (1) (b)

Punj 241 A (C N 34) (FB)

—R. 6 — Interpretation — R. 6 Forms integral part of entire set of rules and cannot be singled out for taking benefit under — Appointment of persons rendering war service on temporary basis — Appointment cannot be regarded as one under R. 3 — Appointees cannot avail of benefit of R. 6 for fixation of his seniority — See Government of India Act (1935), Sec. 241 (1) (b)

Punj 241 A (C N 34) (FB)

—R. 7 — Interpretation — R. 6 Forms integral part of entire set of rules and cannot be singled out for taking benefit under — See Government of India Act (1935), Section 241 (1) (b)

Punj 241 A (C N 34) (FB)

—R. 8 — Interpretation — R. 6 Forms integral part of entire set of rules and cannot be singled out for taking benefit under — See Government of India Act (1935), Section 241 (1) (b)

Punj 241 A (C N 34) (FB)

Civil Services Classification (Control, and Appeal) Rules

See under Civil Services.

Companies Act (1 of 1956)

—S. 10 — Company Court has no exclusive jurisdiction in matters falling outside Companies Act such as suits on contracts or mortgage bonds executed by companies — (Civil P. C. (1908), S. 9)

Andh Pra 225 A (C N 34)

—S. 26 — Articles of Association of the Fertilizer Corporation of India Ltd. — Arts. 67 and 110 — Effect — Exercise of powers of the Board of Directors of the Company held was subject to directives by President of India — Company held bound to implement Circular of Central Government dated 26-12-1965 — Company held bound to pay ex gratia payment of bonus to workers — SC 867 A (C N 188)

—S. 125 — Specific charge and floating charge — Distinction between — (T. P. Act (1882), S. 100)

Andh Pra 225 B (C N 34)

—S. 125 — Mortgage of property by company — Mortgage not registered under

Companies Act (contd.)

section — Purchase of mortgaged property in execution of money decree against Company — Suit by mortgagee for realisation of mortgage debt — Purchaser cannot contend that mortgage was nullity and not enforceable against him

Andh Pra 225 C (C N 34)

—S. 543 — Scope and applicability — Liability under section — It must first be shown that person proceeded against has been guilty of misapplication, etc. — Section covers breach of trust by negligence

Ker 131 A (C N 23)

—S. 543 — Misapplication of capital resulting in loss — Meaning of — Declaration of dividend contrary to provisions of Memorandum of Articles of Association — Held, it was case of such misapplication

Ker 131 B (C N 23)

—S. 543 — Misapplication of capital of company resulting in loss — Burden of proof — Once Liquidator shows that there was declaration of dividend resulting in misapplication, burden shifts on to directors to show that it was not actually paid — (Evidence Act (1872), Ss. 101-104) — (Banking Companies Act (1949), S. 45-H)

Ker 131 C (C N 23)

—S. 543 — Provisions of S. 45-H, Banking Companies Act, apply to misapplication of Bank's funds — The question whether S. 45-11 covers only the cases covered by S. 543 (1) (a) of the Companies Act, 1956, and does not cover the cases contemplated by Clause (1) (b) thereof left open — See Banking Companies Act (1949), S. 45-H

Ker 131 D (C N 23)

Constitution of America (First Amendment and Fourteenth Amendment)

—Case from America — State is not permitted to forbid or prescribe advocacy of use of force or of law violation except where such advocacy is directed to incite or produce imminent lawless action and is likely to incite or produce such action — See Constitution of India, Art. 19(1)(a)

USSC 45 (C N 7)

Constitution of India

—Art. 14 — Provisions of Ss. 91 and 96 Maharashtra Co-operative Societies Act and Rules under not violative of Arts. 14 and 19 — See Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), S. 91

Bom 201 A (C N 34)

—Arts. 14, 16(1) — Posts of Upper Division Assistant and Junior Stenographer having same pay — Posts, in practice, classed together for further promotions — Non-statutory Rules subsequently framed making differentiation between those posts for purpose of promotion — Retrospective application of the Rules to employee appointed before the Rules are promulgated will be in contravention of Arts. 14 and 16(1). Cal 250 A (C N 51)

Constitution of India (contd.)

—Art. 14 — Provisions of S 101, Sch. 1 Entry 3 and Rule 92 of Himachal Pradesh Co-operative Society Rules are discriminatory and violate provisions of Art. 14 of the Constitution — See Himachal Pradesh Co-operative Societies Act (13 of 1956), S. 101

Delhi 119 (C N 28)

—Art. 14 — See Civil Services — Kashmir Civil Services (Classification, Control and Appeal) Rules, R. 52 Note 6

J & K 94 D (C N 18)

—Art. 14 — See Constitution of India, Art. 226

Ker 142 E (C N 25)

—Art. 14 — Rules under Art. 309 proviso framed by Governor of Mysore R. 3 — Termination of service of local candidates in Motor Transport Department as a result of selection made by State Recruitment Committee — Selection quashed by High Court as invalid — Regulation of service of all local candidates continuing in service under R. 3 — Petitioner refused benefit of R. 3 — Discrimination — Direction for regularisation of services of petitioner given under Art. 226 — See Constitution of India Art. 309 Proviso

Mys 160 (C N 39)

—Art. 16 — See Civil Services — Kashmir Civil Services (Classification, Control and Appeal) Rules, R. 52 Note 6

J & K 94 D (C N 18)

—Art. 16 (1), (2) and (3) — Section 4 and the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1969, framed thereunder are ultra vires the power of Parliament under Art. 16(3) and violates Art. 16(1) and (2) of Constitution — See Civil Services — Public Employment (Requirement as to Residence) Act (1957), S. 3

Andh Pra 236 A (C N 36)

—Art. 16(1) — Posts of Upper Division Assistant and Junior Stenographer having same pay — Posts, in practice, classed together for further promotions — Non-statutory Rules subsequently framed making differentiation between those posts for purpose of promotion — Retrospective application of the Rules to employee appointed before the Rules are promulgated will be in contravention of Arts. 14 and 16(1) — See Constitution of India, Art. 14

Cal 250 A (C N 51)

—Art. 16(1) — Posts of Upper Division Assistant and Junior Stenographer having same pay classed together, in practice, for further promotions — Confirmed Lower Division Assistant promoted as Junior Stenographer — Subsequent non-statutory Rules making differentiation between posts of Upper Division Assistant and Junior Stenographer for the purpose of promotion, erroneously applied retrospectively to such employee — Employees only right under Art. 16(1), is to be considered for promotion equally

Constitution of India (contd.)

with Upper Division Clerks without being affected by those Rules — Court cannot issue direction to promote that employee unless there is any statutory rule which gives him right to be promoted — See Constitution of India, Art. 226

Cal 250 B (C N 51)

—Art. 16(3) — Validity of — Delegation of Power under — Amounts to abdication of Legislative function by Parliament — See Civil Services — Public Employment (Requirement as to Residence) Act (1957), S. 3

Andh Pra 236 B (C N 36)

—Art. 19 — See Constitution of India, Art. 226

Ker 142 E (C N 25)

—Art. 19(1) — Freedom of the press — Must be used with discretion

Madh Pra 102 C (C N 23)

—Art. 19(1), (2) — Freedom of press — Limitations

Madh Pra 102 A (C N 23)

—Art. 19(2) — The expression "in the interest of" — Meaning of

Madh Pra 102 B (C N 23)

—Art. 19(2) — Freedom of press — Restrictions upon — Reasonableness — Test stated

Madh Pra 102 D (C N 23)

—Art. 19(2) — The restrictions imposed by S. 12, M. P. Public Security Act — Reasonableness — See M. P. Public Security Act (25 of 1959), S. 12

Madh Pra 102 E (C N 23)

—Art. 19(1) (a) — Case from America — State is not permitted to forbid or prescribe advocacy of use of force or of law violation except where such advocacy is directed to incite or produce imminent lawless action and is likely to incite or produce such action — Whitney v. California, (1927) 274 US 357 = 71 L Ed 1095 = 47 S Ct 641, Overruled — (Constitution of America, First Amendment and Fourteenth Amendment)

USSC 45 (C N 7)

—Art. 19(1) (a) and (2) — Order under S. 12 M. P. Public Security Act totally prohibiting sale, distribution or circulation of paper — Order is violative of Art. 19(1) (a) and (2) — See Public Safety — M. P. Public Security Act (25 of 1959), S. 12

Madh Pra 102 L (C N 23)

—Art. 19 (1) (1) — Provisions of Ss. 91 and 96 Maharashtra Co-operative Societies Act and Rules under not violative of Arts. 14 and 19 — See Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), S. 91

Bom 201 A (C N 34)

—Art. 20 (2) — Criminal P. C. (1898), Section 403 — Rule of autre fois acquit and issue estoppel rule — When can be invoked — Criminal prosecution of accused for smuggling — Not barred by earlier proceedings against him under Sea Customs Act — Sea Customs Act (1878), S. 167 (5)

SC 962 A (C N 195)

Constitution of India (contd.)

—Art. 20 (2) — Separate proceedings under S. 500, Penal Code over same publication against same accused — Maintainability — It is bad and improper and may lead on to double jeopardy.

Cal 248 C (C N 50)

—Art. 20 (3) — "Accused of any offence" — Person against whom enquiry is held under Section 171-A, Sea Customs Act (1878) is not a person accused of any offence — AIR 1956 Cal 253 and AIR 1958 Cal 682, **Overruled**

SC 941 C (C N 193)

—Art. 20 (3) — "Accused of any offence" — Statement made under Ss. 107 and 108 of Customs Act (1962) — Statement not by person accused of any offence

SC 940 E (C N 193)

—Art. 22 — Preventive detention — Satisfaction of detaining authority — Subjective and not objective and hence not justiciable — Validity of detention can, however, be challenged on ground of mala fides or that grounds supplied are irrelevant or vague — See Public Safety— Preventive Detention Act (1950), S. 3(1) (a) and (2)

SC 852 A (C N 185)

—Art. 22(5) — Order of preventive detention — Grounds supplied to detenu containing valid and invalid grounds — Order of detention is illegal — It is not possible to guage in such cases to what extent bad reasons operated on mind of detaining authority — See Public Safety — Preventive Detention Act (1950), S. 3

SC 852 C (C N 185)

—Arts. 22 (5) and 32 — Order of preventive detention — One of grounds extremely vague and not giving sufficient particulars — Constitutional guarantee is infringed — Detention is illegal

SC 852 D (C N 185)

—Art. 32 — Order of preventive detention — Grounds supplied to detenu containing valid and invalid grounds— Order of detention is illegal — It is not possible to guage in such cases to what extent bad reasons operated on mind of detaining authority — See Public Safety — Preventive Detention Act (1950), S. 3

SC 852 C (C N 185)

—Art. 32 — Order of preventive detention — One of grounds extremely vague and not giving sufficient particulars — Constitutional guarantee is infringed — Detention is illegal — See Constitution of India, Art. 22(5)

SC 852 D (C N 185)

—Art. 32 — Instances of self-restraint of Supreme Court under Article 32 — Existence of other ordinary remedy — Delay — No rules of limitation — Exercise of power under Article is discretionary — State cannot put fetters on Court's powers — Payment under mistake of law — Recovery of, under Section 72 Con-

Constitution of India (contd.)

tract Act — Limitation Act prescribes limitation on grounds of public policy which has to be respected in enforcement of fundamental right — Section 12-A (4), Bombay Sales Tax Act (1946) declared invalid in 1964 — Payment towards tax made in 1959 and 1960 — Petition for recovery made 6 months after declaration of invalidity of Section 12-A (4) — Petition held barred — Limitation Act (1963), Article 24 — Contract Act (1872), Sec. 72 — Civil P. C. (1908), Section 11 — Previous petition under Article 226 dismissed not on merits — Subsequent petition under Article 32 is not barred

SC 898 (C N 191)

—Art. 133 — Interim orders of Court — Interference with, by Supreme Court

SC 891 B (C N 190)

—Art. 133 (1) — Application for special leave to appeal to Supreme Court under Art. 133 (1) — Limitation — Application for copy of judgment filed by party on 18th April 1968 — Copy prepared by office of Court on May 23, 1968 — Party not collecting copy on that date for want of funds — Copy collected thereafter on August 27, 1968 — Party held not entitled to add the whole period up to August 27, 1968 to the normal period of limitation prescribed under Art. 132 of Limitation Act — It could only add period between date of its application and date of preparation of copy by office of Court — See Limitation Act (1963), S. 12(3)

Punj 282 A (C N 41) (FB)

—Art. 136 — Registered agreement between landlord and defendant entered in the year 1911 before amendment of Section 107, T. P. Act in 1929 and signed by defendant only — Landlord thereby permitting defendant to construct house on suit property — Recital not to evict defendant or his descendants so long as they pay rent regularly — Defendant constructing house on suit property accordingly and paying rent regularly — Suit for eviction by landlord — Breach of any terms of agreement not established — High Court holding that defendant being licensee could not be evicted — Appeal against — Interference under Article 136 being discretionary Supreme Court refused to interfere — Easements Act (1882), S. 60

SC 970 (C N 197)

—Art. 136 — Appeal by special leave — Powers of Supreme Court — Dismissal of appeal under Section 410 in limine by High Court by using single word even though it raised substantial and arguable points — Dismissal is improper — Order set aside and appeal remanded for rehearing according to law

SC 977 B (C N 199)

—Art. 136 — Practice — Finding of fact — Supreme Court ordinarily does not interfere with concurrent finding of fact

Constitution of India (contd.)

arrived at by Trial Court and High Court — (Civil P. C. (1908), Section 112)

SC 987 A (C N 204)

— Art. 136 — Appeal by special leave — Exercise of special and discretionary jurisdiction — Question involving validity of statute no longer in operation — Claim not substantial — Appeal dismissed without considering merits

SC 1021 (C N 215)

— Art. 141 — Supreme Court decision is binding on High Court — It cannot be ignored on ground that relevant provision was not brought to the notice of the Supreme Court

SC 1002 C (C N 209)

— Arts. 226 and 227 — Disputed questions of fact can be determined

SC 802 B (C N 170)

— Art. 226 — Dismissal of petition in limine — Consideration

SC 802 C (C N 170)

— Art. 226 — Criminal prosecution — Delay in filing complaint — No ground by itself in dismissing complaint — Delay can be considered in arriving at final verdict — Criminal P. C. (1898), S. 190

SC 962 B (C N 193)

— Art. 226 — Writ jurisdiction — High Court will not act as Court of Appeal

SC 992 B (C N 206)

— Art. 226 — Writ petition challenging jurisdiction of Income-tax Officer to issue notice under Section 34(1) (a) Income-tax Act on ground that officer had no reason to believe — Assertion not controverted by filing affidavit or production of relevant material by Income-tax Officer — Proceedings quashed as being without jurisdiction — Order of Bombay High Court (Nag. Bench), Reversed

SC 1011 A (C N 211)

— Art. 226 — Writ of certiorari — Jurisdiction of High Court to issue — Decision of competent authorities based on misconstruction of provision of law and not on erroneous finding of fact — Writ can be issued

Andh Pra 217 B (C N 32)

— Art. 226 — Satisfaction of Governor — So long as Governor acted in good faith his satisfaction cannot be determined by Court by any objective test and inquired into by it — See Constitution of India, Art 311(2) Proviso (c)

Assam 80 A (C N 17)

— Art. 226 — Mandamus — Statutory Tribunal — No mandamus to compel it to exercise jurisdiction which it does not possess

Cal 225 A (C N 42)

— Arts. 226, 16 (1) — Posts of Upper Division Assistant and Junior Stenographer having same pay classed together, in practice, for further promotions — Confirmed Lower Division Assistant promoted as Junior Stenographer — Subsequent non-

Constitution of India (contd.)

statutory Rules, making differentiation between posts of Upper Division Assistant and Junior Stenographer for the purpose of promotion, erroneously applied retrospectively to such employee — Employee's only right under Art. 16 (1), is to be considered for promotion equally with Upper Division Clerks without being affected by those Rules — Court cannot issue direction to promote that employee unless there is any statutory rule which gives him right to be promoted

Cal 250 B (C N 51)

— Art. 226 — Infructuous writ — Appointment of R to post X — Writ petition to quash order of appointment — Petition dismissed — Appeal — During pendency of appeal, abolition of post X and appointment of R to post Y with higher scale of pay — Held, nothing could be adjudicated upon appointment of R to Y post as it would be introducing totally new case — When R did not hold post X after its abolition, writ, even if issued, would be infructuous and meaningless — (Constitution of Jammu and Kashmir (1956), S. 103) — (Letters Patent (Cal.) Cl 15)

J & K 90 A (C N 17)

— Arts. 226 and 311 — Affidavit in support of petition — Petitioners claiming rights as permanent employees — No categorical denial by Government — Civil lists and departmental budget showing their names — Petitioners' claim upheld

J & K 94 A (C N 18)

— Art. 226 — Parties to a writ petition — Government transferring some of its departments to an incorporated company — Employees challenging Government's action in altering their service conditions — Chairman of the Company also impleaded — Held, no writ could issue against him

J & K 94 B (C N 18)

— Art. 226 — Natural justice — Malpractice by candidate at examination — Enquiry — Candidate told in precise terms what charge against him was — Circumstances appearing against him put to him and explanation obtained — Procedure followed in enquiry was as laid down at his instance in writ petition filed by him challenging order of detention passed against him by Principal — College Council was to consider report of enquiry officer, an officer of candidate's choice, and to pass appropriate order — Composition of College Council, which included Principal, was disclosed to him — Procedure agreed upon did not require either that copy of enquiry officer's report should be provided to candidate and he be heard by College Council or that he should be given legal assistance — Held tribunal was only contractual domestic tribunal and there was more than sufficient compliance with principles of natural justice

Ker 142 B (C N 25)

Constitution of India (contd.)

—Art. 226 — Natural justice — It cannot be presumed that person who has once decided matter without due hearing would have such bias in favour of his decision as not to be capable of reaching fair decision after due hearing

Ker 142 C (C N 25)

—Art. 226 — Natural justice — Requirements of — Requirements would vary with circumstances of each case — Test as to whether there has been violation would be to consider what would be reaction of fair minded person of ordinary sense and sensibility who has been informed of all that has happened — Test elaborately explained

Ker 142 D (C N 25)

—Arts. 226, 14, 19 — Natural justice — It is not fundamental right under the Constitution, though its non-observance may result in contravention of fundamental rights

Ker 142 E (C N 25)

—Art. 226 — Natural justice — Natural justice 'unbound' is as bad as its being kept out of bounds

Ker 142 F (C N 25)

—Art. 226 — Bias — When one out of many, is biased, decision of collective body is not necessarily voided

Ker 142 G (C N 25)

—Art. 226 — Bias — Enquiry by quasi-judicial tribunal — 'Interest' as an objectionable factor is secondary in importance in case of quasi-judicial tribunals, a consequence of rule of necessity

Ker 142 H (C N 25)

—Art. 226 — Bias — Enquiry by quasi-judicial tribunal—Mere likelihood of bias stemming out of official association with the cause is insufficient

Ker 142 I (C N 25)

—Art. 226 — Bias — 'Real likelihood' test or 'instinctive opposition' approach is true one and any insignificant and remote interest will be insufficient to invalidate enquiry by quasi-judicial tribunal

Ker 142 J (C N 25)

—Art. 226 — Natural justice. — Requirements of — Applicability of principles of waiver and consent

Ker 142 K (C N 25)

—Art. 226 — Natural justice — Enquiry by domestic tribunal — Need for a 'two-tier hearing' is creature of Art. 311 and not necessarily of natural justice — Law is indulgent to domestic tribunals, depending on variety of factors

Ker 142 L (C N 25)

—Art. 226 — Natural justice — Fair hearing — How far fair hearing involves right to counsel is at least debatable and cannot be taken for granted in view of AIR 1960 SC 914 & 1961 (2) Lab LJ 417 (SC) & AIR 1967 SC 361, (Quare)

Ker 142 M (C N 25)

—Art. 226 — Interference with finding of fact of Domestic Tribunal — Absence of evidence — What is

Ker 142 N (C N 25)

Constitution of India (contd.)

—Art. 226 — Rules under Art. 309 proviso framed by Governor of Mysore R. 3 — Termination of service of local candidates in Motor Transport Department as a result of selection made by State Recruitment Committee — Selection quashed by High Court is invalid — Regulation of services of all local candidates continuing in service under Rule 3 — Petitioner refused benefit of Rule 3 — Discrimination — Direction for regularisation of services of petitioner given under Art. 226 — See Constitution of India, Art. 309, Proviso

Mys 160 (C N 39)

—Art. 226 — Revocation of licence under Arms Act — Speaking order passed by revoking authority — Appeal against revocation dismissed — Appellate order cannot be interfered with in writ petition merely on the ground it does not furnish any reasons for upholding revoking authority's order

Orissa 110 B (C N 39)

—Art. 226 — Order under Section 17 of Arms Act revoking licence — Order passed without giving the licensee an opportunity to show cause — Order liable to be quashed being in violation of principle of natural justice, even though section makes no specific provision for hearing party — See Arms Act (1959), S. 17

Orissa 110 C (C N 39)

—Art. 226 — Petitioner an employee of Sainik Schools society registered under Societies Registration Act — Dismissal by Principal of the School of the Society — Petitioner not holding any civil post — Principal also an employee of that Society — Remedy of writ against the Principal, held, not an appropriate remedy — (Societies Registration Act (1860), S. 3)

Pat 163 C (C N 26)

—Art. 226 — Principles of natural justice — Order of Central Government under Section 30, Mines and Minerals (Regulation and Development) Act (1957) — Opportunity of having his say in the matter not given to person aggrieved — Effect — See Mines and Minerals (Regulation and Development) Act (1957), S. 30

Pat 189 (C N 30)

—Art. 226 — Delay and laches — Order under Section 292 of Tripura State Municipal Act superseding Commissioners — Order not challenged under the provisions of the Act within period of limitation prescribed — Order held, could not be challenged even by writ petition — (Municipalities — Tripura State Municipal Act (2 of 1349 T. E.), Section 292) — (Limitation Act (1908), Art. 120) — (Municipalities — Bengal Municipal Act (15 of 1932), S. 553)

Tripura 37 A (C N 8)

—Art. 226 — Who can file writ petition — Mandamus and Certiorari — Order superseding Municipal Commissioners under Bengal Municipal Act and Tripura State Municipal Act — Aggrieved party

Constitution of India (contd.)

concerned is Commissioner and not the Municipal voter — Voter can, however, pray for holding of general election — (Municipalities — (Bengal Municipal Act (15 of 1932), S. 553 — (Municipalities — Tripura State Municipal Act (2 of 1949 T. E.), Section 292)

Tripura 37 C (C N 8)

—Art. 227 — Disputed questions of fact can be determined — See Constitution of India, Art. 226 SC 802 B (C N 170)

—Art. 227 — Maharashtra Co-operative Societies Act (24 of 1961), Section 91 — Petition under Art. 227 before any order made under Section 91 — Question whether reference made by Society is dispute within Act — Matter held would be properly decided under Act and not under Art. 227 Bom 201 B (C N 34)

—Art. 245 — Overlapping entries — Pith and substance rule to be applied

SC 999 A (C N 208)

—Art. 245 — Validity of — Delegation of power under — Amounts to abdication of Legislative function by Parliament — See Civil Services — Public Employment (Requirement as to Residence) Act (1957), Section 3 Andh Pra 238 B (C N 36)

—Art. 246 (as applicable to Jammu and Kashmir) — Jammu and Kashmir State Constitution, Section 5 — Powers of State Legislature of Jammu and Kashmir — Limitations on — It has power to enact law for taxing not only sales simpliciter but also sales indivisible in character

J & K 85 A (C N 16)

—Art. 248 and Sch. VII, List I, Entry 97 — Subject-matter not covered by any of the entries in any of the Lists — It belongs exclusively to Parliament

SC 999 B (C N 208)

—Art. 248, Sch. VII, List I, Entry 97 — Gift Tax Act (1958), is validly made by Parliament. AIR 1962 Mys 269, Reversed

SC 999 D (C N 208)

—Art. 276 — See Government of India

Act (1935), S. 142-A

—Art. 276 (2) — Municipality collecting tax in excess of amount permitted by Article 276 — Suit for refund is maintainable. ILR (1967) Bom 443 (FB), Reversed

SC 1002 A (C N 209)

—Art. 276 (2), Proviso — Notification increasing tax after enacting of S. 142-A of Government of India Act, 1935, ineffective, is not revived under proviso to Article 276 (2). ILR (1967) Bom 443 (FB), Reversed

SC 1002 F (C N 209)

—Arts. 276 (2), Proviso and 277 — U. P. District Boards Act (10 of 1922), S. 105 — U. P. Zilla Parishad and Kshettra Samitis Act (33 of 1961), S. 270 (a) — Imposition of circumstance and property tax by District Board — Continuation of its levy by Zilla Parishad is valid — Maximum amount of tax can exceed Rs. 250

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—Art. 311 — Affidavit in support of petition — Petitioners claiming rights as permanent employees — No categorical denial by Government — Civil lists and departmental budget showing their names — Petitioner's claim upheld — See Constitution of India, Art. 266

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— S. 251-A — Case instituted on private complaint — Documents referred in Section 173 (4) cannot be made available to accused — See Criminal P. C. (1898), Section 190 (1) SC 962 C (C N 195)

— S. 251-A — Submission of report under Section 173, Criminal P. C. in respect of non-cognizable offence — Magistrate taking cognizance by treating report as complaint — Procedure under S. 252 is to be followed and not under S. 251-A — See Criminal P. C. (1898), S. 190 (1)

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— S. 252 — Submission of report under Section 173, Criminal P. C. in respect of non-cognizable offence — Magistrate taking cognizance by treating report as complaint — Procedure under Section 252 is to be followed and not under S. 251-A —

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—S. 439 — Essential Services Maintenance Ordinance (1968), Ss. 4, 5 — Complaints, against strikers for offences under Sections 4, 5, by persons as officers of Central Government and not to vindicate any personal grievance — Prosecution by police — Consent to withdraw cases granted to Public Prosecutors in spite of opposition by complainants — Revision application by complainants, held maintainable — In a matter of public importance, High Court can exercise its powers of revision suo motu and in such cases locus standi of person bringing matter to notice of High Court would be of no consequence Ker 158 B (C N 26) (FB)

—S. 488 — Application under — Notice sent by registered post — Returned — Endorsement of refusal by husband — Attempt of service by affixture to husband's house — Return of notice — Endorsement — There was no such residence and husband doing business at other places — No attempt to serve notice at those places — Ex parte order against husband — Application by husband to set aside the order — Application beyond 3 months from the date of order — Prayer for extension of period of limitation — Held period could be extended under Section 5

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—S. 517 (3) — Trial under — Provisions of Section 517 (3), Criminal P. C. apply — Section 8 (3) of Criminal Law Amendment Act (1952) does not render them inapplicable — See Prevention of Corruption Act (1947), S. 5 (3)

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—Ss. 526 (1), 270 (e) — Grounds of transfer — Expedient for the ends of justice — No Public Prosecutor available to conduct prosecution before Sessions Judge — Furthermore one of accused who was at time of incident Local Block Development Officer, continuing as Sub-Deputy Collector at that place — Though accused had nothing to do with Sessions Judge hearing case witnesses would be people of locality where accused was Block Development Officer at relevant time and was still officer where trial was to be held — Held it would be expedient for ends of justice that trial should be held elsewhere though that meant inconvenience to accused who had already engaged lawyers and paid their fees Cal 241 C (C N 48)

—S. 526 (3) — 'Party interested' — Meaning of — Person who lodges F.I.R.

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is 'party interested' in case prosecuted by State — AIR 1920 Pat 836 & AIR 1953 All 698, Dissent. from — Even assuming that such person is not competent to make application under Section 526, there is no bar to make order of transfer if High Court is otherwise satisfied that facts and circumstances of case justify such transfer
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—Ancestral property — Alienation — Right to challenge — Gift in favour of adopted sons, the next male descendants, and others with their consent — Collaterals of the adopters in the fourth degree cannot challenge its validity

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—S. 108 — Statement under — Statement not by person accused of any offence within Art. 20 (3) of the Constitution of India — See Constitution of India, Art. 20 (3) SC 941 E (C N 193)

—S. 135 — Raid by police with intention to detect cognizable offence under Rule 131-B of Defence of India Rules — Submission of report by police for offence under Section 134, Customs Act — Permission under Section 137, Customs Act obtained — Magistrate can take cognizance — Report under Section 173 can be treated as complaint under S. 190 (1) (b) — No evasion of S. 155 (2) — See Criminal P. C. (1898), S. 190 (1)

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—Ss. 2 (f), 4 — Loan — Definition of — Lessee unable to pay salami amount — Lessee mortgaging the lease property — Mortgage deed executed in favour of lessor —

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—S. 4 — Loan — Definition of — Lessee unable to pay salami amount — Lessee mortgaging the lease property — Mortgage deed executed in favour of lessor — Transaction is not 'loan' within the meaning of the section — Provisions of S. 4 not attracted — See Debt Laws—Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), S. 2 (f) Pat 167 C (C N 27)

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Delhi Rent Control Act (59 of 1958)

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—Ss. 18 and 19 — 'Impotency', meaning of — Disability arising from mental or moral causes is sufficient — Due to wife's mental disease the husband could not at the time of marriage and on the date he instituted suit, have sexual intercourse with the wife — Decree declaring marriage as null and void, held, could be granted Mad 237 (C N 62)

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—S. 5 — Employees' Provident Funds Scheme, Cl. 39 — Administrative charges — Communication sent to employer stating that provisions of the Act and scheme are applicable to his establishment from the date the establishment was found employing 22 persons during inspection — Administrative charges can be collected from the employer even for the period earlier to the date of communication, from the date when the scheme became applicable to the establishment Mad 224 B (C N 58)

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—Cl. 26 — S. 1 (3) (a) — Expression "in which 20 or more persons are employed" — Meaning of — Employment of 20 or more persons even for a period of one day in a year is sufficient to attract the provisions of the Act — Meaning of the section is not controlled by Cl. 26 of the

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Scheme — See Employees' Provident Funds Act (1952), S. 1 (3) (a)

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—Cl. 39 — Administrative charges — Communication sent to employer stating that provisions of the Act and scheme are applicable to his establishment from the date the establishment was found employing 22 persons during inspection—Administrative charges can be collected from the employer even for the period earlier to the date of communication, from the date when the Scheme became applicable to the establishment — See Employees' Provident Funds Act (1952), S. 5

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—Ss. 2 (3), 3 (3-C) (as amended in 1967)—Sugar produced in 1966-67 damaged by fire and reprocessed in 1967-68 — Reprocessed sugar does not become fresh sugar produced in 1967-68 — S. 3 (3) does not apply — Portion of damaged unprocessed sugar containing more than 90 per cent sucrose — No power in Central Government to give directions for its reprocess—It is imperative on Central Government to fix price for its release

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—S. 3 (3-C) — Sugar produced in 1966-67 damaged by fire and reprocessed in 1967-68 — Reprocessed sugar is not fresh sugar but continues to be sugar produced in 1966-67, to justify its release at the rates fixed for that year — S. 3 (3) does not apply — Portion of damaged unprocessed sugar containing more than 90 per cent sucrose — No power in Central Government to give directions for its reprocess — It is imperative on Central Government to fix price for its release — See Essential Commodities Act (1955) (as amended in 1967), S. 2 (3)

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—S. 7 — Conviction under — Propriety — Dealer charged for storing foodgrains without entering in stock register — Seizure of stock-book and other registers — Delay in filing complaint — Conviction of accused mainly on ground of tampering with record while in possession of Supply Officer — Failure to prove that tampering was in interest of dealer or made at his instance — Other records not proving prosecution case — Held, conviction was improper— Decision of Patna High Court, Reversed SC 989 (C N 205)

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Ker 158 B (C N 26) (FB)

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—Ss. 17, 18 and 30 — Charge under Section 302/149 and Section 120-B, I.P.C. — Statement by accused under Section 164, Cr. P. C. — Accused exculpating himself but only admitting his presence at the place of occurrence — It can only be treated as admission of the fact of his presence — Statement does not amount to confession and what is stated by accused against co-accused cannot be used as evidence against other co-accused Orissa 100 B (C N 37)

—S. 18 — Charge under S. 302/149 and S. 120-B, I. P. C. — Statement by accused under S. 164, Cr. P. C. — Accused exculpating himself but only admitting his presence at the place of occurrence — It can only be treated as admission of the fact of his presence — Statement does not amount to confession and what is stated by accused against co-accused cannot be used as evidence against other co-accused — See Evidence Act (1872), S. 17

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—S. 25 — Police officer who is—Officer of Customs is not Police officer

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—Ss. 101-104 — Misapplication of capital of company resulting in loss — Once Liquidator shows that there was declaration of dividend resulting in misapplication — Burden shifts on to directors to show that it was not actually paid — See Companies Act (1956), S. 543 — Ker 131 C (C N 23)

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—S. 114 — Consignment booked at owner's risk rate — Damages to goods in transit — Responsibility of Railway — Negligence on the part of Railway Administration or its servant must be proved — Disclosure as to how consignment was dealt with in course of transit — Railway is not bound to disclose where Cls. (a) and (b) of 74-D are not applicable — No disclosure sought for by plaintiff — Adverse inference cannot be drawn against Railway — See Railways Act (1890) (before its amendment by Act 39 of 1961), S. 74-C (3) — Pat 182 B (C N 29)

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Madh Pra 123 A (C N 26)

Prevention of Food Adulteration Rules, 1955

—R. 20 — Failure to add preservative in prescribed quantity — Conviction of accused can be challenged
Madh Pra 123 B (C N 26)

Preventive Detention Act (4 of 1950)

See under Public Safety

Public Employment (Requirement as to Residence) Act (44 of 1957)

See under Civil Services

PUBLIC SAFETY

—Madhya Pradesh Public Security Act (25 of 1959)

—S. 12 — The restrictions imposed by the section on the freedom of the press are reasonable and constitutional
Madh Pra 102 E (C N 23)

—S. 12 — Action under, against 'Swadesh' daily — Satisfaction of the State Government to make the order — Action not for political reasons — Political ideology of paper different from Government — Action taken next day after the Assembly session ended — Action cannot be called mala fide
Madh Pra 102 F (C N 23)

—S. 12 — Action under — Action based on certain news-item published in the paper after communal disturbances ended — Action for prevention and not for punishment — Criminal proceedings against the paper in respect of the matter pending — Held, the order was not unjustifiable on that ground
Madh Pra 102 G (C N 23)

—S. 12 — Order under — Sale, distribution or circulation of the paper totally prohibited — Order held excessive and arbitrary
Madh Pra 102 L (C N 23)

—S. 12 (1) (i) — Newspapers already printed within the State — Clause applies
Madh Pra 102 I (C N 23)

—S. 12 (1), Clauses (i) and (ii) — Distinction between — Expression "such matter" — Meaning of
Madh Pra 102 J (C N 23)

—S. 12 (5) — Power under — Extent of
Madh Pra 102 H (C N 23)

—S. 12(5) — Under sub-section (5) of the Section High Court has power to modify an order of the State Government and make it appropriate having regard to the particular facts of the case
Madh Pra 102 K (C N 23)

—Preventive Detention Act (4 of 1950)

—Ss. 3 and 7 — Order of preventive detention — Grounds supplied to detenu containing valid and invalid grounds — Order of detention is illegal — It is not possible to gauge in such cases to what extent bad reasons operated on mind of

Public Safety — Preventive Detention Act (contd.)

detaining authority — (Constitution of India, Articles 22 (5) and 32)

SC 852 C (C N 185)

—S. 3 (1) — 'Public order', meaning of — Detention can be ordered to prevent subversion of public order but not in aid of maintenance of law and order

SC 852 B (C N 185)

—S. 3 (1) (a) and (2) — Preventive detention — Satisfaction of detaining authority — Subjective and not objective, and hence not justiciable — Validity of detention can, however, be challenged on ground of mala fides or that grounds supplied are irrelevant or vague — (Constitution of India, Article 22)

SC 852 A (C N 185)

—S. 3 (1) (a) (ii) — Detention under — Grounds for — Incidents mentioned in, not amounting to anything more than commission of certain breaches of law — They can be said prejudicial to "law and order" and not prejudicial to maintenance of "public order" or subversive of "public order" — Detention is illegal

SC 814 (C N 174)

—S. 7 — Order of detention — Grounds supplied to detenu containing valid and invalid grounds — Order of detention is illegal — It is not possible to gauge in such cases to what extent bad reasons operated on mind of detaining authority — See Public Safety — Preventive Detention Act (1950), S. 3

SC 852 C (C N 185)

Punjab Pre-emption Act (1 of 1913)

—S. 21 — Lease and subsequent sale of property — Suit for pre-emption — Plaintiff disputing the genuineness of the lease, alleging that lease and sale are part of the same transaction — Lessee can be joined as co-defendant with the vendor and vendors under O. 1, R. 3, A. 1, R. 3 P. C. — See Civil P. C. (1908), O. 1, R. 3

Punjab 276 (C N 39)

Punjab Government Services (War) Amendment Rules (1913)

See under Civil Services

Railways Act (9 of 1890)

—S. 74-A (Before its amendment by Act 39 of 1961) — No recording of defective packing in forwarding note — Section is not applicable — Inapplicability of the section will not debar Railway from proving that the goods were defectively packed

Pat 182 A (C N 29)

—Ss. 74-C, 74-D — Negligence on the part of Railway administration — Proof of — Consignment of tins of coconut oil — Rule 132 of Standing Order requiring wagons containing coconut oil to be affixed with a label "not to be loose shunted" — Failure to comply with, will

Railways Act (contd.)

amount to negligence. AIR 1964 Andh Pra 172, Dissented from

Pat 182 C (C N 29)

—Ss. 74-C (3), 74-D — Consignment booked at owner's risk rate — Damages to goods in transit — Responsibility of Railway — Negligence on the part of Railway administration or its servant must be proved — Disclosure as to how consignment was dealt with in course of transit — Railway is not bound to disclose where Cls. (a) and (b) of S. 74-D are not applicable

Pat 122 B (C N 29)

—S. 74-D — Consignment booked at owner's risk rate — Damages to goods in transit — Responsibility of Railway — Negligence on the part of Railway administration or its servant must be proved — Disclosure as to how consignment was dealt with in course of transit — Railway is not bound to disclose where Cls. (a) & (b) of S. 74-D are not applicable — See Railways Act (1890) (Before its amendment by Act 39 of 1961), S. 74-C (3)

Pat 182 B (C N 29)

—S. 74-D — Negligence on the part of Railway administration — Proof of — Consignment of tins of coconut oil — Rule 132 of Standing Order requiring wagons containing coconut oil to be affixed with a label "not to be loose shunted" — Failure to comply with, will amount to negligence — See Railways Act (1890) (Before its amendment by Act 39 of 1961), S. 74-C

Pat 162 C (C N 29)

Registration Act (16 of 1908)

—S. 17 (1) (b) — Creation of rights under a document — Registration is necessary — Rights whether enforceable is immaterial — See Arbitration Act (1940), S. 14

SC 833 (C N 179)

—S. 23 — Registration of document — Delay till the last date of limitation — Does not amount to negligence of transferee

Mad 226 E (C N 59)

—S. 47 — Registration of a deed — Operation of deed — From date of its execution — See Transfer of Property Act (1882), S. 46

Mad 226 C (C N 59)

—S. 49 — Lease — Non-registration of — Document can be used as proof of nature of possession

Assam 75 C (C N 16)

—S. 49 — Unregistered mortgage — Registered sale — Registration of mortgage deed within time allowed by registration law — Operation of mortgage — From date of its execution — Gets priority over subsequent sale under S. 48, T. P. Act — S. 49, Registration Act, does not apply — See Transfer of Property Act (1882), S. 43

Mad 226 C (C N

Registration Act (contd.)

—S. 72 — Non-appearance of executant to admit execution before Sub-Registrar — Denial of execution cannot be presumed — Sub-Registrar refusing to register document on that ground — Appeal under S. 72 to Registrar to get document registered is maintainable

Manipur 47 (C N 14)

SALES TAX

—Jammu and Kashmir General Sales Tax Act (20 of 1962)

—Ss. 2 (1), 4 — Scope of Section 2 (1) — Indivisible contract does not fall within Section 2 (1) and is not chargeable to tax J & K 85 C (C N 16)

—S. 2(1) — Word "sale" in S. 2(1) of J. & K. General Sales Tax Act is not given extended meaning — See Civil P. C. (1908), Pre.

J & K 85 D (C N 16)

—S. 4 — Indivisible contract does not fall within S. 2(1) and is not chargeable to tax — See Sales Tax — Jammu and Kashmir General Sales Tax Act (20 of 1962), S. 2(1)

J & K 85 C (C N 16)

—U. P. Sales Tax Act (15 of 1948)

—S. 8 (1-A) — Scope — For recovery of interest under the section — Sales Tax Officer not required to make assessment order in respect of interest and issue a notice of demand in respect of interest — 1968 All LJ 970, Overruled

All 330 (C N 51) (FB)

Sea Customs Act (8 of 1878)

—S. 6 — Officers appointed under Land Customs Act (1924) are treated as Customs Officers SC 951 G (C N 194)

—S. 167 (8) — Criminal prosecution of accused for smuggling — Not barred by earlier proceedings against him under Sea Customs Act — See Constitution of India, Art. 20 (2)

SC 962 A (C N 195)

—S. 171-A — Statement under — Admissibility must be adjudged in the light of taint attaching thereto at the time of statement SC 940 A (C N 193)

—S. 171-A — Person against whom enquiry is held under S. 171-A is not a person accused of any offence within Article 20(3) of the Constitution of India — See Constitution of India, Art. 20(3)

SC 941 C (C N 193)

—S. 178-A — Burden of proof — In the absence of special notification under Section 178-A specifying goods to which the section applies, the onus of proof under that section cannot be placed on persons whose goods are seized for violation of other provisions of the Sea Customs Act, 1878

SC 951 H (C N 194)

Societies Registration Act (21 of 1860)

—S. 3 — Society registered under the Act. — Legal character of — It enjoys the status of legal entity apart from the members constituting it — It can sue and be sued — See Societies Registration Act (1860), S. 6 Pat 163 A (C N 26)

—S. 3 — Petitioner an employee of registered Society — Dismissal by Principal of the School of the Society — Petitioner not holding any civil post — Principal also an employee of that Society — Remedy of writ against the Principal, held, not an appropriate remedy — See Constitution of India, Art. 226

Pat 163 C (C N 26)

—Ss. 6, 8 and 3 — Society registered under the Act — Legal character of — It enjoys the status of legal entity apart from the members constituting it — It can sue and be sued

Pat 163 A (C N 26)

—S. 6 — Constitution of India, Art. 311 — Registered society — Can sue and be sued — Person serving under registered society is an employee of society under control of the Board of Governors — His service conditions are regulated by rules and regulations framed by Society — He must be deemed to hold post under the Society and not to hold any civil post either under the Union or State — Protection under Art. 311, cannot be claimed

Pat 163 B (C N 26)

—S. 8 — Society registered under the Act — Legal character of — It enjoys the status of legal entity apart from the members constituting it — It can sue and be sued — See Societies Registration Act (1860), S. 6 Pat 163 A (C N 26)

Special Marriage Act (43 of 1954)

—S. 21 — Section does not affect or alter joint family structure between person married under Act and his son

Mad 249 E (C N 67)

—S. 27 — Adultery on the part of wife — Must be proved beyond reasonable doubt and not merely on balance of probability — (Divorce Act (1869), S. 10) — (Hindu Marriage Act (1955), S. 13)

Cal 266 F (C N 54)

—S. 27 (b) — Desertion — What amounts to — Constructive desertion — Desertion has to be proved beyond reasonable doubt — (Divorce Act (1869), S. 10) — (Hindu Marriage Act (1955), S. 10)

Cal 266 D (C N 54)

—S. 27 (d) — Cruelty — Legal cruelty — What amounts to, stated — (Divorce Act (1869), Section 10) — (Hindu Marriage Act (1955), Section 10)

Cal 266 E (C N 54)

—S. 34 (1) (c) — Divorce proceedings by wife — Delay of 21 months — Reason that her sister was to be married and settled and the avoidance of scandal of a divorce — No acquiescence in marital

Special Marriage Act (confd.)

offences of husband — Delay held not unnecessary and improper — (Divorce Act (1869), S. 14) — (Hindu Marriage Act (1955), S. 23)

Cal 266 B (C N 54)

—S. 35 — Divorce petition by wife — Relief as in petition is available to respondent husband only on compliance with provisions of Special Marriage Act (Calcutta High Court) Rules (1955) incorporated in Civil Rules and Orders, Vol. 1 as Rule 340-A — Relief is not available at appellate stage — (Divorce Act (1869), S. 15) — (Hindu Marriage Act (1955), S. 13)

Cal 266 C (C N 54)

—S. 51 (1) (a) — Marriage solemnised under repealed Act of 1872 is deemed to have been solemnised under 1954 Act — Divorce proceedings are governed by 1954 Act

Cal 266 A (C N 54)

Specific Relief Act (1 of 1877)

—S. 42 — Ascertainment of mesne profits — Suit for declaration of title, for possession and for mesne profits — Held, mesne profits had to be ascertained separately on petition under O. 20, R. 12 of Civil P. C. on obtaining possession — (Civil P. C. (1908), O. 20, R. 12)

Tripura 43 F (C N 10)

Specific Relief Act (47 of 1963)

—S. 9 — Action for ejectment against trespasser — Prior possession of plaintiff is sufficient title notwithstanding that suit is brought more than six months after dispossession. (1883) ILR 9 Cal 130 & (1890) ILR 17 Cal 256 & (1899) ILR 26 Cal 579, Overruled

SC 846 (C N 183)

—S. 38 — International trade — Irrevocable letters of credit — Courts should refrain from interfering with mechanism of such letter — See Banking Regulation Act (1949), S. 6

SC 891 A (C N 190)

TENANCY LAWS**—Bihar Land Reforms Act (30 of 1950)**

—Ss. 4, 10 — Mining lease — Lease property mortgaged — Vesting of estates in State under Section 4 — Effect of, on lease — Old lease comes to an end and new statutory lease comes into effect — Remedy of mortgagee is not to enforce mortgage bond but to follow compensation

Pat 167 F (C N 27)

—S. 10 — Mining lease — Lease property mortgaged — Vesting of estates in State under S. 4 — Effect of, on lease — Old lease comes to an end and new statutory lease comes into effect — Remedy of mortgagee is not to enforce mortgage bond but to follow compensation — See Bihar Land Reforms Act (30 of 1950), S. 4

Pat 167 F (C N 27)

Tenancy Laws (confd.)

—Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958) (as amended by Act 44 of 1963)

—S. 38 (7) — "Acquired any land by transfer or partition" — Interpretation of — Words 'acquire' and 'partition', meaning of — Partitions of every kind are now included within ambit of S. 38 (7) — AIR 1966 Bom 194, Overruled

Bom 232 A (C N 40) (FB)

—S. 38 (7) — As amended by Act 44 of 1963 — Scope and effect of amendment in doubt and actively disputed — Court can legitimately look to Statement of Objects and Reasons in making that amendment

Bom 232 D (C N 40) (FB)

—Calcutta Thika Tenancy Act (2 of 1949)

—Application by tenant for review of ejectment order dismissed for default — Tenant filing application under S. 151 for setting aside order of dismissal — Held, though order was appealable, scope of appeal was limited and point of absence could not usually be considered in appeal and, therefore, application under S. 151 was competent. 68 Cal WN 1064, Not foll.

— See Civil P. C. (1900), S. 151

Cal 240 (C N 47)

—C. P. Tenancy Act (1 of 1920)

—S. 104 — See Limitation Act (1908), Art. 142

SC 1019 D (C N 213)

—Sch. 2, Art. 1 — Suit not as tenant but as reversioner — Article 1 does not apply

SC 1019 C (C N 213)

—Sch. II, Art. 1 — See Limitation Act (1908), Art. 142

SC 1019 D (C N 213)

—East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948)

—S. 42 — Additional Director can amend and vary scheme in case of single right-holder — Procedure to be followed indicated. Civil Writ No. 1928 of 1963, D/- 11-3-1964 (Punjab), Civil Writ No. 1728 of 1963, D/- 7-1-1965 (Punjab), 1965 Cur LJ 807 (FB) (Punjab); Civil Writ No. 1057 of 1963, D/- 12-11-1965 (Punjab); Civil Writ No. 1551 of 1964, D/- 12-5-1966 (Punjab); Civil Writ No. 659 of 1965, D/- 25-5-1966 (Punjab) and Obiter in AIR 1968 Punjab 10 (FB), Overruled

Punjab 261 (C N 35) (FB)

—Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act (15 of 1951)

—S. 11 (2) — Right of tenant of acquisition of proprietary rights in the land — Protection to minor landlord under Section 11 (2) — Held on facts, as not available

SC 1022 A (C N 214)

—S. 11 (2) — Protection to minor landlord having no other means of livelihood against right of tenant of acquisition of proprietary rights in the land — Whether the statutory right of maintenance of a

Tenancy Laws — Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act (contd.)

minor under Hindu Adoptions and Maintenance Act (1956) can or cannot be treated as a means of livelihood — (Quaere)

SC 1022 B (C N 214)

—M. B. Abolition of Jagirs Act (28 of 1951)

—S. 8 — Suit for declaration of title and for possession by Jagirdar — Commencement of Act during pendency of suit — Plaintiff does not lose his rights in suit properties — Although suit properties vest in State the plaintiff is entitled to compensation if he is proved to have been owner of suit properties on the day of commencement of the Act — (Case remanded to High Court with direction that State be impleaded and rights of all parties be decided in accordance with law.) Decision of Madh Pra High Court, Reversed

SC 997 C (C N 207)

—U. P. Consolidation of Holdings Act (5 of 1954)

—S. 4 — Stay order under S. 5 — Notification under S. 4 during pendency of civil appeal — Fact of notification brought to notice of Court — Appellate Court holding that S. 5 did not apply to facts of case and deciding appeal — Decision allowed to become final between parties — Decree passed by Civil Court held was not a nullity — See Tenancy Laws — U.P. Consolidation of Holdings Act (5 of 1954), S. 5 (as it stood in the year 1961)

All 344 (C N 52) (FB)

—S. 5 (as it stood in the year 1961) — Section 4 and S. 49 (as amended upto 1958) — Scope of S. 5 — Effect of stay order under S. 5 — Notification under S. 4 during pendency of civil appeal — Fact of notification brought to notice of Court — Appellate Court holding that S. 5 did not apply to facts of case and deciding appeal — Decision allowed to become final between parties — Decree passed by Civil Court held was not a nullity — Assumption of jurisdiction by erroneous decision of jurisdictional facts can be set aside in appeal or revision — Even under S. 49, jurisdiction of Civil Court is not absolutely barred — (Civil P. C. (1908), Ss. 9 and 115)

All 344 (C N 52) (FB)

—S. 49 (as amended upto 1958) — Under S. 49 jurisdiction of Civil Court is not absolutely barred — See Tenancy Laws — U.P. Consolidation of Holdings Act (5 of 1954), S. 5 (as it stood in the year 1961)

All 344 (C N 52) (FB)

—U. P. Zamindari Abolition and Land Reforms Act 1950 (1 of 1951)

—S. 18 — Expression "mortgagee" in S. 21 (1) (d) — Not confined to valid mortgages only — See Tenancy Laws —

Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (contd.)

U. P. Zamindari Abolition and Land Reforms Act 1950 (1 of 1951), S. 21(1)(d)

All 350 (C N 53) (FB)

—S. 19 — Expression "mortgagee" in S. 21 (1) (d) — Not confined to valid mortgages only — See Tenancy Laws — U.P. Zamindari Abolition and Land Reforms Act 1950 (1 of 1951), S. 21(1)(d)

All 350 (C N 53) (FB)

—Ss. 21 (1) (d), 18 and 19 — Expression "mortgagee" in S. 21 (1) (d) — Not confined to valid mortgages only — 1963 RD 288 & 1964 RD 410 & 1965 RD 23 & AIR 1965 All 504 & AIR 1955 NUC (All) 4171 & F.A.F.O. No. 227 of 1966, D/- 9-12-1968 (All) & 1968 RD 456, Overruled

All 350 (C N 53) (FB)

Tort — Damages

See Motor Vehicles Act (1939), S. 110-D

Transfer of Property Act (4 of 1882)

—S. 3— Demand of title deeds— Right of purchaser — Title deeds with prior unregistered mortgagee — Purchaser not making demand — Purchaser is negligent — Cannot be said to be without notice of prior mortgage — See Transfer of Property Act (1882), S. 55(3)

Mad 226 B (C N 59)

—S. 48 — Unregistered mortgage followed by registered sale — Subsequent registration of prior mortgage deed within time allowed by registration law — Mortgage operates from date of execution under S. 47 of Registration Act — Mortgagee gets priority over the subsequent sale under S. 48, T. P. Act — S. 49, Registration Act, does not apply — (Registration Act (1908), Ss. 47 and 49)

Mad 226 C (C N 59)

—Ss. 48, 78 — Principle underlying S. 78 — Applies to sales also — Prior mortgagee guilty of fraud, etc. — Will be postponed after subsequent vendee

Mad 226 D (C N 59)

—S. 52 — Settlee pendente lite of one of items of suit property not coming on record as party to suit — Application by settlee to be brought on record in appeal — Settlee can take benefit of S. 146 — See Civil P. C. (1908), S. 146

Andh Pra 211 A (C N 31)

—S. 53 — Plea of benami referring to sham transaction — Want of consideration for transaction must be established by party pleading— (Evidence Act (1872), Ss. 101, 104)

Assam 75 B (C N 16)

—S. 53-A — Scope — Provisions do not confer any right on transferee to claim possession or any other right in property — Transferee has a right only to plead estoppel to protect his possession against transferor

Gui 122 (C N 18)

Transfer of Property Act (contd.)

—Ss. 55(3) and 3 — Demand of title deeds — Rights of purchaser — Title deeds with prior unregistered mortgage — Purchaser not making demand — Purchaser is guilty of gross negligence — Cannot be said to be without notice of prior mortgage Mad 226 B (C N 59)

—S. 78 — Principle under the section — Applies to sales also — See Transfer of Property Act (1882), S. 48

Mad 226 D (C N 59)

—S. 91(a) — Suit filed on prior mortgage without impleading puisne mortgagee — Execution of the decree obtained — Purchaser is entitled to redeem the puisne mortgagee Mad 244 (C N 65)

—S. 100 — Specific charge and floating charge — Distinction between — See Companies Act (1956), S. 125

Andh Pra 225 B (C N 34)

—S. 106 — Premises let out to partners of partnership firm carrying on business as coach builders under registered lease — Partners entering into agreement with company to sell entire business along with general assets and lease-hold properties — Company entering into possession of lease-hold premises — Object of company to carry on trade or business of coach and carriage builders and to buy, sell, import, manufacture, repair, let on hire, otherwise deal in carriages and vehicles of every description — Separate deed of transfer of premises in favour of company not executed — Lessor treating company as monthly tenant — Failure of Company to prove that lease was dominantly for manufacture purpose — Tenancy was monthly and terminable by 15 days' notice. AIR 1963 Cal 198, Reversed SC 839 A (C N 181)

—S. 106 — Whether for applying the presumption under Section 106 the test is exclusiveness of manufacturing purpose. (Quaere) SC 839 B (C N 181)

—S. 111 — Prohibition under S. 3 of U. P. Act 3 of 1947 — Prohibition is not against determination of tenancy — See Houses and Rents — U.P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 All 309 D (C N 49) (FB)

Tripura State Municipal Act (2 of 1919 T. E.)

See under Municipalities

U. P. Consolidation of Holdings Act (5 of 1954)

See under Tenancy Laws

U. P. Industrial Disputes Act (28 of 1947)

—S. 6-H (2) — U. P. Industrial Disputes Rules (1957), Rules 16 (1) and 16 (2) — Application under Section 6-H (2) — Dismissal of, for default of appearance — Order of dismissal not covered by R. 16(1) — Second application claiming identical

U. P. Industrial Disputes Act (contd.)

relief is maintainable without following procedure laid down in R. 16 (2) SC 806 (C N 171)

U. P. District Boards Act (10 of 1922)

—S. 108 — Circumstance and property tax imposed under — Nature of All 316 A (C N 50) (FB)

—S. 108 — Imposition of circumstance and property tax by District Board — Continuation of its levy by Zilla Parishad is valid — See Constitution of India, Art. 276 (2) Proviso

All 316 B (C N 50) (FB)

U. P. Sales Tax Act (15 of 1948)

See under Sales Tax

U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947)

See under Houses and Rents

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951)

See under Tenancy Laws

U. P. Zilla Parishad and Kshetra Samities Act (33 of 1961)

See under Panchayats

Wealth Tax Act (27 of 1937)

—S. 3 — Hindu undivided family — Assessee separated member of Hindu undivided family marrying with Australian lady under Special Marriage Act — Son born out of such wedlock — Assessee is entitled to claim status of Hindu undivided family for purposes of assessment — See Income Tax Act (1922), S. 3 Mad 240 D (C N 67)

Words & Phrases

—'Acquire' — Meaning of — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958 as amended by Act 44 of 1963) S. 32 (7) Bom 222 A (C N 40) (FB)

—'Affairs of the State' — Meaning — See Evidence Act (1872), S. 123

Raj 118 D (C N 28)

—'Coparcenary property' — Meaning of — See Hindu Adoptions and Maintenance Act (1956) Puni 270 A (C N 36)

—'Direct' means command — See Criminal P. C. (1898), S. 159

Orissa 107 (C N 38)

—'Of' — Meaning of the word 'of' in 'within three months of the date' — 'Of' means 'after' — See Factories Act (1918), S. 106 Andh Pra 231 B (C N 35)

—'Partition' — Meaning of — See Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958 as amended by Act 44 of 1963), S. 32 (7)

Bom 232 A (C N 40) (FB)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1970 JUNE

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in;
REVERS.=Reversed in

Andhra Pradesh Motor Vehicles Rules (1969)

—R. 212 (1) (iv) (a) — (66) W. P. No. 1732
of 1966, D/-1-12-1966 (AP) — Revers.
AIR 1970 Andh Pra 217 A (C N 32).

Arbitration Act (10 of 1940)

—S. 14 — AIR 1958 Pat 252 (FB) — Over.
AIR 1970 SC 833 (C N 179).

—S. 14 — AIR 1968 Punj 204 (FB) —
Over. AIR 1970 SC 833 (C N 179).

—S. 17 — AIR 1958 Pat 252 (FB) —
Over. AIR 1970 SC 833 (C N 179).

—S. 17 — AIR 1968 Punj 204 (FB) —
Over. AIR 1970 SC 833 (C N 179).

—Sch. 1, R. 7 — AIR 1958 Pat 252 (FB) —
Over. AIR 1970 SC 833 (C N 179).

—Sch. 1, R. 7 — AIR 1968 Punj 204 (FB)
— Over. AIR 1970 SC 833 (C N 179).

Arms Act (54 of 1959)

—S. 17 — AIR 1969 Assam 50 (FB) —
Diss. AIR 1970 Orissa 110 C (C N 39).

—S. 17 — AIR 1960 Madh Pra 157 —
Diss. AIR 1970 Orissa 110 C (C N 39).

—S. 17 — AIR 1954 Raj 264 — Diss. AIR
1970 Orissa 110 C (C N 39).

Banking Regulation Act (10 of 1949)

—S. 6 — ('68) Applns. Nos. 1760 and 2455
of 1967 (in C. S. No. 118 of 1967), D/-12-4-
1968 (Mad) — Revers. AIR 1970 SC 891
A (C N 190).

Central Excise Rules (1944)

—R. 40 — AIR 1961 Bom 48 — Over. AIR
1970 SC 829 (C N 178).

Civil Procedure Code (5 of 1908)

—S. 11 — AIR 1941 Pat 83 — Diss. AIR
1970 Mad 232 (C N 60).

—S. 107 — AIR 1957 Pat 111 — Not F.
AIR 1970 Punj 273 A (C N 38).

—S. 115 — AIR 1939 Pat 30 — Diss. AIR
1970 Tripura 35 (C N 37).

—S. 115 (c) — AIR 1933 Pat 61 — Diss.
AIR 1970 Tri 36 (C N 37).

—S. 146 — (1951) 2 Mad LJ 26 — Over.
AIR 1970 Andh Pra 211 A (C N 31).

—S. 149 — AIR 1957 Pat 111 — Not F.
AIR 1970 Punj 273 A (C N 38).

—S. 151 — (1964) 68 Cal WN 1064 —
Not F. AIR 1970 Cal 240 (C N 47).

—O. 7, R. 11 — AIR 1957 Pat 111 —
Not F. AIR 1970 Punj 273 A (C N 38).

—O. 22, R. 10 — (1951) 2 Mad LJ 26
— Over. AIR 1970 Andh Pra 211 A
(C N 31).

—O. 23, R. 3 — (1951) 2 Mad LJ 26 —
Over. AIR 1970 Andh Pra 211 A (C N 31).

Constitution of India

—Art. 19 (1) (a) — (1927) 274 US 357 —
Over. AIR 1970 USSC 45 (C N 7).

—Art. 20 (3) — AIR 1956 Cal 253 — Over.
AIR 1970 SC 941 C (C N 193).

—Art. 20 (3) — AIR 1958 Cal 682 — Over.
AIR 1970 SC 941 C (C N 193).

—Art. 248 — AIR 1962 Mys 269 — Revers.
AIR 1970 SC 999 D (C N 208).

Constitution of India (contd.)

—Art. 276 (2) — ILR (1967) Bom 443
(FB) — Revers. AIR 1970 SC 1002 A
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THE ENGLISH AND INDIAN LAW OF TORTS

BY

RATANLAL RANCHHODDAS, B.A., LL.B.

Advocate (O. S.) Bombay High Court

AND

DHIRAJLAL KESHAVLAL THAKORE, B.A.,

Barrister-at-Law

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JOURNAL SECTION

1970 JUNE

THE IMPACT OF LICENSING ON VARIOUS TRADES

(By : V. B. AWASTHI, LL.M., *Lecturer, Faculty of Law, Lucknow University.*)

Article 19 under the title 'Right to Freedom' confers seven freedoms on all citizens which have been described as 'vital rights inherent in each man'. Freedom to carry on any occupation, trade or business is one among these vital rights.

2. Absolute or unrestricted individual rights do not and cannot exist in any modern State. The Constitution of India, is no exception to this rule which acknowledges that liberty has to be curtailed in order to be effectively possessed by adjusting the conflicting interests of the individual and of the society.

3. The regulation of trade or business usually takes the form of initial requirement of obtaining a licence or permit to start a particular trade or business. This is also sometimes referred as obtaining a permit e. g. Section 12 of Motor Vehicles Act, 1939 provides that no motor vehicle shall be used for carrying passengers or goods without obtaining a permit. A distinction is at times drawn between a permit and a licence. The Madras High Court in *C. S. S. Motor Service v. State of Madras* (1) has held that permit is the result of a confirmation of an administrative authority having an absolute discretion to grant or refuse a permit while licence is to be issued by imposing appropriate conditions for the conduct of business. The Court there sought to limit the use of the word 'permit' to cases where it depends upon the sweet will of the Government to allow a certain activity to be carried on so that when the freedom of trade and profession is guaranteed by the Constitution, the Government is not free to deny its exercise. All that it can do is that it can impose appropriate conditions on the utilization of such freedom by way of insisting upon obtaining of licenses. At the same time if the condition for granting licence is unreasonable, it will be held violative of the guarantee. (2) Thus it is reasonable to conclude that it has not been left to the arbitrary discretion of the Government to authorize or refuse, as it wills, the carrying of any business activity. Permit in the sense, as used by the Madras High Court, has no

place in the scheme of things envisaged by the Constitution.

4. It appears that there has not been a proper realization of the change that the Constitution has striven to bring in the "status of trade or business activity of an individual". In a Travancore case (3) the High Court refused to recognise any fundamental right in the matter of obtaining temporary permits for plying stage carriages for hire. In another case (4) the Court refused to interfere with the order of the regional transport authority renewing the stage carriage permits held by the applicant on the ground that the applicant had no right to obtain a permit. The Madras High Court (5) went to the extent of observing that no person can claim it as a matter of fundamental right that he is entitled to a particular quota or license.

5. These and similar observations of the Courts are likely to be misinterpreted as a denial of the right to carry on a business. The proper approach is to begin with the assumption that every person is entitled to carry on a business as a matter of right unless he is disqualified in any way, as for example, in Gounder's case, AIR 1955 Mad 699 the real reason for refusing a quota was that the applicant was a defaulter in payment of his income-tax and failed to supply an income-tax clearance certificate. If thus viewed, the denial of the license was reasonable but to say that the person had no initial right to enter into that business, is to do away with the provisions of Art. 19 (1) (g) altogether.

6. In this context we should also avoid confusion between the right to carry on a trade and the right to enjoy a particular privilege from the Government, for the reason, that the word 'license' has been indiscriminately used to denote both the grant of a privilege as well as the permission to exercise the freedom to trade as for example in an Assam case (6) the petitioner's claim that he had a right to obtain a license from a Municipal Board

3. *S. Sankara Subramony v. State*, AIR 1952 Trav-Co 260.

4. *J. M. T. Union v. State*, AIR 1955 Sau 57.

5. *N. Dasai Gounder and Co. v. Dy. Chief Controller*, AIR 1955 Mad 699.

6. *Mahboob Khan v. Dy. Commr.*, AIR 1953 Assam 145.

1. AIR 1953 Mad 279.

2. Shukla, V. N. : 'Constitution of India' p. 73.

for collecting tolls on behalf of the Board, from a newly constructed market, was turned down by the Court on the ground that the petitioner had no right to license in such cases where the license is in the nature of grant of special privilege by an owner to an agent and has nothing to do with the freedom of business. Similarly in *D. L. D. W. Association v. State of W. B.* (7) the claim of deed writers for the exclusive privilege to perform their functions in the registration office was denied on the ground that the government are the owners of the premises and may allow anyone to do anything, subject to any conditions. The word 'license' thus ought to be restricted to such cases only where the act is in the nature of initial permission to start a business or professional activity. The power of the State to regulate business by licensing is exercised in four different ways:—

(1) The State may issue or refuse a license.

(2) It may impose conditions prescribing the mode in which the business is to be carried on or by adding condition to the grant of the license.

(3) By cancelling the license in case the license holder does not conform to the conditions so laid down.

(4) The power to grant or refuse license is usually required to be delegated to an officer, body or authority, designed or constituted by the government for that purpose. Such delegation is generally made by the rules and the regulations prescribing the limits and procedure for the exercise of such powers. Where the standards for the exercise of such powers are not clearly laid down, the exercise of power is bad and is labelled as arbitrary as for example in *Dwarka Prasad v. State of U. P.* (8) the Supreme Court held the power to grant, refuse or cancel licenses arbitrary, as no rules, principles and directions for its exercise were laid down. Besides if the Court finds that the discretion conferred is unfettered and final without any provision of appeal or review, it shall hold it invalid. (9) e. g., though rikshaw-pulling is barbarous yet it must be conceded that a person has a right to do so and the authorities cannot refuse license on this ground only. (10) Similarly the power delegated by the

Central Government to the State Government to cancel all or any licenses under Section 15 (b) of the Arms Act (11) and by State Government to District Municipalities under S. 249 of the Municipalities Act (12) without laying down any guidance or safeguards for its exercise, was held to be bad. The legislation in such matters, therefore, must be unambiguous, laying down with sufficient clarity its intended intention; otherwise an action on an indefinite criterion is bound to be arbitrary (13).

7. The basic requirement in the exercise of discretion is that there must be a rule for guidance which may deter the authority from making 'any' directions at any stage. (14) Thus in *Hussain Ali v. Durgah Committee* (15) the Court struck down S. 11 (f) of the Durgah Committee Act on the ground that the power of the Committee to regulate the privileges of Khadims was an unreasonable restriction on their right to carry on profession for the Act laid down no guidance on the point of granting or refusing a license in the matter. Likewise a bye-law authorizing the Executive Officer to grant or refuse licenses to rikshaws in his absolute discretion (16) or an order of the Municipal Board fixing the maximum limit of rikshaws in contravention of the byelaws (17) cannot be reasonable restriction in the absence of any rules or principles which could even remotely be taken to control the acts. In this reference it may also be noted that since it is not possible for the legislature to provide for all contingencies and some discretion has to be left to the licensing authority, the abuse of power should not be lightly assumed. If an act makes the grant of licenses the general rule and the two circumstances in which it may be refused are clearly defined, it cannot be said to be arbitrary. (18) So also is the case with the power which is regulated by the Statute and entrusted to a non-political body like Reserve Bank which

11. *Kishori Lal v. Dy. Commr., Kamrup*, AIR 1955 Assam 181.

12. *Mahomed Ebrahim v. Municipal Commr., Ootacamund*, AIR 1956 Mad. 181.

13. *Kamdev Club v. State of Punjab*, AIR 1957 Punj. 20.

14. *Mohd. Ismail v. District Magistrate*, AIR 1957 AH 487.

15. AIR 1957 Raj 177.

16. *Lachnow Municipality v. Iqbal Singh*, AIR 1953 AH 823.

17. *Iqbal Singh v. Municipal Board*, AIR 1953 AH 186.

18. *Babulal Gupta v. Cantt. Board*, AIR 1961 Madh-Pr 351.

7. AIR 1953 Cal 121.

8. AIR 1954 SC 274.

9. *Banwari Lal Kapurthala v. Cloth Controller*, AIR 1954 Pat 325.

10. *Satyajit Banerjee v. Commr. of Police Calcutta*, AIR 1954 Cal 417.

regulates the credit of the country and is to be exercised after prescribed investigation of a quasi-judicial character.(19)

8. The nature of trade may sometimes also be material in the exercise of discretion. There can be nothing arbitrary in granting discretion to an excise officer to determine whether a person is an addict and to increase or decrease his quota according to his will. The reasonableness of noxious trades is to be judged by standards entirely different from other trades.(20)

9. In judging the reasonableness, all the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of it from the manner of its imposition or the mode of putting them into practice. Thus the President of a Municipal Board can validly refuse the sanction for the construction of a house if he feels that such a construction shall affect the interests of the residents of the locality or that the adequate provision has not been made to prevent overcrowding or for laying out.(21) Similarly the refusal of a license to a pawn broker on the ground that he is a bad character or that his shop is frequented by bad characters is reasonable because a pawn-broker's trade afforded facilities for the disposal of stolen property and he is in a position to dictate terms to the poor and needy.(22)

10. In determining the persons entitled to obtain a licence, the conditions which have been prescribed must be such as are germane to the objects with which they have been laid down. The restrictions imposed for obtaining a license to make dangerous substances like explosives(23) or for running an eating house(24) are reasonable considerations in the interest of general public. If the policy of an Act is to provide for public safety, convenience and health in a particular area, a refusal to grant a license for running a rice or flour mill in that area is well justifiable.(25) Similarly the requirement of a license for a prize competition(26) and

the payment of a due tax as a condition precedent for the grant of a motor permit(27) were held to be valid restrictions for the former was with an object to protect the poor man who may part with his hard earned income in pursuit of some hypothetical gain and the latter to keep roads in proper condition.

11. Public interest is always supreme and no restriction which subverts it can be said to be harsh or excessive. If the R. T. A.(28) is vested with the authority to consider the proposed services' effect on the continuance of existing services and maintenance of standards of comforts and amenities or to limit the number of carriages on a particular route in the interest of general public,(29-30) the vesting is not arbitrary. But this does not mean that the consideration may go to the extent of violating other fundamental principles of the Constitution e.g. in *Ghouse Miah v. RTA, Cuddapah*,(31) the consideration for the grant of the license that the applicant must not have his main or branch office at the route or reside beyond five miles from the route, was held to be unreasonable for it made a discrimination based on place of residence. However, an order giving preference to those whose renewals were refused can be valid because a preference to experienced operators is a relevant consideration and hence constitutional.(32)

12. Consideration of the public interest has, thus, been the supreme factor in granting or refusing a license. In a Madras case(33) the High Court allowed a writ appeal on the principle that in declining to grant a license, the local body is entitled to take into consideration the fact that the property had been acquired by Eminent Domain for a wholly different purpose, that the petitioner will presumably have no further legal right to continue in possession of that property. This was held to be a consideration of mere animosity or hostility to a private party.

13. The power to impose a condition upon the exercise of the right should not

19. *Sajjan Bank v. Reserve Bank of India*, AIR 1961 Mad 8.

20. *Arjan Das Duggal v. State of Punjab*, AIR 1958 Panj 400.

21. *Mulaim Chand v. Municipal Committee*, AIR 1957 Madh-Pra 50.

22. *Keval Chand v. State of Madras*, AIR 1956 Mad 514.

23. *Alahnoor v. District Magistrate, Chittorgarh*, AIR 1956 Raj 153.

24. *Kishan Chand Arora v. Commissioner of Police*, AIR 1959 Cal 123=1959 Cri L J 180.

25. *Naina Mohd. v. T. P. Board*, AIR 1956 Mad 289.

26. *State of Bombay v. RMDC*, AIR 1956 Bom 1.

27. *Krishnan v. Seey. RTA*, AIR 1956 Andhra 129.

28. *Malik Ram v. RTA*, AIR 1955 Raj 142 (FB).

29-30. *Kulwant Singh v. A. A. of S. T. Authority*, AIR 1957 Raj 237; *Transport Dev. Co. v. Bus Association*, AIR 1956 Vin-Pra 25.

31. AIR 1963 Andh Pra 283.

32. *Tulsi Ram Agarwal v. R. T. O. Dhanba*, 1962 Pat 57.

33. *The Executive Officer Bhavani Panchs M. K. Mani Iyer*, AIR 1967 Mad 89 at p.

be left in the hands of an officer without formulation of proper standards for determination of conditions which should be reasonably put upon the exercise of such occupation. The conditions for the grant of license should not be so vague as to make their compliance an impossibility.(34) There should not be an unjustifiable interference with the licensees' right as for example a condition attached to a cinematograph license that the applicant shall exhibit at least 2,000 feet of approved film at the commencement of each performance after paying the required hire was treated by the Supreme Court(35) an unreasonable restriction, for there was no guide to the discretion of the government. But where the conditions prescribed a maximum of 2,000 feet or limited(36) the number of shows and prohibited any person below 18 years in morning and late night shows unless accompanied by guardians(37) the conditions are not arbitrary on the ground of considerations of health, safety and public morality.

13. The authority imposing the conditions must not act subjectively and therefore if the Commissioner imposed a reasonable security on a registered dealer or on an applicant for registration under S. 7 (4) (a) of the Bengal Finance (Sales Tax) Act of 1941(38) or refused a license for running a cinema on the reasons given by him,(39) the power cannot be arbitrary for the test for 'good and sufficient reasons' is objective and not subjective.

15. The conditions may also at times take the form of a fee. According to the spirit of Cl. (6) of Art. 19, the licensing power being a restriction upon the freedom or right to carry on a business must be reasonably exercised and our Supreme Court, in this connection, has observed(40) that since the imposition of a license fee operates as a restriction because unless it is paid the person cannot carry on a business, its reasonableness can be put to challenge.

16. A license fee is different from a

license tax.(41) In fact charges are levied either for purposes of regulation or for purposes of revenue or both. If the primary object of the charge is to regulate or restrain, it is a license fee but if, on the other hand, the primary object is to produce revenue, it is a license tax. The courts usually do not interfere simply on the ground of hardships but they certainly do so if the quantum is such as to make the carrying on the business impossible.(42) Moreover, the object of license fee is to reimburse the Government for any expenditure made by it in respect of the business or matter intended to be regulated, and so where it is proportionately sufficient to keep a track of dealings, it is reasonable,(43) but where the enhancement of fee is far in excess of the expenditure incurred by the government on the maintenance of the checking staff, it is bound to constitute an unreasonable restriction.(44)

17. Since the license fee is a requisite condition for obtaining a license in certain trade, its non-payment may validly lead to the cancellation of license. The cancellation is one of the coercive methods to enforce collection of dues.(45)

Cancellation :

18. The power to cancel a license is required to be exercised for good reasons and the principles and the standards, guiding the authority exercising such power, must be laid in advance. It should not be in any case left to the sweet will of an authority otherwise it shall be discriminatory and offend Art. 19 (1) (g).(46) The ways and means must be concretely suggested. An order cancelling a license to store hides and skins(47) cannot be sustained merely on the ground that the odour emanating from it is a nuisance and health-hazard. Any order passed on extraneous considerations as are not germane to the exercise of power, is unreasonable within the meaning of Art. 19 (1) (g) of the Constitution of India.(48) The

41. Gopi Pershad v. State of Punjab, AIR 1957 Punj 45.

42. Liberty Cinema v. Commr. of Cal Corpns., AIR 1959 Cal. 45.

43. Gurusah Naidu v. State of Madras, AIR 1953 Mad 158.

44. Vardachari v. State of Madras, AIR 1952 Mad 764.

45. M. A. Rahman v. State of A. P., AIR 1951 SC 1471.

46. R. J. Singh v. Electrical Inspector, AIR 1960 All 87.

47. Afshooned Amanulla v. District Municipality, AIR 1953 Ker 80.

48. Eriabha Khanna v. State of Punjab, AIR 1961 Punj 32.

34. Asit Ranjan v. Dock Labour Board, AIR 1961 Cal 355.

35. Sheshadri v. District Magistrate Tanjore, AIR 1954 SC 747.

36. M. A. Baig v. State of Andh-Pra, AIR 1951 Andh-Pra 126.

37. O. R. Sharma v. State of U. P., AIR 1961 All 600.

38. D. P. Khatian v. C. T. Officer, AIR 1956 Cal 596.

39. Ranchore Lal Ji v. Rev. Dev. Commr., Sambalpur AIR 1950 Orissa 89.

40. Mohd. Yasin v. Town Area Committee, Jalalabad, 1952 B C N 572 = AIR 1952 B C 115.

person affected by such cancellation must also be given a reasonable opportunity for hearing and in the absence of any such opportunity, the cancellation is bound to be null and void.(49)

19. But where the cancellation takes place in accordance with the principles and standards already laid down, the courts have no say as for example in *Karam Chand Thapar v. State of Bihar*(50) Regulation 48 of the Coal-mines Regulations providing for a public enquiry by Central Government and obtaining Court's recommendation before cancelling or suspending a license was held valid for it laid down sufficient principles and standards for the guidance of the rule-making authority. The regulation required the Government to apply its mind to the enquiry report and the recommendations of the Court before taking any action. Similarly, in another case (51) the Supreme Court upheld the cancellation order made on ground of fraud, because the licensee was given an opportunity for hearing and to explain his conduct in the matter.

20. The right to import any goods is only an incident of the fundamental right to carry on business which belongs to every citizen.(52) But for the Imports Control Order, 1955 a licensee has a right to import steel goods. The violation of the terms of a license can attract the penalty of only the cancellation of the license. The licensee cannot be denied any rights or privileges with respect to the Iron and Steel business apart from import business. The granting of licenses and the remedies for the violation of the terms of such licenses are governed by provisions of that Order and they cannot be substituted by any non-statutory action of the Government.

Procedure:

21. The authority which seeks to alter the conditions of the license or cancel or refuse to renew license held by a person, is required to act judicially and must give a proper hearing to the affected party. Hearing implies that there should be a reasonable notice, an opportunity to show cause which includes the right to be heard orally and produce evidence and that the decision should be based upon proper reasons. An order which does not provide for an opportunity of hearing is

bad.(53) Besides where the opinion of the licensing authority is conclusive and no higher authority is prescribed to look into the case, an order so made is invalid for it may make a scheme as practically nugatory.(54)

22. An order refusing to renew a license must contain the reasons for such refusal. The absence of any reasons shall make the renewal dependent on subjective satisfaction and therefore invalid (55). The provisions of appeal may sometimes be implied in the spirit of the Act and where it is so done, the power is not unguarded as for example the Patna High Court upheld S. 6 (6) of the Bihar Mica Act (56) which empowered the Controller to alter the particulars of any license in the absence of any express provision of appeal. The Court held that the provision of appeal, though not expressly given, must be implied and deemed to be incorporated in the provisions of the section where the Government has been given the power to revise the proceedings or entertain and hear an appeal (57), the power is not arbitrary.

23. At times it has been observed that the licensing authority so examines its powers as to create a monopoly in favour of a particular person. The action is invalid unless there be a right of appeal against such action or where the attendant circumstances are exceptional in character: as for instance in a Supreme Court case (58), the petitioner contended that the canalization of imports of soda ash through two importer stockists is the grant of monopoly and offends against Art. 19 (1) (g). The Court rejecting the contention held that in modern times the export and import policy of any democratic State is bound to be flexible. The needs of the country, the position of foreign exchange, the need to protect national industries and all other relevant considerations have to be examined by the Government. Since the Government found the importers of soda ash resorting to mal-practices, leading to speculation and violent fluctuations in prices of the commodity, national interest made it their

49. *Amolak Chand Murlidhar v. S. D. O. Shirsagar*, AIR 1962 Assam 80.

50. AIR 1958 Pat 378.

51. *Fed Co (P) Ltd. v. Bilgrami*, AIR 1960 S C 415.

52. *Ram Krishna v. Union of India*, AIR 1969 Cal. 18.

53. *Madan Lal v. State of Rajasthan*, AIR 1953 Raj 162=1953 Cri L 1283.

54. *Amir Chand v. State of U. P.*, AIR 1956 All 562 =1956 Cri L J 1141.

55. *Shambhu Nath & Sons Ltd. v. State of Punjab*, AIR 1959 Punj 525.

56. *Srikant Lal v. State of Bihar*, AIR 1959 Pat 496.

57. *George v. Municipal Commr.*, AIR 1957 Trav Co. 249.

58. *Bhatnagar & Co. Ltd. v. Union of India*, AIR 1957 S C 478.

duty to intervene and regulate the distribution of the commodity in a suitable manner. But where the Act contemplated exercise of licensing power by a body and instead it granted a monopoly to a particular person, it thereby deprived itself of the power to grant licenses. The action in such cases is invalid (59).

24. The licensing authority must also act within the four walls of the grant of power for in case its action is not covered by the terms of the grant, the exercise is held *ultra vires*: as for example in a Supreme Court case (60) the petitioner challenged the condition imposed on his license that he shall purchase tendu leaves from contractors only and from none else. The Court held the condition invalid as it was not authorized and supported by the Act itself. The maxim *delegatus non potest delegare* has its application in the field of licensing also. In *Ganpatl Singhji v. State of Ajmer* (61) the District Magistrate refused to permit the appellant to hold fair on his land on which he had been holding it earlier on the ground that permits for fair shall be granted only to local bodies and not to individuals. The Court held that the delegation of authority to District Magistrate is *ultra vires* for the regulation gives this power to Commissioner who cannot further delegate it to District Magistrate. Furthermore, the regulation assumes the individual right to hold fair and merely imposes certain conditions in respect of sanitation etc. The right to hold fair came within the purview of Article 19 (1) (g).

Presumption of Constitutionality

25. At times the validity of a licensing provision is sought to be put by the Court upon a presumption of constitutionality. There have come only two examples to light where the High Court of M. P. has sought to do so. In *Banta Singh v. State*, (62) the petitioner challenged validity of Rule 49A of the C. P. & Berar M. V. Rules which provided for a preference to viable units in matters of grants of permits, other things being equal. The Court held the rule as subserving the purpose of the Act. It is open to Government to create standards of efficiency with a view to achieve reasonable public comfort and inconvenience

in matter connected with public utilities. Prescription of a limit is a matter for the Government and the Court will not interfere unless it is unreasonable or unrelated to public purpose. With a bias in favour of the constitutionality of a provision, the rule was valid.

26. In the other case (63) the Court turning down the challenge of the petitioner that the requirement under Section 18 (a) (iii) to display the formula or the ingredients of a patent or proprietary medicine offended Article 19 (1) (g) contended that in a welfare State, the legislative powers are exercised to subserve the ultimate objective. The requirement was reasonable in view of protection of public from fraud or deceit and providing for preservation and safety of its health, morals and general welfare. There is a presumption of constitutionality and the challenger must prove otherwise. If the legislature thought it fit that the disclosure shall be made to the world at large, the Court cannot sit in judgment upon it. In this connection it must be pointed out that the presumption of constitutionality must not be relied upon to sustain an infringement of a fundamental right. As pointed out by the Supreme Court in *Sagor Ahmad v. State of U. P.* (64) the onus of proof in the cases where the State seeks to detract from the freedom of a citizen lies upon the State and not upon the person whose freedom has been restricted. It appears that in the two aforesaid cases, this was not brought to the notice of the Court and the cases, therefore, must be treated as exceptional in character.

27. Thus we see that the power of the Government to control the individuals in matter of trade or business etc. by licensing appears to be of a very wide amplitude and variety. It is humbly suggested that it shall be more conducive to the basic objective of the Constitution if the powers of licensing are at least exercised on a uniform pattern which makes provision for proper hearing and opportunities to the affected persons. It is necessary that there should be a uniformity of process, at least something on the lines of the Federal Administrative Procedure Act (1946) with suitable variations which might be more conducive to a better administration of this system.

59. *Bowther v. Pampraty Panchayat*, AIR 1957 Trav Co 2=1957 Cri L J 105

60. *Hamid Raza v. State of M. P.*, AIR 1960 SC 931.

61. AIR 1955 SC 178.

62. AIR 1958 Madh Pra. 193.

63. *E. L. Chaturvedi v. State of Madhya Pradesh*, AIR 1960 Madh Pra 259=1960 Cri L J 1614.

64. AIR 1954 SC 729.

BAR COUNCIL NEWS

We have received the following communication from the Secretary,
Bar Council of India, New Delhi.

THE BAR COUNCIL OF INDIA

St. B. C. 16/1970.
Cir. L. E. No. 1/1970.

Dated 20th April, 1970.

From:

A. N. Veeraraghavan, B.A., B.L.,
Secretary, Bar Council of India,
AB/21, Mathura Road, Facing
Supreme Court Bldg., New Delhi-1

To,

1. The Secretaries of all State Bar Councils.
2. The Registrars of all Universities having the Law Faculty, with 2 copies for the Vice-Chancellor and the Dean, Faculty of Law.

Subject: Recognition of Law Degrees under section 24 (1) (c) (iii) of the Advocates Act, 1961, for purposes of enrolment as Advocates.

Sir,

I am to communicate to you the following Resolution passed by the Bar Council of India on the above subject, at its meeting dated 19th April, 1970:

"Resolution No. 59/1970:

In exercise of the powers conferred under Section 24 (1) (c) (iii) of the Advocates Act, 1961, it is hereby resolved that till a notification by the Bar Council of India to the contrary, with reference to the degree in Law of all or any particular University having a Law Faculty—

(1) a degree in law obtained from any of the Universities which fulfils the requirements of Rule 11 in Part III.A of the Rules of the Council reproduced in Annexure at the end of this Resolution, and

(2) a degree in law obtained from any of the Universities in India by any person who has commenced his course of instruction in law, in or after the 1st term of the academic year 1967-68, after undergoing such course of instruction for a period of 3 years by actual attendance at college shall be deemed to be recognised for purposes of enrolment as advocate.

PROVIDED, however, that the degree was obtained in compliance with Rule 1 of the Rules of the Council in Part III-A.

Explanation: With reference to the following Universities the figure "1967-68" in sub-paragraph (2) above shall be read as "1968-69":—

(1) Jiwaji, (2) Kanpur, (3) Madras, (4) Meerut, (5) Sardar Vallabhbhai Patel, (6) Bangalore, (7) Aligarh, (8) Mysore, (9) Bhagalpur, (10) Patna, (11) Vikram, (12) Agra, (13) Ranchi, (14) Berhampur."

Yours faithfully,

A. N. Veeraraghavan
Secretary,
Bar Council of India.

ANNEXURE

(See Sub-paragraph (1) of Resolution No. 59/1970 of the Bar Council of India).

I. Rule 11, in Part III-A:

Explanation: Nothing in these rules shall affect persons who joined a course of instruction in law for a degree in law before the 1st academic term of the year 1967 and have taken a degree in law before 31st December, 1971, but they shall continue to be governed by the Resolution of this Council being Resolution No. 201/1963 dated 26th February, 1963, read with Resolutions Nos. 50/1965 dated 11-4-1965, 16/1966 dated 27-2-1966 and 121/1966 dated 27th August, 1966."

Resolution No. 201/1963 dated 26-2-1963:

1. RESOLVED that a degree in law obtained on or before the 30th June, 1964, from any University established by law in the territory of India be recognised for the purposes of Section 24 (1) (c) (iii) of the Advocates Act, 1961.

2. RESOLVED that no degree in law obtained after the 30th June, 1964, from any University in the territory of India shall be recognised unless such degree has been obtained after undergoing a course of study in law for a minimum period of two years after graduation. Provided however that nothing herein contained shall affect a person who has commenced a course of study in law before graduation prior to the 28th February, 1963 and obtained a degree in law before the 1st October, 1966.

3. RESOLVED that for the purpose of Section 24 (1) (c) (iii) of the Act, a degree in law obtained from any University in Pakistan shall be recognised only if such degree has been obtained after a study in

law for a minimum period of two years after graduation.

Resolution No. 50/1965 dated 11-4-1965:

The Bar Council of India is of the opinion that the degree in law recognised in Paragraph 2 of the Resolution No. 201/1963 should have been obtained after a course of study in law by regular attendance and after attending the necessary lectures of a college recognised by a University.

Resolution No. 16/1965 dated 27-2-1966:

RESOLVED that Resolution No. 50/1965 passed on the 10th of April, 1965, will not apply to persons who have begun their course of study in law or taken a degree in law prior to that date viz., 10th April, 1965.

Resolution No. 121/1965 dated 27-8-1966:

Having considered the following Resolutions 201/1963, 50/1965 and 16/1966 and representations for letters received (1) dated 28th May, 1966, from the Secretary of the Bar Council of Rajasthan and (2) 15-6-1966 from the Secretary, Bar Council of Madras.

This Council resolves that all applications for enrolment rejected by any State Bar Council or Enrolment Committee thereof of persons who began their course of study in law or who took their degree in law prior to 10th April, 1965, on the sole ground that their law degrees were not obtained after a course of study in law by regular attend-

ance and after attending the necessary lectures at the University—recognised college shall be deemed to be pending and the State Bar Councils concerned and the Enrolment Committee thereof are hereby directed to dispose of the same in the light of the above mentioned Resolutions of this Council.

II. Rule 1 in Part III.A: (referred to in the Proviso in sub-paragraph No. 2).

"Rule 1: No person shall be eligible for enrolment under the Advocates Act, 1961, unless at the time of joining the course of instruction in law for a degree in law he is a graduate of a University or holds such academic qualifications which are considered equivalent to a graduate's degree of a University by the Bar Council of India."

III. "Resolution No. 8/1970:

RESOLVED that as a special case, the Diploma in Rural Service awarded by the National Council for Rural Higher Education which has been treated to be on a par with a graduate's degree of the Rajasthan University, may be treated as equivalent to a graduate's degree in terms of Rule 1, as amended and that there should be no objection to the enrolment of candidates who obtained the LL.B Degree thereafter, provided that the other requirements relating to enrolment are satisfied."

(A. N. Veeraraghavan)

Secretary,

The Bar Council of India

REVIEWS

TAXATION OF COMPANIES; By A. V. Kasbekar, Foreword by R. N. Jain, Member, Central Board of Direct Taxes, 2nd Edition, 1969, Eastern Law House, Private Ltd., Calcutta. Pp. 227 & xiv. Price. Rs. 15.

The tax law applicable to companies has undergone vast changes recently, and the new tax structure evolved by the Finance Act, 1961 has been successively revised. Further the relevant provisions are strewn about in the Income-Tax Act, the Income Tax Rules, the Finance Act, etc. The present handbook on the Income-Tax Act, 1961 & subsequent revisions was originally published in 1966, and the present Edition has been enlarged & revised to suit practical requirements.

The book has been divided into three Parts. Part I deals with the provisions

of the Income-Tax Act which are important to companies under suitable chapter heads like income from house property income from Business, depreciation, Development rebate, Business Expenses, Capital gains, Losses, Assessment procedures, Demand & Collection, and Penalties, Topics of special interest like Amalgamations, Collaboration agreements, Non-resident companies & priority industries are considered in Part II, while the third Part contains a survey of the company rate structure from 1952-3 to the present day, followed by tables of Tax rates, rates of development rebate, etc. The Survey is compiled under the heads of Primary classification of companies, Grouping of companies for rate purposes, residence of companies, factors governing rebate, and withdrawal of rebate

The Appendices giving the different Schedules of articles of priority industries, etc., and the Index are useful. The author has collected all relevant material pertaining to the taxation of companies, and topics of vital interest have been appropriately grouped together. To appreciate the change, in the proper perspective, a brief historical background has been provided where necessary, and to the extent that is possible the law applicable to individual assessment years has been differentiated. In this task the author's official experience has stood him in good stead. For sixteen years he was with the Income-Tax Department, when he had to deal with the income-tax assessments of limited companies; he is now working as Tax Adviser to the National and Grindlays Bank Ltd. Dealing as it does with the provisions of interest to Companies, it should be useful to those who are too busy to undertake a comparative study of the various changes effected from year to year. Tax-payers, tax-practitioners and those who are concerned with the assessment of limited Companies should find the book of considerable assistance.

Publications like the one under review can necessarily be of assistance only during the currency of the Act and amendments they deal with, because taxation is subject to budgetary changes every year. The latest Union Budget leaves the structure of company taxes more or less intact although it proposed to disallow entertainment and guest house allowances in the computation of total income for income tax purposes. But the Budget provisions for corporate taxation for 1969 came into force subsequent to the publication of this book.

R.S.S.

EQUALITY BY STATUTE: By Monroe Berger, University Book House. 15 U. B. Bungalow Road, Delhi 7. Revised Edition. 1969. Pp. viii and 263. Price Rs. 3.50.

The highly interesting story of the gradual removal of the many civil and political disabilities of the American Negro and his rehabilitation in the eye of the law to a position of equality with the other citizens in the United States is the sum and substance of this absorbing volume. The concept of equality is at work in several activities of life — equality in employment opportunities, equal protection of the laws, segregation and equality in educational facilities, equality in

the exercise of the franchise, equality in housing, equality in the use of transportation facilities and equality in recreational facilities. The author has highlighted the crucial role that the U. S. Supreme Court has played in this process. He describes a succession of important judicial decisions which have earned for that institution an undying place in the constitution of that country.

The fifth, fourteenth and fifteenth Amendments to the U. S. Constitution are relevant to the issues discussed in the pages of this volume. According to the fifth Amendment, "no person . . . shall be deprived of life, liberty or property without due process of laws." The fourteenth Amendment lays down that all persons born or nationalised in the U. S. . . . are citizens of the U. S. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . No State shall deny to any person the equal protection of the laws . . ." and the fifteenth Amendment guarantees that the citizen's right to vote shall not be denied or abridged on account of race or colour." How far these judicial decisions have helped to uphold and amplify the principles and policies enshrined in the Constitution has been examined with critical insight by the author of the volume under review, and it is not without significance that he has given it the sub-title "The Revolution in civil rights."

The revised edition of 1969, the first edition having been printed so far back as 1952, devotes two chapters to the evolution of civil rights in the period prior to 1868 and to the subject of law and the control of prejudice and discrimination. In the fourth chapter is recounted the experience of New York State in reducing discrimination in employment, while chapters 2 and 3 are mainly concerned with the Supreme Court's role in buttressing the caste order in the period 1868-1936, and subsequently with that Court's role in undermining the caste order in the period since 1937. Until about 1937 the Supreme Court buttressed laws which enforce separation, but, mindful of America's equalitarian doctrine, it joined hands with the legislatures in establishing the compromise of "separate but equal." Since 1937, however, the Court has been telling the nation that the Negro must be treated in accordance with the professions of equality and justice which underlie the basic law of America. Its special position

in the U. S. Federal system has been of great help. It places it at the apex of a pyramid and farthest removed of all political agencies, it becomes most independent of the pressure of public opinion in general and of specific group interests and gives it the greatest immunity from the influence of periodic elections. In the last three decades it has considerably reshaped the basic law governing the rights of Negroes in almost every aspect of social life, increased personal liberty in political and cultural life, further protected persons accused of crime in facing the State apparatus ranged against them and started legislatures on the road to a more equitable system of apportioning representatives in these law making bodies.

Beginning in the late 1930s the Supreme Court judicial decisions have, in a series of well-planned cases, educated the public regarding civil rights and removed legal obstacles to equality of opportunity. This education has been through the interpretation of older statutes and the Constitution itself and the affirmation of the constitutionality of such new State and federal legislation as has been enacted in recent years. All the evidence presented in this volume indicates that law is a formidable means for the elimination of group discrimination and the establishment of conditions which discourage prejudicial attitudes. Law's potentialities for good are many. The legal machinery can be withdrawn from the support of discriminatory patterns. Law can withhold certain privileges from the discrimination. It can put the State's influence and power on the side of those discriminated against. It can help to establish those conditions of social life which encourage the free association of all groups on a level of equality. Often favourable laws herald the advent of advances in the status and welfare of groups which have been subject to discrimination. Finally, proper legal controls fortify the believers in fair play and weaken the position of those who discriminate.

The volume we have been reviewing has a useful bibliography, list of cases and Index at the end. R.S.S.

THE INDIAN SUPREME COURT AND THE CONSTITUTION. By Mohammad Inam, B.A., LL.M. (Osm), Ph. D. (London). With a Foreword by the Hon'ble Mr. Justice M. Hidayatullah; Eastern Book Co., 34 Lal Bagh, Lucknow, or Kashmir Gate, Delhi, 1968. Pp. xxxvi and 571. Price, Rs. 30.

In the book under review, which embodies substantially the author's thesis approved by the London University for its Doctorate degree, the author analyses the nature and significance of the judicial process adopted by the Supreme Court of India in the construction of the Constitution. Although a study of the cases decided by the Supreme Court interpreting the Constitution, the cases of the United States and Australian and Canadian constitutional laws have also been brought under focus. In the treatment of the judicial process, the development of constitutional law through the instrumentality of the Supreme Court has been placed in its historical setting, (e.g.), proceedings of the Constituent Assembly, Parliament, the Joint Committees, and the Government of India Act, 1935.

The book has been divided into three parts. In the first part are discussed the general features, complexities, and object of the Constitution which have presented problems in the solution of which the Supreme Court had to set its judicial process to work. It discusses the place that the Supreme Court occupies in the scheme of the Constitution. The next 3 chapters, in the second part, consider the questions as to how far the Constitution is a document complete in itself, how far the framers, intentions have been unambiguously expressed and, if not, to what other sources one should look for their intention. They also examine whether the future generations have a right to understand the Constitution in any way they like as an agent to carry out their desires. These chapters try to show to what extent history played a role in the development of the Constitution through the Supreme Court. The author has tried to assess how far the Supreme Court has subjected its value preferences to the intentions of the founders, and he examines how far the Court is guided by the principles of the constitutional laws of the U.S., Austria, Canada and England. Finally, he has tried to evaluate the process of constitutional interpretation through the Supreme Court under convenient topics. This process of constitutional interpreta-

tion is never-ending, because social, economic and political values change perpetually and would require the Supreme Court, says the author, to become "super-sensitive in changing the values of the constitution with the same pace as other values change." This chapter, therefore, assesses the creative work of the Supreme Court in creating new values of its own in the context of the general scheme, as an institution of vital importance under the constitution to maintain equilibrium between constitutional Government, the liberties of the individual, and the welfare of the Community. Part III contains a re-appraisal of the judicial process, and considers to what extent the Supreme Court has adhered to principles as such and to what extent it has shifted from one principle to another. This analysis of the Supreme Court's approach in the interpretation of the Constitution tells us what has been the nature of the judicial process of the Supreme Court, what values emerge from them, which of its policies are reflected in it, and what place it has carved for itself in the system of Government under the Constitution.

According to the Constitution there shall be a President of India in whom the Executive Power of the Union shall be vested, and there shall be a Council of Ministers collectively responsible to the House of the People to aid and advise the President in the exercise of his functions. There shall be a Parliament for the Union consisting of the President and the two Houses. There shall be a Supreme Court of India whose declaration of law shall be binding on all Courts within the territory of India, and all authorities, civil and judicial, shall act in its aid. Thus the three traditional organs of the State were created. Under Part III of the Constitution certain fundamental rights are guaranteed to the citizen, and he is empowered to move the Supreme Court for the enforcement of these rights by appropriate proceedings.

In this study of the judicial process of the Supreme Court, the case law method has been adopted. Most of the relevant decisions of the Supreme Court on constitutional law have been studied and analysed under each topic. The Court and its work are continuously on the march, and its actual decisions have, therefore, been the starting premise of this study. Frequent changes in the personnel of the Court and the creation of a wide area of conflicting reasoning and judgment, the author requests, may not have made his

conclusions as accurate as it would otherwise have been possible.

In an Appendix is given the text of the Constitution of India with its nine schedules, and a list of the several Chief Justices and judges who have been on the Bench is given in another appendix. A select bibliography table of cases and subject index are other useful features of this interesting piece of research.

R.S.S.

COMMENTARIES ON THE INDIAN EVIDENCE ACT, 1872: By V. B. Raju, M. A., I. C. S., Judge, Gujarat High Court, Vol. I (Secs 1—92) Eastern Book Company, 34 Lalbagh, Lucknow, or, Kashmere Gate, Delhi. 3rd Edition. 1969. Pp. viii & 1056. Price. Rs. 60 per set.

Here is a welcome attempt to explain in a lucid and simple manner the principles of evidence in such a way that the law on any point can be ascertained quickly, the Evidence Act being a difficult branch of the Law of Procedure. The book is divided into two Parts, the 1st Part dealing with the relevancy of facts, under various heads such as statement by persons who cannot be called as witnesses, statements made under special circumstances. How much of a statement is to be proved, judgments of courts when relevant, opinions of third persons, and character, when relevant. Part II is devoted to the subject of proof, with separate chapter titles for facts which need not be proved, oral evidence, documentary evidence, public documents and presumptions as to documents. The different sections in the 2nd chapter cover the relevancy of facts enabling a court to determine the amount in suits for damages, and when right or custom is in question or when they hear on the question whether an act was accidental or intentional. The relevancy is discussed then of statement made by a person who is dead or cannot be found, or made in a will or deed. Entries in books of account, in public records and statements in law books are relevant. The opinions of experts in law, science and the arts are relevant. In civil cases character to prove conduct imputed is irrelevant, but in criminal cases previous good character is relevant.

As regards proof, the Court has to take judicial notice of facts which are grouped under 13 heads and none of these need be proved, and all facts, except the contents of documents may be proved

by oral evidence, which should in all cases be direct. Documents are public or private; public documents are those forming the acts or records of the sovereign authority, official bodies or tribunals, public officers, and public records of a State of private documents. All others are private documents. The text of the Evidence Act is given sectionwise, and each section is followed by detailed synopses, commentary, notes and illustrations, where necessary.

The present Edition has undergone complete revision and up-to date case law has been incorporated. The author's views on several points have been supported with original and convincing reasons. He has included explanations and comments of his own on Sections 3, 11, 13, 24, 27, 30, 42, 74, 80, 91, etc., as well as relevant extract from various judgments. In at least two instances the author's views have been endorsed by the Supreme Court, e.g., his view that the evidence of identification parades held by the Police in the course of investigation is both inadmissible and irrelevant, and that the Privy Council's decision that in the Indian Evidence Act it would not be inconsistent with the natural use of language to construe a confession as a "statement by an accused suggesting the inference that he committed the crime" is wrong. There have been important changes in case-law in 1953, 1954 & 1955, which have been dealt with in the commentary; it includes also cases, Indian & English, not reported in any other commentary. A good commentary must be exhaustive, as well as clear and useful, and the exposition of the law should be such that it should be possible to ascertain the law on any point unequivocally and quickly, and members of the legal profession will find that this volume admirably fills the bill.

"Sections 1-192" on the shoulder of the binding is a mistake. R.S.S.

THE WEST BENGAL PREMISES TENANCY ACT, 1956 by Nirmal Kumar Roy, M. A., LL. B., Advocate, S. C. Sarkar & Sons Private Ltd., 1-C College Square, Calcutta 12, 2nd Edition, 1963, Pp. xxxii and 356, Price, Rs. 13.

Whether Bombay or Calcutta is the first city in India may admit of argument, but there can be no denying the fact that Calcutta is perhaps far ahead of the other cities in India in respect of population.

It is a large centre of industrial activity and there is always a large rush of people in search of employment, with a resultant shortage of accommodation. This shortage has become chronic in Calcutta and the districts, leading to all sorts of undesirable practices by the landlord or the tenant. To stop them a series of legislative measures was enacted. In West Bengal the Calcutta Rent Act of 1920 was the starting point of rent control legislation, and this was in force for 7 years, after which it died a natural death. It defined 'premises' as a building or hut "let separately for residential, charitable, educational or public purpose, or for the purposes of a shop or an office". After the second World War there was a series of enactments in Bengal culminating with the West Bengal Premises Tenancy Act, 1956.

The main provisions of this Act, which provide for the regulation of certain incidents of tenancy of premises in the city of Calcutta and some other areas of West Bengal, include: fixation of fair rent; provisions under which such rent may be increased or revised; protection of tenants against arbitrary eviction; the conditions under which the landlord is entitled to recover possession; restriction on sub-letting or assignment; position of sub-tenants, and when a tenant is entitled to restoration and compensation. The main objects of the Act are to give the tenant 'fair rent and a status of irremovability, and it aims at preventing landlords from increasing rents by more than a permitted amount above a basic figure called 'fair rent,' and conferring on them security of tenure by preventing the landlords from evicting the tenants without an order of the Court; it also forbids a Court to make an order for possession in favour of landlords except on certain specified grounds.

There are seven chapters in this book, which include those on provisions regarding rent, suits and proceedings for eviction, deposit of rent, appointment of Controller and other officers, their powers and functions, appeal, revision and review, and penalties. The different sections are suitably grouped under each chapter, accompanied by suitable and satisfying notes. In this second edition of the book, the provisions of the 1963 Amendment Act and of the President's Amendment Act 1963 have been duly incorporated in the relevant sections. In view of these amended provisions, many judicial decisions on S. 17 have been rendered out-

tory, and these have been omitted from this edition. The book, we learn, has been thoroughly revised and brought up to date, by incorporating and analysing the large number of judicial decisions that have been pronounced since the first edition was published.

Towards the end of the book are reproduced the texts of the West Bengal Premises Tenancy Rules, 1956, the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 and the West Bengal Premises Rent Control Rules, 1950. The value of the book has been enhanced by a useful Table of Cases and Index. The Rent Act legislation is a remedial measure in nature and its main purpose is to prevent the landlord from exacting higher sums of money from the tenant in addition to the permitted or fair rent. As a corollary, it inevitably leads to the granting of security of tenure to the tenant. To both, therefore, as well as to the practising lawyer, the publication should be of practical assistance.

R.S.S.

JUSTICE IN INDIA. By Govind Das, M.A., Bar-at-Law, N. M. Tripathi Private Ltd., 164 Samaldas Marg, Bombay 2, Pp. 197. Price, Rs. 20.

"Can an Indian be arrested without any trial in his country? Can the Executive drive him out of his house? Is the policeman feared most in the slums? Does the law aid the strong and the aggressive? Does it mumble for the failing and the weak? Does the law guarantee security, freedom and progress?"—These are among the several questions posed by the author in the volume under review. There are laws in India, he concedes, any number of them, but Justice? He answers in his own style in the pages of this book. It contains three parts, 'Past,' 'Present,' and 'Future.' The 'Past' contains a rapid survey of various concepts of justice including the Indian; the existing problems of law and justice in the Indian context in the last two decades are dealt with in the 'present'; and the 'future' contains attempted solutions. The earlier chapters deal with the different theories of law and justice and the agencies administering them among the ancient Greeks and Romans, in the mediaeval ages, in Christianity, in Islam and Hinduisms at different periods in history.

It was after the great Indian mutiny

of 1857 that many of the British systems of law were introduced into India, but, during the British days, the Indian legal system functioned without the native spirit, and today the prevailing temper has not succeeded in formulating a categorial philosophy of law. An attempt to inject a lively spirit into the laws resulted in the enactment of the Constitution of India, whose "Directive Principles" sought to introduce a social order in which justice, social, economic and political, shall inform all the institutions of national life. These principles were considered fundamental in the governance of the country, but a subsequent paragraph said that these "Directive Principles" were not enforceable by a Court, and the Supreme Court has considered them as merely "subserving, and not over-riding" the Constitution. But it is feared that the ever-increasing power of the Executive coupled with the ever-contracting power of the Judiciary might upset the delicate balance on which the Indian legal structure rests. The Courts, adds the author, must contrive means to exercise the fullest control over the administrative actions of the Executive and the limitations on the power of judicial review of executive actions should be relaxed. The author refers appreciatively to the adverse comments of the Ford Foundation Specialist on the system of legal education obtaining in the country and considers that it is high time we stopped deluding ourselves with all sort of fanciful notions about the qualifications and attainment desirable for members of the judiciary.

In the third Part the author deals with Roscoe Pound's concept of "social engineering," into which he has contrived to squeeze the entire scheme of legal process. But the author would seem to think that in an under-developed society like that of India, "humane order with safety for the failure, since every failure does not imply fault," should be the task of social promotion, and not mere social engineering. Dealing with the doctrine of countervailing power, in a juristic sense, says the author, different institutions should be given freedom to lead their own effective lives. On occasions when a sense of injustice is caused, or justice is threatened, or liberty is in peril, the judiciary should tackle the situation and avert the feared eventuality. The Supreme Court of India seems to have inaugurated this process in its epoch-making judgment in the Golak Nath case. It said that Parlia-

ment had no power to take away or abridge any of the fundamental rights guaranteed by the Constitution by way of constitutional amendments. However, considering the great social and economic changes that had been effected on the basis of such laws and having regard to the requirements of justice, the Court limited the effect of the judgment to future legislation only.

"... There is no justice in India and no one is playing the game fairly" deplores the author. India needs for the success of its legal system full-employment and a modicum of social security. It needs reaffirmation of the norms and values in the community which have had a record of past success. Among the suggestions made by the author are: the decentralisation of the seats of power, the enthronement of the judiciary with effective authority and jurisdiction; use of suitable language for law with drastic re-orientation of legal education; recasting of the statutes based upon the ideal norms of the community; the proper choice of the judges as agents for implementing justice, and the enunciation of a positive philosophy of law. Mere amendments of statutes would be futile. What is wanted is a thorough revaluation or a fundamental revolution "whereby right and wrong shall be enunciated, emphasised, and enforced in society, and economic progress or prosperity will be a mere consequential by-product." Even the change in our political masters does not guarantee the automatic prevalence of justice, which can be made possible only through prescribed endeavours of a fundamental character.

This is a thought-provoking book on the drawbacks and deficiencies of the ruling concept of law and justice and of the agencies in charge of their administration. An index and table of cases would have been useful features of the volume.

THE SUPREME COURT ON CRIMINAL LAW: By J. K. Soonawala, B. A. LL. B., Attorney-at-law, Bombay High Court. Second Edition, 1958; By Y. D. Nayak, B. Sc., LL. M., Advocate High Court, Bombay. Vol. I, Pp. CXXXI and 1155. Vol. II, Pp. CXVIII and 1157 to 1958. N. M. Tripathi Private Ltd., Princess Street, Bombay 2, Price per set, Rs. £0.

Since the inception of the Supreme Court in 1950 the exercise of its powers of authoritative interpretation has made a heavy impact on all branches of criminal law, and a comprehensive reference book, like the one under review, containing all its decisions on the entire range of criminal law, was becoming necessary in order to meet the needs of judges and lawyers. The first Volume contains four Parts, one each for the Decisions of the Supreme Court on constitutional principles applicable to criminal law, the Penal Code, the Law of Evidence, and the Code of Criminal Procedure. The Constitution is the Paramount Law which has laid down a scheme of Government under which a balance has been struck between the rights and freedoms of the citizen and the State's power of social control, and a study of the basic principles of the constitution is necessary if there is to be any thorough understanding of criminal law. While all the relevant articles are given, the difference between the Indian and American Constitutions and the Scheme of governance under the constitution are also touched upon. The Second Part deals with the Penal Code under the heads, inter alia, of Punishment or Sentence, Criminal Conspiracy, Unlawful Assembly, Offences of Bribery and Corruption, against the State and Public Servants, Offences against Religion and Human Life, Theft, Misappropriation, Cheating, Trespass and offences relating to marriage. In the next Part, on the Law of Evidence, the heads cover, among other things, Rules, as to relevancy of facts, Oral evidence, Documentary evidence, Burden of Proof, and the Law as to Dying declarations. Special importance has been given to the Law as to Circumstantial evidence, the Law as to Confessions, the Law as to Sufficiency and Corroboration, and the Law as to the effect of contravention of mandatory rules of procedure under the Criminal P. C., subjects on which the Law is believed to have crystallised as a result of the Supreme Court decisions.

The Second Volume deals with Appeals to the Supreme Court, all other criminal enactments, and the interpretation of criminal statutes. After briefly dwelling on the criminal appellate jurisdiction of the Supreme Court and appeals on Constitutional issues, this Part is devoted to the Court's power of intervention on questions of fact and questions of law, new points raised for the first time, and the binding character of its decisions, principles governing the issue of a certificate

under Art. 134, and the the Court's discretion in the matter of sentence or order. In the sixth Part all the other criminal laws have been dealt with under headings such as Bribery and Corruption, Preventive Detention, Public Safety and Public Order, Contempt of Court, Prohibition and Excise, Customs and Import Control, Rent Control, Work in factories and Shops, Municipalities and Local Bodies, Industrial Disputes, Motor Vehicles and a host of other laws under a comprehensive "Miscellaneous and General" Section. In the final Part have been brought together a large number of principles on the interpretation of criminal statutes laid down by the Court, and they cover basic rules of construction, use of ancillary aids, and the effect of the repeal or expiry of a statute.

It is noteworthy that the exhaustive contents include every heading in the Book, and a chronological and comparative index and alphabetical index, with the page numbers of each case in the text, are also given. When an authority on a particular subject is sought for, the reader has to refer to the contents and trace the appropriate heading and then to look up the same heading in the body of the text where all the cases relating to that subject are grouped together, with their serial numbers indicating their citations in the Law Reports. This combined use of Text, Contents and Index should facilitate easy and quick reference, and Mr. Soonawala's novel method of arranging the subject-matter distinguishes it from other books on the subject. In an Appendix in the second volume are given the decisions of the Privy Council and the Federal Court on Criminal Law between 1900 and 1950. Altogether a laudable effort to present in an easily assemblable form the continuity and development of interpretation on each subject in successive judgments of the Court.

The first edition of this book appeared in 1961, but the author did not live to see the present edition out. Although he suddenly passed away in 1965, he had prepared the manuscript of this edition bringing the case-law upto June 1965, and Mr. Nayak was entrusted with the work of bringing it out by adding case-law upto December 1967, which appears as a supplement at the end of the second volume.

R.S.S.

THE HONOURABLE COURT (A HISTORY OF THE UNITED STATES SUPREME COURT), By *Leo Pfeffer*, 1st Indian Print 1969, Academic International, Calcutta 9, Pp. 471, Price. Rs. 10.

Has the Supreme Court of the United States been a handmaid of capitalist exploitation? Has it served as an instrument of Communist machinations? Is it necessary to enact measures to curb its power? Or, has it fulfilled the hopes entertained by John Marshall, the greatest of the Supreme Court Chief Justices who moulded the destinies of the Court over the first three decades of the 19th Century? Marshall hoped that the Court would be capable of withstanding the shifts of popular passions and of changing the patterns of the nation on healthy lines. How far these hopes have been vindicated have been vividly and graphically brought out by the author's masterly survey of the developments which have made the Court the unquestioned guardian of the Constitution; the survey is based on the epoch-making decisions of a succession of distinguished judges who have adorned the Court. He describes the great personalities and landmark decisions of the Court's history. He points out how the Court has become the agency most committed to and effective in the participation of American democracy.

When the average American, says the author, thinks of the Supreme Court, it is in terms of decisions outlawing racial segregation in the public schools or declaring unconstitutional gerrymandering in favour of rural over urban voters. They are constitutional law decisions which invoke the superior authority of the Constitution to check action by the Legislature. The uniqueness of the Supreme Court as a judicial tribunal is to be found in these decisions. In major political economic and social cases, the Supreme Court's power to interpret the acts of the Legislature can be an extremely effective instrument, as effective as vetoing a law by declaring it unconstitutional. Practically it makes little difference whether the Supreme Court declares a particular law unconstitutional or interprets it in such a way as to deprive it of its vital force.

There has at the same time been a series of judicial decisions which exalted what is known as the "due process clause" as a means of asserting power to pass judgment on industrial and commercial measures adopted by the legislative arm

of Government. Under the doctrine of the "due process of law" the American Supreme Court assumed and exercised powers, as the ultimate judicial authority, in testing whether in cases before it the Executive or Legislature conformed in certain fundamental principles of right and justice within the ambit of the American Constitution. The Supreme Court in India, although the ultimate interpreter of the Constitution and the final protector of the Citizen's fundamental rights guaranteed under the Constitution, has not been able until the 10th February 1970, to widen the scope to mould the "concept of justice" in contrast with the American analogy. But this gap has to an extent been bridged by the latest decision of the Court in striking down the Bank Nationalisation Act as unconstitutional. In doing so, it set a new principle for Court adjudication on fundamental right cases, abandoning a principle enunciated by Mr. Justice Kania in 1950 in a case in which the Marxist leader Mr. A. K. Gopalan, challenged his preventive detention. This decision has now been rejected as being based on the theory that in protecting the fundamental rights of citizens the Court need consider only "the object and form" of the State action and should ignore the effect of the laws on the fundamental rights of the individuals in general.

Dealing with the American Supreme Court, the author of the present volume poses a three-fold paradox. A high judicial tribunal, acting within judicial customs and using judicial instruments, exercises important political and legislative functions. In doing so it makes enemies in high places but escapes any

effective attack upon its status or powers. All other agencies of Government accept these political and legislative decisions though the Court has absolutely no weapon to employ to enforce compliance. How is this triple paradox explained? "Where", asks the author, "does one find the solution for the riddle of a Court that exercises political power... and yet has no means" to defend its power if it was seriously challenged? How does the Court enjoy, though it has been continually making enemies, such a high prestige? The answers to these are to be found in the life history of the Court, which the book under revision presents. This life history is examined against the political, social and economic background which gave rise to its major decisions and which in turn was vitally affected by these decisions. At the same time due consideration is given to the influence upon the Court's evolution of Titans inside and outside the Court like Jefferson, Marshall, Holmes, Franklin Roosevelt, Warren, etc.

Index of cases cited, Selected bibliography and general index are useful features of the book.

The author, Mr. Leo Pfeffer, is a constitutional lawyer of reputation in America and is a noted authority on religious liberty and Church-State issues. A lawyer before the United States Supreme Court, he has written several well known books like "Church, State and Freedom," "The Liberties of an American" and "Creeds in competition". At present he is Professor of Political Science and Chairman of the department at Long Island University, New York.

R.S.S.

BOOKS RECEIVED

"HUMANISM OF MAHATMA GANDHI" By M. Hidayatullah Chief Justice of India, Published by Gandhi Centenary Literature Propagation Committee, 46 Parimal Society, Ahmedabad 6.

"COMPANY ACTIONS IN THE MODERN SET-UP" By S. C. Sen, Bar-at-Law. Published by Eastern Law House (p.) Ltd. Calcutta 13 Price Rs. 10.

"LAW DIARY 1970" Published by Law Book House, Laxmi Road, Panna 30. Price Rs. 4-50.

END OF A DISPUTE, By C. N. Kamath, Advocate. Being the details of dispute between workmen and the Management of Indian Telephone Industries, Tribunal Award, Judgment of the Supreme Court of India, Gajendragadkar Commission Recommendations, A challenge and A Problem. Foreword by Hon'ble Mr. Justice T. K. Tukol, High Court of Mysore 1962. Price Rs. 2.

: B.D.B.

viz., June 3, 1957 by the appellants' counsel, and it is after such a fairly exhaustive consideration of the objections of the appellants, the demand notice Exhibit A and the materials on record, that the Collector passed the order Exhibit Q. In fact, as already mentioned, it is not as if the Collector merely confirmed the demand under Exhibit A in toto. On the other hand, he modified it in favour of the appellant to some extent. It is such an exhaustive order passed by the Collector — Exhibit Q — that was the subject of consideration in the first instance, by the Central Board of Revenue, in Exhibit T, and later, by the Central Government, in Exhibit V. Under those circumstances, we are not inclined to accept the contention of the learned counsel for the appellant that the orders — Exhibits T and V — require to be interfered with.

16. The further grievance placed before us by the learned Counsel on behalf of the appellant is that before the High Court various objections had been raised in the writ petition regarding the manner in which the inspection was done by the Deputy Superintendent and none of these matters had been considered by the High Court. To a direct question put by us, as to whether all the points referred to in para 33 of the writ petition were really argued before the High Court, the counsel quite fairly stated that he has no instructions to say that these points were as a matter of fact pressed before the High Court.

17. The counsel further urged that no opportunity had been given to cross-examine the Deputy Superintendent of Central Excise nor was a copy of his report made available to the appellants. The inspection was done without the knowledge of the appellants and without notice to them and Khuda Bux was not authorised to represent them at the time the inspection was conducted by the Deputy Superintendent. We are not inclined to accept these contentions of the learned counsel. So far as we could see, the appellant had made no grievance before the Collector of Central Excise that they should be allowed to examine witnesses nor did they urge that a copy of the report of the Deputy Superintendent had not been made available to them. They did not make any request for cross-examining the Deputy Superintendent of Central Excise. In view of all these circumstances, in our opinion

the High Court was justified in holding that the appellants had a proper opportunity of contesting the demand made by the department and that there had been no failure of natural justice in the proceedings conducted by the respondents.

18. A further grievance was made by the learned counsel for the appellants that the order — Exhibit N — dated February 6, 1958, passed by the Collector of Central Excise, was illegal and contrary to the proviso to sub-section (1) of Section 35 of the Act. According to the learned Counsel, the Assistant Collector, by his order Exhibit M, had condoned the losses by a certain percentage in respect of five lots whereas the order of remand for a de novo adjudication passed by the Collector under Exhibit N will have the result of depriving the appellants of the favourable directions obtained by them under Exhibit N and their liability would be enhanced. That is, according to the appellants, the order of remand, Exhibit N, passed by the Collector, will have the effect of subjecting them to a greater penalty than has been adjudged under the original order of the Assistant Collector, Exhibit M. We are not inclined to accept this contention of the appellant. Section 35 deals with appeals and sub-section (1) gives a right of appeal to an aggrieved party against any decision or order passed by officers under the Act and the Rules giving power to the appellate authority that such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against, provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation or penalty than has been adjudged against him in the original decision or order. The fallacy underlying the contention of the learned counsel is the assumption that the consequence of the order of the Collector will be to subject the appellants to a greater penalty for which, in our opinion, there is no basis, as is seen from Section 35. What the Collector has done in this case is to give the appellants an opportunity of satisfying, if they can, the authority concerned that there was no justification for the issue of the two notices, Exhibits K and L under R. 223-A. The order does nothing more than this. If the appellants are able to satisfy the authority properly, the result may even be that no action will be taken under Rule 223-A.

19. Lastly, it was feebly urged that there was a conflict between the orders of the Collector, Exhibit Q dated March 8, 1958 and Exhibit N, dated February 6, 1958. In our opinion, there is no scope for any conflict because the two orders relate to different types of proceedings initiated against the appellants.

20. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 802

(V 57 C 170)

(From: Punjab)

J. C. SHAH AND K. S. HEGDE, JJ

Sm. Gunwant Kaur and others, Appellants v. Municipal Committee, Bhatinda and others, Respondents.

Civil Appeal No. 1337 of 1969, D/- 4-12-1969.

(A) Land Acquisition Act (1894), Sections 4, 6 and 5A and 17 (4) — Notification seeking to acquire certain land without demarcation — Objections alleging that notification did not show correct demarcation and that different landholders had no opportunity to file objections — Collector's order stating that collector was satisfied that land demarcated corresponded to the area notified — Order under Section 17 (4) not passed — Writ petition dismissed in limine on ground that High Court could not go into disputed question of fact — Order held, was bad — Decision of Punjab H. C., Reversed.

Where no order under Section 17 (4) is issued by the Government of Punjab, the owners of the lands are entitled to be heard on the question whether their lands or any land in the locality should be acquired for the purpose for which it is intended to be acquired. As the collector is to make an offer of compensation petitioners are entitled to challenge the correctness of the collector's opinion. The jurisdiction of the Collector depends upon the issue of a valid notification and the mere fact that the Collector is satisfied that the true area of land demarcated corresponds to the area notified — whatever that expression may mean — does not prevent the owners of the lands from contending before the High Court that they had no opportunity of making their

representations under Section 5A of the Act and of satisfying the Collector that their lands should not be acquired. Decision of Punjab High Court, Reversed.

(Paras 10 and 11)

(B) Constitution of India, Articles 220 and 227 — Disputed questions of fact can be determined.

The High Court is not deprived of its jurisdiction to entertain a petition under Article 220 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 220 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction, though discretionary the discretion must be exercised on sound judicial principles. When the petition raises complex question of fact which may require oral evidence to be taken and the High Court may decline to try a petition.

(Para 14)

(C) Constitution of India, Article 220 — Dismissal of petition in limine — Consideration.

Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made, dispute sought to be agitated, or that the petition against the party against whom relief is claimed, the petition is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction or for analogous reasons.

(Para 14)

The Judgment of the Court was delivered by

SHAH, J.: This is an appeal against the judgment of the High Court of Punjab dismissing in limine a petition filed by the three appellants in this appeal.

2. The third appellant purchased from one Hari Ram a plot of land approximately 500 sq. yds. at Bhatinda and applied on August 4, 1960 for permission of the local Municipal Committee to construct a house on that plot of land. Sanction was granted on August 10, 1960, and the third appellant constructed a residential building on the land. The first appellant also purchased 500 sq. yds. from Hari Ram on April 4, 1961 and submitted an application with plans to the Municipal Committee for constructing a house. The application was granted on August 9, 1963. The second appellant purchased a plot measuring 268 3/4 sq. yds. on November 5, 1962 adjacent to the land

purchased by the first appellant from one Tarsem Singh who in his turn had purchased it from Hari Ram. He also applied for constructing a structure and that was sanctioned by the local Municipal Committee on August 9, 1963.

3. A notification had been issued by the State Government of Punjab under Section 4 of the Land Acquisition Act on June 26, 1959 declaring that land specified in the Schedule to the notification was needed for a public purpose i. e., for construction of Mall Road leading from the Railway Station Bhatinda to the Main Road known as Goniana-Bhatinda Road. In the schedule to the notification the land was described as Khasra No. 2030 and 11 sets of persons were shown as owners of different pieces of land. The aggregate area of the land likely to be needed was shown as 15 bighas and 5 biswas, and Hari Ram was shown as owner of two pieces out of the land. By an amendment of the notification published on July 31, 1959, the holding of Hari Ram was shown in the aggregate as 8 bighas and 15 biswas. A notification under Section 6 of the Land Acquisition Act declaring that the lands were needed for a public purpose was issued on January 6, 1960 and published on January 15, 1960. The Schedule to the notification was in the same form as it was originally published in the notification under Section 4 and modified on July 31, 1959. It was recited in paragraph 3 of the notification that the plans of the land may be inspected in the office of the Bhatinda District and of the Municipal Committee, Bhatinda.

4. In the view of the Municipality of Bhatinda the demarcation of the land according to the plan published with the notification under Section 6 did not tally with the situation on the site. The matter was accordingly referred to the Public Works Department of the State. Later the Municipal Committee resolved to reduce the width of the road which was originally intended to be 100 feet to 60 feet. On February 15, 1965, the Municipal Committee resolved to abandon the scheme for it appeared to the Municipal Committee that even with the reduced width of 60 feet certain Municipal installations and lands used for public purposes were likely to be included in that road width. There was correspondence between the Municipal Committee and the local Government under which the alignment of the road was

sought to be modified. The Government of Punjab, however, insisted that the Municipal Committee should proceed with the acquisition and directed the Collector to issue the requisite notices and to make his award of compensation.

5. The appellants then filed a writ petition in the High Court of Punjab on December 16, 1968, alleging that the substance of the notification under Section 4 and its corrigendum was not published in the locality by the Collector; that the proposed land which was sought to be acquired for the Mall Road was not demarcated at site under Section 4 (2) of the Act; that the procedure laid down in S. 5-A of the Act was not followed; that the notification was vague and since the land sought to be acquired was not fully described in the notification, the interested persons could not file their objections against the requisition; that Khasra No. 2030 was a very large plot of land consisting of several building plots which were all part of the main Khasra No. 2030 and the original owners of this field number had divided this field into several abadi plots and had sold them to different persons before the notification and unless the portions of Khasra No. 2030 sought to be acquired were specified by the mere reference to certain areas thereof the owners could not be deemed to have intimation that their plots were to be acquired; and that the notification issued by the Government under Sec. 6 and the plan accompanying thereto did not tally with the alignment of the road as originally intended to be laid or subsequently modified by the Municipal Committee.

6. The High Court of Punjab dismissed the petition in limine. The High Court observed:

"The grievance of the petitioner's complaint is that the area now sought to be taken possession of was not included in the acquisition notification of 1959. In the elaborate order of the Collector the condition is, 'I am satisfied that the true area of land demarcated corresponds to the area notified and that it has been demarcated on the ground with as much accuracy as was reasonably possible.' This Court cannot determine disputed question of fact and this petition is dismissed accordingly".

With certificate granted by the High Court the petitioners have appealed to this Court.

7. The notification under Section 4 is the foundation of a proceeding for acquisition of land. In the present case the notification under Section 4 did not set out with precision the parts of Khasra No. 2030 belonging to different owners sought to be acquired. The notification merely set out the areas intended to be acquired out of Khasra No. 2030 but the location of the areas under Khasra No. 2030 could not thereby be ascertained. No plans demarcating the land to be acquired were published or made available to the owners of the land.

8. The contention of the appellants is that they had no opportunity to avail themselves of their statutory right to object to the proposed acquisition under Section 5A of the Land Acquisition Act and on that account the proceedings for acquisition are ultra vires.

9. Section 4 of the Land Acquisition Act does not expressly require the Collector to publish or make available the plans of the lands intended to be notified to the owners of the lands. But the acquiring authority is bound to publish sufficient information giving due notice to the owners of the lands that their properties are intended to be compulsorily acquired. Under Section 4 (1) the appropriate Government being of the opinion that land in any locality is needed or is likely to be needed for any public purpose, may publish a notification to that effect. The Collector has then to cause public notice of the substance of such notification to be given at convenient place in the locality. After the notification is issued the Collector may exercise the power to enter upon and survey the land and set out the boundaries of the land proposed to be taken and the intended line of the work proposed to be made thereon. By Section 5A any person interested in any land notified under Section 4 as being needed or likely to be needed for a public purpose or for a Company may within thirty days after the issue of the notification, submit in writing to the Collector his objection to the acquisition of the land or of any land in the locality as the case may be. The Collector has to give to the objector an opportunity of being heard and has, after hearing the objections and making such further inquiry as he thinks necessary, to submit the case for the decision of the appropriate Government, together with the record of the proceedings held by him and a report containing his recom-

mendations on the objections. Under Section 6 of the Act the Government may proceed to make a notification only if the Government is satisfied after considering the report of the Collector under Section 5-A that the land is needed for a public purpose. The inquiry and the report under Section 5-A may be dispensed with only if a notification is issued under Section 17 (4) of the Land Acquisition Act.

10. In the present case no order under Section 17 (4) was issued by the Government of Punjab. The owners of the lands were, therefore, entitled to be heard on the question whether their lands or any land in the locality should be acquired for the purpose for which it was intended to be acquired. The appellants contended that they had no opportunity of making their representations, for the notification gave no notice to them that the land in their occupation was intended to be acquired.

11. In summarily rejecting the petition two grounds were given in the order of the High Court—first that the Collector was satisfied that the true area of the land demarcated corresponded to the area notified and that it had been demarcated on the ground with as much accuracy as was reasonably possible, and the second, that the question raised was one of fact. The writ petition filed before the High Court was not in the nature of an appeal against the decision of the Collector. The Collector was acting for and on behalf of the State Government to make an offer of compensation for the lands to be acquired. The appellants were entitled to challenge the correctness of the Collector's opinion. Again the jurisdiction of the Collector depended upon the issue of a valid notification and the mere fact that the Collector was satisfied that the true area of land demarcated "Corresponded to the area notified"—whatever that expression may mean—did not prevent the owners of the lands from contending before the High Court that they had no opportunity of making their representations under Section 5-A of the Act and of satisfying the Collector that their lands should not be acquired. The three appellants had applied to the Local Municipal Committee for constructing buildings on their plots and the Municipal Committee had sanctioned the constructions. Prima facie, this may indicate that in the view of the Municipal Committee the lands on which the buildings were allowed to be constructed were not with-

in the area notified for acquisition or would not be needed for the road.

12. The Government of Punjab did not publish any plans, nor did they inform the owners of the lands in the locality to which the notification under Section 4 of the Land Acquisition Act related, that plans were available for inspection at the office of the Collector: the owners of the lands were only informed that some parts of Khasra No. 2030 belonging to the owners were required. There is no evidence on the record that the entire area of khasra No. 2030 was intended to be acquired. The notification did not, therefore, give due notice to the owners that their lands were intended to be notified for acquisition. In paragraph 2 of the petition it is also averred that there was no due publication of the notification in the locality by the Collector.

13. The pleas raised by the petitioners about the infirmity in the notification and the proceedings for compulsory acquisition were serious.

14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit in reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made, dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inap-

propriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute, and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit in reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit.

17. It was urged by Mr. Hazarnavis on behalf of the Municipal Committee, Bhatinda, that the three appellants were purchasers of the lands claimed by them after the notification under Section 4 was issued and they had no right to challenge the issue of the notification. If, however, the notification under Section 4 was vague, the three appellants who are purchasers of the land had title thereto may challenge the validity of the notification. The appellants have spent in putting up substantial structures considerable sums of money and we are unable to hold that merely because they had purchased the lands after the issue of the notification under Section 4 they are debarred from challenging the validity of the notification, or from contending that it did not apply to their lands.

18. The appeal is, therefore, allowed and the order passed by the High Court is set aside. The proceeding is remanded to the High Court with the direction that the petition be readmitted to its original Number and that it be heard and disposed of according to law after considering the affidavits in reply and the other evidence produced by the parties. Costs of the appeal will be the costs in the petition.

Appeal allowed.

AIR 1979 SUPREME COURT 806
(V 57 C 171)

(From: Allahabad)*

**J. M. SHELAT, V. BHARGAVA AND
G. A. VAIDIALINGAM, JJ.**

**Agra Electric Supply Co. Ltd., Appel-
lant v. The Labour Court, Meerut and
another, Respondents.**

**Civil Appeal No. 1631 of 1967, D/- 8-
11-1968.**

**U. P. Industrial Disputes Act (28 of
1947), Section 6-H (2) — U. P. Industrial
Disputes Rules (1957), Rules 16 (1) and
16 (2) — Application under Section 6H (2)
— Dismissal of, for default of appearance
— Order of dismissal not covered by
Rule 16 (1) — Second application claim-
ing identical relief is maintainable with-
out following procedure laid in R. 16 (2).**

Where a previous application under Section 6H (2) filed by workmen was dismissed for default of appearance, a second application claiming identical reliefs is maintainable without following the procedure indicated by Rule 16 (2). The necessity for filing an application for setting aside an order passed in the case in the absence of a party, as contemplated under sub-rule (2) of Rule 16 will only arise when an order on merits affecting the case has been passed in the absence of a party, under sub-rule (1) of Rule 16. An order dismissing a case for default for non-prosecution, does not come under sub-rule (1) of Rule 16 and to such an order sub-rule (2) has no application. Civil Misc. Writ Petn. No. 1647 of 1967, D/- 11-5-1967 (All), Affirmed.

(Paras 11, 12)

**Mr. S. V. Gupte, Senior Advocate (Mr.
D. N. Mukherjee, Advocate with him),
for Appellants; Mr. M. K. Ramamurthi,
Mrs. Shyanla Pappu and Mr. Vineet
Kumar Advocates, for Respondent No. 2.**

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: In this appeal by special leave, the appellant challenges the order of the Allahabad High Court dated May 11, 1967 dismissing Civil Miscellaneous Writ Petition No. 1647 of 1967.

2. The facts leading up to the filing of the said writ petition by the appellant under Article 226 of the Constitution may be briefly stated. The appellant is an existing company under the Companies

Act, 1956, and has its registered office at Calcutta. The company was and is being managed by Martin Burn Ltd., Secretaries and Treasurers. The Company carries on the business of generation, distribution and supply of electricity within its licensed area in the city of Agra and its environs in the State of Uttar Pradesh. On a reference made by the Government of Uttar Pradesh regarding a dispute that had arisen between the electricity undertakings managed by Martin Burn Ltd., of which the appellant was one, and their workmen about the demand of the workmen for supply of uniforms, free of charge the Chairman, Martin Electricity Supply Company Adjudication Board made an award on February 20, 1947 in and by which certain types of workmen were directed to be supplied with uniforms. The said award remained operative till April 15, 1950 on which date it was terminated. Though the award had been terminated, the appellant continued practice of supplying uniforms to its workmen. Subsequently, again, a dispute was raised by the employees of the electricity undertakings managed by Martin Burn Ltd., regarding the supply of uniforms to some categories of workers. The said dispute was referred by the Government of Uttar Pradesh, by order dated March 15, 1951, for adjudication to the State Industrial Tribunal, Uttar Pradesh, Allahabad. The said Industrial Tribunal passed an award dated November 29, 1952 holding that the same categories of workmen to whom uniforms had to be supplied as per the award dated February 20, 1947 were entitled to be supplied with uniforms. Though this award remained in operation only for a period of one year, the appellant continued to supply uniforms till 1953 after which year the supply of uniforms was discontinued. Nevertheless, the appellant again resumed supplying uniforms from May 1961.

3. On December 31, 1961 twenty-three employees of the appellant, including the second respondent herein filed a joint petition before the Labour Court, Meerut, under Section 6-H (2) of the Uttar Pradesh Industrial Disputes Act, 1947 (hereinafter referred to as the Act) claiming that they were entitled to recover the money equivalent to the cost of uniforms which had not been supplied to them during the period 1954 to 1960. The said petition was numbered as Case No. 1 of 1962. According to these employees, the employer had failed to supply them uniforms which they were entitled to get

*C. M. W. P. No. 1647 of 1967, D/- 11-5-1967—All.)

and in consequence of such failure the workmen had been put to expense by purchase of clothes to be used while rendering service in the company. They claimed that the benefits which they were entitled to get should be computed in terms of money to enable them to recover the cost of uniforms from the appellant. The appellant filed a written statement on January 27, 1962 disputing the claim of the workmen and denying its liability to either supply uniforms or pay the money value of the same.

4. On February 22, 1964 the application filed by the workmen was taken up by the Labour Court for hearing, but as none appeared on behalf of the workmen who were the applicants when the case was called on for hearing, the Labour Court, Meerut, dismissed the application for non-prosecution. The actual order passed by the Labour Court was as follows:

"Case called on for hearing. No one is present on behalf of the applicant, nor any request for adjournment has been received.

The application is dismissed as not having been prosecuted. No order as to costs."

5. On or about January 1, 1965 seven employees of the appellant, including the second respondent herein, filed seven separate applications before the Labour Court, Meerut, again under Section 6-H (2) of the Act. The seven applications had been numbered as Case Nos. 217 to 223 of 1965. The application filed by the second respondent was Case No. 217 of 1965. The second respondent, in particular claimed that he was a mains cooly from April 13, 1950 to September 15, 1959 and that he was entitled to be supplied uniform by the appellant. As the uniform had not been so supplied, he pleaded that he was entitled to recover a sum of Rs. 330 as cost of the uniforms which the management should have supplied during these years. All the applicants, including the second respondent, had also stated in their respective applications that they had moved before the Labour Court a similar application, under Sec. 6H (2) of the Act, but unfortunately that had been dismissed for default on February 21, 1964 and hence the fresh applications were being filed.

6. The appellant filed, on or about April 7, 1965 separate objections denying the claim made by the applicants. We are not, at this stage, concerned with the

various pleas taken either by the employees, in support of their claim, or by the appellant, in denial thereof. It is only necessary to state that the appellant pleaded that the fresh applications, filed by the workmen, were not maintainable in view of the fact that identical applications, claiming the same reliefs, had been dismissed on February 21, 1964 by the Labour Court. If the workmen were aggrieved by the said order, the proper remedy that should have been adopted by them was by taking action under Rule 16 (2) of the Uttar Pradesh Industrial Disputes Rules, 1957 (hereinafter referred to as the rules). Not having adopted the procedure indicated therein, the management pleaded that it was no longer open to the workmen to file a second application and the Labour Court had no jurisdiction to entertain the same.

7. The labour Court had, by its order dated August 27, 1965 consolidated all the seven applications. On the basis of the objection raised by the appellant to the maintainability of the applications filed, issue No. 5 was framed in the following terms:—

"Whether the present applications of the workmen under Section 6-H (2) are not maintainable for the reasons given in para 5 of the written statement of the employers?"

and this issue was treated as a preliminary issue and arguments heard on the same. By order dated February 10, 1967 the Labour Court held that the applications filed by the seven workmen, including the second respondent were maintainable. The Labour Court has expressed the view that the order passed on February 21, 1964 was one dismissing the applications, filed by the workmen, for default and such an order was not contemplated by sub-rule (1) of Rule 16 of the rules, and hence the workmen were not bound to take action under sub-rule (2) of Rule 16. In consequence the Labour Court held that the applications filed by the workmen were competent and directed the applications to be posted for further hearing. Though the order had been passed in Case No. 217 of 1965, the Labour Court directed that the finding given on issue No. 5 would govern Cases Nos. 218 to 223 of 1965 also. The appellant challenged this finding of the Labour Court before the High Court of Allahabad in Civil Writ No. 1647 of 1967. A Division Bench of the High Court, by its order dated May 11, 1967 summarily dismissed the writ petition.

8. Mr. Gupte, learned counsel for the appellant and Mr. Ramamurthy, learned counsel for the second respondent, urged the same contentions that were urged on behalf of their clients before the Labour Court. Therefore the question that arises for consideration is whether the view of the Labour Court that the second application filed by the second respondent herein is maintainable, is correct.

9. Section 8-H of the Act deals with recovery of money due from an employer. Section 8-H more or less corresponds to Section 33-C of the Industrial Disputes Act, 1947. Sub-section (2) of Section 8-H, with which we are concerned is as follows:

"(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the State Government, and the amount so determined may be recovered as provided for in sub-section (1)."

As we have already mentioned the second respondent, along with certain others, had filed an application on December 31, 1961 claiming identical relief that is now claimed in Case No. 217 of 1965. That application was dismissed as not having been prosecuted, on February 22, 1964. The second application was filed on January 1, 1965.

10. We shall now refer to the relevant rules. Rule 9 empowers a Tribunal or Labour Court to accept, admit or call for evidence at any stage of the proceedings before it and in such manner as it may think fit. Rule 10 relates to the issue of summons for production of any books, papers or other documents as the Labour Court, Tribunal or Arbitrator feels necessary for the purpose of investigation or adjudication. Rule 12 relates to procedure at the first hearing. It states that at the first sitting of a Labour Court or Tribunal, the Presiding Officer shall call upon the parties in such order as he may think fit to state their case. Rule 18 provides for the Labour Court or Tribunal or Arbitrator proceedings *ex parte*, as follows:

"(1) If on the date fixed or on any other date to which hearing may be adjourned any party to the proceedings before the Labour Court or Tribunal or an Arbitrator is absent, though duly served

with summons or having the notice of the date of hearing, the Labour Court or Tribunal or the Arbitrator, as the case may be, may proceed with the case in his absence and pass such order as it may deem fit and proper.

(2) The Labour Court, Tribunal or an Arbitrator may set aside the order passed against the party in his absence if within ten days of such order, the party applies in writing for setting aside such order and shows sufficient cause for his absence. The Labour Court, Tribunal or an Arbitrator may require the party to file an affidavit, stating the cause of his absence. As many copies of the application and affidavit, if any, shall be filed by the party concerned as there are persons on the opposite side. Notice of the application shall be given to the opposite parties before setting aside the order."

Sub-rule (1) deals with the absence of a party on the date fixed or any other date to which the hearing may be adjourned, though he has been served with summons or he has notice of the date of hearing. Under those circumstances it provides that the Labour Court, Tribunal or Arbitrator, as the case may be, "may proceed with the case in his absence and pass such order as it may deem fit and proper." It is to the setting aside of such an order that may have been passed under Sub-rule (1), that the procedure is indicated in sub-rule (2). According to Mr. Gupte, learned Counsel for the appellant, the order passed on February 22, 1964, by the Labour Court is one contemplated by sub-rule (1) of Rule 16, in which case the provisions of sub-rule (2) are attracted and the second respondent, if he felt aggrieved by that order, should have filed an application under sub-rule (2), within time, to set aside that order.

11. We are not inclined to accept this contention of Mr. Gupte. As pointed out earlier by us, the order passed on February 22, 1964, is one dismissing the application as not having been prosecuted, for default of appearance of the second respondent. We will presently show that the order of February 22, 1964, cannot be considered to be one contemplated to have been passed under sub-rule (1) of Rule 16. Sub-rule (1) refers to a party being absent on the date fixed, or on any other date to which the hearing has been adjourned, and such party having been duly served or having notice of the date of hearing. The said sub-rule (1) indicates as to what is to be done under such circumstances. We have referred to

Rule 12 which provides for what the Labour Court or Tribunal should do at the first hearing. Neither the Act nor the rules empower a Tribunal or Labour Court to dismiss an application for default of appearance of a party. Rule 16 (1) is the only provision providing for what is to be done when a party is absent. That provision, which clearly enjoins the Labour Court or Tribunal in the circumstances mentioned therein "to proceed with the case in his absence", either on the date fixed or on any other date to which the hearing may be adjourned, coupled with the further direction "and pass such order as it may deem fit and proper", clearly indicates that the Tribunal or Labour Court should take up the case and decide it on merits and not dismiss it for default. Without attempting to be exhaustive, we shall just give an example. Where a workman, after leading some evidence in support of his claim, absents himself on the next adjourned date with the result that he does not lead further evidence, the Tribunal is bound to proceed with the case on such evidence as has been placed before it. It cannot dismiss the application on the ground of default of appearance of the workman. This will be an instance of "proceeding with the case in the absence of a party" and giving a decision on merits. If such an order is passed by the Tribunal in the absence of one or other of the parties before it, a right is given to such party to apply, under sub-rule (2) for setting aside the order that has been passed in his absence in the case in terms of sub-rule (1). The application must be filed within the period mentioned in sub-rule (2) and the party will have also to satisfy the Tribunal or Labour Court that he had sufficient cause for his absence. The necessity for filing an application for setting aside an order passed in the case in the absence of a party, as contemplated under sub-rule (2) of Rule 16 will only arise when an order on merits affecting the case has been passed in the absence of a party, under sub-rule (1) of Rule 16. An order dismissing a case for default or non-prosecution, does not come under sub-rule (1) of Rule 16 and to such an order sub-rule (2) has no application.

12. We have already indicated that the order passed on February 22, 1964 by the Labour Court cannot be considered to be an order contemplated under sub-rule (1) of Rule 16. If that is so, the second respondent was not bound to file an application within the time mentioned

in sub-rule (2) for setting aside the order dated February 22, 1964. Therefore the fact that a previous application, filed by the second respondent, was dismissed for non-prosecution on February 22, 1964 is no bar under Rule 16 (2) to the filing of the present application, Case No. 217 of 1965. It follows that the objections raised by the appellant to the maintainability of the application filed by the second respondent have been rightly rejected by the Labour Court and the High Court.

13. The appeal fails and is dismissed. The appellant will pay the costs of the second respondent.

Appeal dismissed.

AIR 1970 SUPREME COURT 809 (V 57 C 172)

(From: Patna)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Shashibhushan Prasad Misra (dead) and another, Appellants v. Babuaji Rai (dead) by his legal representatives and others, Respondents.

Civil Appeal No. 1110 of 1965, D/- 27-11-1968.

Civil P. C. (1908), Sections 11, 96 and Order 22, Rules 3 and 4 — Res judicata between co-defendants — Settlement of land in favour of plaintiff as tenant from deity — Suit by plaintiff for declaration of title and possession of land annexed to their land by alluvion — Deity impleaded only as pro forma defendant — Dismissal of suit — First appeal to High Court impleading deity as pro forma respondent — Dismissal of appeal against deity for failure to pay cost of guardian ad litem appointed by Court for deity — Dismissal of entire appeal not proper — No inconsistent decree would result.

Plaintiff obtained settlement from a deity in respect of certain plot of land situate in a village. The deity was 16 annas proprietor of the said village. Due to changes in the channel of the river flowing between the village of the deity and another village a portion of land became annexed to the plot of land settled upon plaintiff. Plaintiff claimed declaration of title and possession in respect of annexed land contending that by diluvion

* (First Appeal No. 235 of 1951, D/- 6-7-1959 — Pat.)

the said land was lost to the village to which it originally belonged. The proprietor of this other village as well as the deity were arrayed as defendant the latter being only a pro forma. The suit having been dismissed on grounds inter alia that plaintiff had failed to prove adverse possession for requisite period, a first appeal was filed in the High Court wherein a guardian ad litem in respect of the respondent deity was appointed. On failure of plaintiff to pay costs of guardian ad litem the appeal came to be dismissed against deity. The Court dismissed the whole appeal as incompetent holding that the appeal had abated against deity and as there was an issue between contesting defendants and deity as to whether the land in dispute appertained to the village of the deity and as that issue stood concluded against the deity by the decree of trial Court, success in appeal might result in inconsistent decrees. On appeal to Supreme Court:

Held that (i) the High Court erred in holding that appeal abated wholly or in part. Nono of the parties having died there was no question of abatement.

(Para 2)

(ii) that the question whether the suit lands appertained to the village of the deity became res sub judice on filing of first appeal and since this question was not finally decided between deity and other contesting defendants in appeal in the absence of any decision by High Court on merits on this question there was no final decision against deity. Thus there was no question of res judicata between co-defendants. AIR 1931 PC 114, Rel. on.

(Para 5)

(iii) that as the plaintiffs suing as tenants of deity did not ask for any relief against the deity, were entitled to prosecute the appeal against the contesting defendant-respondents on the question of title and possession on allegation that the suit land appertained to the village of deity.

(Para 3)

On facts, however, the Supreme Court having decided the question of the proprietorship of deity to the accreted land against the plaintiff in C. A. No. 140 of 1936 arising out of another suit T. S. 29/11 of 1946, this appeal was also dismissed.

(Para 6)

Cases Referred: Chronological Paras

(1931) AIR 1931 PC 114 (V 18)=

58 Ind App 158, Munni Bibi v.

Tirlok Nath

Mr. Sarjoo Prasad, Senior Advocate (Mr. B. P. Jha, Advocate, with him), for Appellants (excepting Respondents Nos. 15 (b) to 15 (d), C. B. Agarwal, Senior Advocate, (M/s P. K. Chatterjee and R. B. Datar, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

BACHAWAT, J.—This appeal arises out of Title Suit No. 12/9 of the 1946 instituted in the Court of the First Additional Subordinate Judge, Darbhanga. The plaintiff claimed declaration of their title and possession in respect of 70 bighas of land in plot No. 1083 in village Siripur Majraha. They obtained settlements of the lands from the deity Shri Radhakrishnan Jee Baldeojee. The deity was the 18th owner proprietor of village Siripur Majraha Pergana Jankahalpur, Tauzi No. 27/94. The river Karey flows between this village and the villages of Kazi Dumra and Shankarpur. The contesting defendants were the landlords and tenants of villages Kazi Dumra and Shankarpur. The deity was defendant No. 18 and was represented by one Tantreshwar Singh. The plaintiffs claimed that in consequence of the changes in the Channel of the river Karey the lands in suit were lost to villages Kazi Dumra and Shankarpur by diluvion and were annexed to plot No. 1083 in village Siripur Majraha by gradual increment and accretion. The Trial Court dismissed the suit. It held that (1) the suit lands did not accrete to plots Nos. 1083 and 1089 in village Siripur Majraha due to slow, gradual and imperceptible changes in the channel of the river Karey, (2) there was no custom in the village by which the disputed lands became the property of the owner of plots, (3) the deity Radha Krishanji Baldeoiji or the owner of village Siripur Majraha did not obtain possession of the lands in the manner alleged in the plaint, (4) the lands originally belonged to the proprietors of villages Kazi Dumra and Shankarpur and continued to be their property and (5) the plaintiffs failed to prove their title and possession in respect of the suit lands within 12 years before the date of the institution of the suit. The plaintiffs filed F. A. No. 291 of 1951 in the High Court of Patna against the decree passed by the Trial Court. The deity Shri Radha Krishanji Baldeoiji, the original defendant No. 18 was impleaded as respondent No. 23 in the appeal. By an order dated January 24, 1952 the High Court appointed the Deputy Registrar

as the guardian of the deity. On February 18, 1952 the High Court passed the following order:—

“Two weeks further time is allowed to deposit D. R. guardian's cost for respondent No. 23 (deity) failing which this appeal shall stand dismissed against him without further reference to a Bench.”

This peremptory order was not complied with and on the expiry of the two weeks the appeal stood dismissed against the deity. At the hearing of the appeal the contesting defendants urged that the entire appeal became incompetent in view of the dismissal of the appeal against the deity. The High Court accepted this contention and dismissed the appeal in its entirety. The High Court held that there was a clear issue between defendant No. 18 and the contesting defendants as to whether the lands formed part of the village Siripur Majraha, that the issue stood concluded against defendant No. 18 by the decree of the Trial Court, that the appeal had abated against defendant No. 18 and that as success in the appeal might lead to conflicting and inconsistent decrees, the appeal against all the defendants became incompetent. The present appeal has been filed by the plaintiffs after obtaining a certificate from the High Court.

2. Clearly, the High Court was in error in holding that the appeal had abated either wholly or in part. None of the parties to the appeal had died and there was no question of the abatement of the appeal. Mr. C. B. Agarwala relying on the case of Munni Bibi v. Trilokinath, 58 Ind App 158 = (AIR 1931 PC 114) submitted that the decision of the Trial Court on the question whether the suit lands appertained to village Siripur Majraha operated as *res judicata* between the deity and the contesting co-defendants, that the appellate court could not record an inconsistent finding that the suit lands appertained to village Siripur Majraha, and that in the circumstances, the entire appeal before the High Court became incompetent. We are unable to accept these contentions.

3. The plaintiffs claiming as tenants of the deity sued the contesting defendants for declaration of their title and possession in respect of the suit lands on the allegation that the lands appertained to village Siripur Majraha of which the deity was the proprietor. The deity was not a necessary party to the suit. It was joined as a defendant, but no relief was

claimed against it. The suit was dismissed on the finding that the suit lands did not appertain to village Siripur Majraha. The plaintiffs filed an appeal against the decree impleading the deity as one of the respondents. The appeal was dismissed against the deity for non-payment of costs of its guardian *ad litem*. The deity was not a necessary party to the appeal. The plaintiffs were entitled to prosecute their appeal against the contesting defendants in the absence of the deity.

4. As soon as the appeal was filed by the plaintiffs in the High Court the decision of the Trial Court lost its character of finality and the question whether the suit lands appertained to village Siripur Majraha became once again *res sub judice*. The case of 58 Ind App 158 = (AIR 1931 PC 114) (*supra*) shows that a decision operates as *res judicata* between co-defendants if (1) there is a conflict of interest between them; (2) it is necessary to decide that conflict in order to give the plaintiffs the reliefs which they claim and (3) the question between the co-defendants is finally decided. In the present case, the third condition was not satisfied. The question whether the suit lands appertain to Siripur Majraha was not finally decided between the deity and the co-defendants. On the filing of the appeal by plaintiffs, the question became once more the subject of judicial inquiry between the deity and the contesting defendants.

5. Before the appeal was finally heard and decided, it was dismissed as against the deity for non-payment of its guardian's costs. The Appellate Court did not give any decision on the merits of the case in the presence of the deity. There is no final decision against the deity on the question of the title to the suit lands. The decision of the Appellate Court against the contesting defendants will not lead to conflicting and inconsistent decree. The High Court was in error in holding that the appeal against the contesting defendants became incompetent.

6. In the circumstances the High Court ought to have decided the appeal before it on the merits. Counsel for the parties agreed that the decision of the present appeal on the merits would abide by the decision in C. A. No. 140 of 1966 arising out of T. S. No. 29/11 of 1946. That suit and T. S. No. 12/9 of 1946 out of which the present appeal arises were heard together by the Trial Court and disposed of by a common judgment. In C. A. No.

140 of 1968 we have held that the disputed lands appertained originally to village Kazi Dumra and Shankarpur, that due to the recession of the river Karey the lands re-formed in situ and that the property in the lands continued to remain with the proprietors of the lands in villages Kazi Dumra and Shankarpur. The plaintiffs failed to prove that the deity Shri Radha Krishnaji Baldeoji came into possession of the disputed land as alleged in the plaint. There was no issue on the question whether the deity had acquired title to the suit lands by adverse possession. The plea for the acquisition of title by adverse possession cannot be raised for the first time at the appellate stage. The plaintiffs failed to establish acquisition of the title of the deity to any portion of the suit lands by adverse possession. It follows that there was no merit in F. A. No. 235 of 1951. Although the High Court did not decide this appeal on the merits, it is not necessary to remand the matter to the High Court. Having regard to our findings in C. A. No. 140 of 1968, T. S. No. 12/9 of 1946 also must be dismissed.

7. In the result, the appeal is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 812

(V 57 C 173)

(From: Delhi)

J. C. SHAH AND K. S. HEGDE, JJ.

Sangat Singh, Appellant v. Ch. Perma Nand Bahl and others, Respondents.

Civil Appeal No. 1850 of 1966, D/- 28-11-1969.

Houses and Rents — Delhi Rent Control Act (59 of 1958), Section 3 (a) and Section 3 Proviso — Auction of evacuee property — Acceptance of bid — Attornment by tenant to purchaser — Suit for ejectment of tenant — No evidence led to indicate that title did not pass to purchaser — Proviso to Section 3 and not Section 3 (a) is attracted — Civil Court is barred from entertaining suit — Decision of Delhi High Court Reversed — Civil P. C. (1908), Section 9.

Certain building which was originally evacuee property was put to auction. Bid of an auction purchaser was accepted but no certificate was immediately issued. The Managing Officer gave provisional possession to the purchaser with direction to the tenant occupying the building to at-

torn to him. Purchaser realised the rent accordingly. He filed a suit for ejectment of the tenant in Civil Court. He did not discharge the burden which lay upon him to prove that he had not paid consideration till filing of the suit and that title was not conveyed to him by the Government.

Held, the Civil Court was barred from entertaining the suit. In absence of proof that the property did belong to Government at the time of filing the suit, the case did not fall under Section 3 (a). Proviso to Section 3 was attracted as the direction by the Managing Officer to the tenant to attorn to the purchaser and actual realisation of rent by him constituted letting within meaning of the Proviso. "Letting" within meaning of the Proviso is not restricted only to the voluntary act on the part of the landlord allowing the former tenant to continue in possession. AIR 1965 SC 1994 and 1969 Ren CR 494, Foll. (Paras 4, 5)

Cases Referred: Chronological Paras (1969) Civil Appeals Nos. 548 of 1966 and 331 to 334 of 1967, D/- 25-4-1969 = 1969 Ren CR 494, Shiv Nath v. Shri Mela Ram 4, 5 (1965) AIR 1965 SC 1994 (V 52) = (1965) 2 SCJ 873, Bishan Paul v. Mothu Ram 4

The following Judgment of the Court was delivered by

SHAH, J.—For many years before 1955 the appellant was a tenant of the Government in respect of a part of a building which was originally evacuee property. The property was treated as part of the compensation pool and was put up for auction on December 7, 1955. A bid offered by respondents 1, 2 and 3 in this appeal was accepted by the Government, but no certificate was immediately issued. The Managing Officer addressed a letter to respondents 1, 2 and 3 on December 8, 1956 informing them that "provisional possession" was "decided to be given of the property subject to terms and conditions stipulated in the Indemnity Bond and the special affidavit executed by them." One of the conditions was that the respondents were entitled to realise rent from the tenants who were directed to attorn to respondents 1-3 with effect from December, 1956. Pursuant to this direction the respondents collected the rent from the appellant from and after December 4, 1956.

2. The Delhi Rent Control Act (59 of 1958) was brought into force with effect from some time in the year 1958. The

first respondent served on the 21st February 1964 a notice on the appellant determining the tenancy and requiring the appellant to deliver possession of the premises in his occupation. He thereafter instituted on August 7, 1964 a suit in the Civil Court at Delhi for an order in ejectment. The suit was resisted by the appellant contending inter alia that under the provisions of Delhi Rent Control Act, 1958 the suit was not maintainable in the Civil Court and that in any event the notice served upon the appellant did not operate to terminate the tenancy. These contentions were rejected by the Trial Court and a decree in ejectment was passed. The decree was confirmed in appeal to the District Court and in Second Appeal to the High Court. By special leave the appellant has appealed to this Court.

3. The principal question which falls to be determined in this appeal is whether the Civil Court had jurisdiction to entertain the suit. The facts may be recalled. The appellant was originally a tenant of the Government; the property was put up for sale by an auction on December 7, 1955 and the bid of the respondents was accepted; till the institution of the suit no certificate of sale or any deed conveying title to the property was executed in favour of the respondents by the Government. Under the Delhi Rent Control Act jurisdiction to entertain a proceeding in ejectment on the ground of termination of tenancy is maintainable not in the Civil Court but before the Rent Controller. But by Section 3 of the Act it is provided

"Nothing in this Act shall apply—

(a) to any premises belonging to the Government; or

(b) to any tenancy or other like relationship created by a grant from the Government in respect of the premises taken on lease, or requisitioned by the Government;

Provided that where any premises belonging to Government have been or are lawfully let by any person by virtue of an agreement with the Government or otherwise, then, notwithstanding any judgment, decree or order of any Court or other authority, the provisions of this Act shall apply to such tenancy."

4. The respondents contended that the Civil Court had jurisdiction because the premises belonged to the Government. The appellant contended that the premises at the date of the institution of the suit did not belong to the Government and that in any event they were

let to him by the respondents "by virtue of an agreement with the Government or otherwise" within the meaning of the proviso. This Court has held that where evacuee property is put up for sale at an auction and the bid is accepted by the Government and price is received by the Government even in the absence of a sale deed executed or a certificate, the purchaser would be deemed to be an owner and not the Government. See the judgment of this Court in Bishan Paul v. Mothu Ram, AIR 1965 SC 1994 and Civil Appeals Nos. 546 of 1966 and 331 to 334 of 1967, Shiv Nath v. Shri Mela Ram, D/- 25-4-1969 (SC). But Mr. Misra contended that those cases have no application here for there is no evidence on the record that the price stipulated to be paid was in fact paid by the respondents before the suit was instituted. The question whether the consideration has been paid by the respondents to the Government is one of fact within the special knowledge of the respondents. They have not stated in the plaint nor have they attempted to prove that they have not paid the consideration which was agreed to be paid by them. Our attention was invited to some documents which were not before the trial Court nor before the District Court nor the High Court but were sought to be produced in this Court in support of the plea that the price could not have been paid by the respondents before the suit. We have declined to consider those documents as part of the record. If it was the case of the respondents that the property did belong to the Government and the title was not conveyed to them, it was for them to allege and prove that case. The case therefore does not fall under the terms of Section 3 (a) of the Delhi Rent Control Act.

5. In any event the case is clearly governed by the proviso to Section 3. This Court has in interpreting the proviso to Section 3 observed in Civil Appeal No. 546 of 1966 (SC) and the companion appeals.

"Even if it were assumed that the premises belonged to Government it would have to be held in the circumstances of the case, that it was lawfully let by the respondent to the appellants inasmuch as the Managing Officer's giving "provisional possession of the property to the respondent" would really mean delivering symbolical possession of the property to him with the result that a direction on the appellants to pay rent to him would in effect amount to a direction to attorn to

him. We are not impressed by the argument that 'letting' within the meaning of the proviso can only apply to a voluntary act on the part of the landlord allowing the former tenant to continue in possession. Acting in pursuance of the direction of the managing officer after the property had been auctioned to the respondent would in law amount to a letting by the respondent to the persons who were tenants under the custodian before."

The facts which gave rise to Shiv Nath's case, Civil Appeals Nos. 548 of 1960 and 331 to 334 of 1967, D/- 25-4-1969 (SC) appear to be identical with the facts of the present case. The provisional possession had been given by the Managing Officer authorising the respondents to recover the rent and the tenants were directed to attorn to them. There is no dispute that the appellant did attorn to the respondents and according to the decision of this Court in Shiv Nath's case, Civil Appeals Nos. 548 of 1960 and 331 to 334 of 1967, D/- 25-4-1969 (SC), a direction of the Managing Officer after an auction sale, to the tenant to attorn to the purchaser and receipt of the rent by the purchaser constitute letting within the meaning of the proviso to Section 3. In either view of the case the suit was not maintainable in the Civil Court.

6. The appeal is therefore allowed and the plaintiff's suit is dismissed with costs throughout.

Appeal allowed.

AIR 1970 SUPREME COURT 814
(V 57 C 174)

J. C. SHAH AND K. S. HEGDE, JJ.

Sudhir Kumar Saha, Petitioner v. Commissioner of Police, Calcutta, and another, Respondents.

Writ Petn. No. 378 of 1969, D/- 18-12-1969.

Public Safety — Preventive Detention Act (1950), Section 3 (1) (a) (ii) — Detention under — Grounds for — Incidents mentioned in, not amounting to anything more than commission of certain breaches of law — They can be said prejudicial to "law and order" and not prejudicial to maintenance of "public order" or subversive of "public order" — Detention is illegal.

Where allegations made against a person detained under Section 3 (1) (a) (ii) do not amount to anything more than that he committed certain breaches of law and

the stray incidents mentioned in the grounds which are not inter-linked are such which could not have prejudiced the maintenance of 'public order' nor can they be said to be subversive of 'public order' but were at best prejudicial to 'law and order' then the detention will be illegal. (Paras 7, 8)

Maintenance of "law and order" is a conception much wider than the conception of maintenance of 'public order'. The latter is the prevention of a disorder of grave nature. Every act that affects 'law and order' need not affect 'public order'. 'Public order' is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of 'law and order'. AIR 1960 SC 740, (1970) 1 SCWR 94, Relied on. (Para 7)

Cases Referred: Chronological Paras (1969) Writ Petn. No. 287 of 1969,

D/- 2-12-1969 = (1970) 1 SCWR 94, Arun Ghosh v. State of West Bengal

(1966) AIR 1966 SC 740 (V 53) = (1966) 1 SCR 709 = 1066 Cri LJ 608, Dr. Ram Manohar Lohia v. State of Bihar

D. P. Singh, Advocate, Amicus curiae for Appellant; C. S. Chatterjee, Advocate for Mr. Sukumar Basu, Advocate, for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.—In this petition under Article 32 of the Constitution submitted from Jail, the petitioner seeks a writ of Habeas Corpus directing his release from detention. We have already directed the release of the petitioner on 15-12-1969. Now we proceed to give our reasons in support of that order.

2. The petitioner was ordered to be detained by the Commissioner of Police, Calcutta under Section 3 (2) of the Preventive Detention Act, 1950 (Act IV of 1950) by his order dated July 15, 1969. It is stated in that order that the petitioner was ordered to be detained with a view to preventing him from acting in any manner prejudicial to the maintenance of "public order". That order was confirm-

ed by the State Government after the same was approved by the Advisory Board.

3. From the grounds served on the petitioner, it appears that his detention was ordered because of the three instances mentioned therein. It is said therein that on 28-2-1968 between 9-50 p. m. and 10-30 p. m. the petitioner armed with a knife along with some others also armed, created disturbance on the Northern Avenue in the course of which he attacked the local people with knife as a result of which one Ajit Kumar Biswas sustained stab injuries. It is further alleged that during that incident, the petitioner and his associates hurled sodawater bottles and brickbats towards the local people endangering their lives and safety and thereby they created fear and frightfulness amongst the people of the locality and thus affected public peace and tranquillity of the locality.

4. The second incident mentioned therein is that on 29-10-1968 at about 9-10 p. m. the petitioner being armed with bombs and accompanied by some others created disturbance on Raja Manindra Road, in the course of which he and his associates hurled bombs, used swords, iron rods and lathis against the local people endangering their lives and safety and thereby they created fear and frightfulness in the locality resulting in the disturbance of public peace and tranquillity of that locality.

5. The last incident mentioned is that on 28-6-1969 at about 11-15 p. m., the petitioner and his associates armed with bombs created disturbance on Raja Manindra Road in the course of which they indiscriminately hurled bombs towards the local people endangering their lives and safety and thereby they affected public peace and tranquillity of that locality.

6. From the record it does not appear that the petitioner was prosecuted for any of the offences mentioned earlier. It is not known why he was not prosecuted. In the ordinary course, if there is truth in the allegations made, he should have been prosecuted and given an opportunity to defend himself. The allegations made against the petitioner do not amount to anything more than that he committed certain breaches of law.

7. The freedom of the individual is of utmost importance in any civilized society. It is a human right. Under our Constitution it is a guaranteed right. It can be deprived of only by due process of law.

The power to detain is an exceptional power to be used under exceptional circumstances. It is wrong to consider the same, as the executive appears to have done in the present case, that it is a convenient substitute for the ordinary process of law. The detention of the petitioner under the circumstances of this case appears to be a gross misuse of the power, conferred under the Preventive Detention Act.

8. The three incidents mentioned in the grounds are stray incidents spread over a period of one year and four months. These incidents cannot be said to be inter-linked. They could not have prejudiced the maintenance of 'public order' nor can they be held to be subversive of 'public order'. They were at best prejudicial to 'law and order'. The distinction between the maintenance of 'public order' and maintenance of 'law and order' was brought out by this Court in *Dr. Ram Manohar Lohia v. State of Bihar*, (1966) 1 SCR 709= (AIR 1966 SC 740). Therein this Court pointed out that maintenance of "law and order" is a conception much wider than the conception of maintenance of 'public order'. The latter is the prevention of a disorder of grave nature. Every act that affects "law and order" need not affect 'public order'. If it is otherwise every one who disturbs "law and order", however petty the offence committed by him may be, can be detained under the Preventive Detention Act. This would be a total repudiation of the rule of law and an affront to our Constitution. The legal position relating to the point in issue was again recently considered by this Court in *Arun Ghosh v. State of West Bengal*, Writ Petn. No. 287 of 1969, D/- 2-12-1969. Therein it was observed that 'public order' is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of "public order" is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of "law and order".

9. We are of the opinion that the grounds stated in support of the detention cannot amount to a disturbance of the maintenance of 'public order'.

Petition allowed.

AIR 1970 SUPREME COURT 818
(V 57 C 175)

(From Mysore: (1966) 1 Mys. L. J. 494)

J. C. SHAH, V. RAMASWAMI,
AND A. N. GROVER, JJ.

K. Brahma Suraiah and another, Appellants v. Laxminarayana, Respondent.

Criminal Appeal No. 183 of 1966, D/- 26-11-1968.

Panchayats — Mysore Village Panchayats and Local Boards Act (10 of 1959), Section 220 — Commission of an offence under — Private complaint is not maintainable in view of Rule 16 of Mysore Panchayat Secretaries' Powers and Duties Rules, 1961: 1966 (1) Mys LJ 494, Reversed.

A private complaint cannot be entertained for the commission of an offence under Section 220 of the Mysore Village Panchayats and Local Boards Act, 1959. A complaint can be filed under R. 16 of Mysore Panchayat Secretaries Powers and Duties Rules, 1961, only by the secretary of the Panchayat and by no one else.

(Para 2)

The Secretary has to act on behalf of the Panchayat and it is the panchayat that would be vitally interested in preventing and stopping any contravention of provisions like Section 220 of the Act. The question of his subordination to any of its office-bearers is of no consequence. 1966 (1) Mys LJ 494 Reversed, AIR 1968 SC 1339, Followed.

(Para 4)

It is true that under Section 236 of the Act any police officer may arrest any person committing in his presence any offence against any of the provisions of the Act or of any rule, regulation or by law made thereunder. But it is incorrect to say that all offences committed under the various provisions contained in the Act would be cognizable owing to the general powers conferred on police officers by Section 236. Indeed that section gives only a limited power to the police officer to effect arrest if an offence is committed in his presence. There are certain sections in Chapter II of the Act which by express words make offences committed under them cognizable but in the same chapter there are other sections which do not contain any such provision; for instance, Sections 15, 17, 21 and 22 expressly provide that the offences committed under them would be cognizable but Sections 18, 19 and 20 do not contain any such provision. In other

words the offences committed under them must be deemed to be not cognizable.

(Para 8)

The other provisions also of the Act, namely, Sections 214 to 219 indicate that it was never contemplated that a complaint for infringement or contravention of the prohibition contained therein could be lodged before a magistrate having jurisdiction under Section 233 by any private individual in the presence of a specific rule that the secretary shall have the power to file a complaint on behalf of the Panchayat.

(Para 2)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 1339 (V 55) =

Cri App No. 145 of 1965, D/-

18-4-1968 = 1968 Cri LJ 1510,

K. M. Kanavi v. Stato of Mysore 2, 4

(1958) AIR 1958 Andh Pra 392

(V 45) = 1958 Cri LJ 737, Public

Prosecutor v. A. V. Ramiah 8

Mr. R. B. Datar, Advocate, for Appellants.

The following Judgment of the Court was delivered by

GROVER, J. — This is an appeal by special leave from a judgment of the Mysore High Court in which the only point involved is whether a private complaint could be entertained for the commission of an offence under Section 220 of the Mysore Village Panchayats & Local Boards Act, 1959, hereinafter called the "Act". The appellants who were the Vice-Chairman and the Chairman of the Keladi village panchayat were convicted under the aforesaid section and sentenced to pay a fine of Rs. 50/- and Rs. 40/- and in default to undergo 7 days and 5 days' simple imprisonment respectively.

2. A private complaint was filed against the appellants alleging that they gave bids at an auction held at the village panchayat and appellant No. 1 purchased a radio belonging to the panchayat for Rs. 35/-. Appellant No. 2 also bid at the same auction for the radio. According to Section 220 of the Act no member or an employee of a panchayat shall directly or indirectly bid for or acquire interest in any movable or immovable property sold at such sale in connection therewith. If any person contravenes this provision he is to be punished, on conviction, with a fine which may extend to Rs. 500/-. Under Rule 16 of the Mysore Panchayat Secretaries' Powers and Duties Rules, 1961 promulgated under the provisions of the Act, only the Secretary of the Panchayat has the power

to file a complaint on behalf of the Panchayat. The High Court was of the view that this Rule did not preclude persons other than the Secretary from filing a complaint but it only debarred complaints being made by others on behalf of the Panchayat. Now Rule 16 may be reproduced.

"The Secretary shall have power to file complaints and suits on behalf of the Panchayat and to conduct the proceedings on its behalf under the orders of the Panchayat."

In *K. M. Kanavi v. The State of Mysore*, Cri. App. No. 145 of 1965, D/- 18-4-1968 = (AIR 1968 SC 1339) the appellant Kanavi, who was the President of Municipal Borough of Gadag Betgeri had been removed from Presidentship. He refused to hand over the charge of all the papers and property which were in his possession relating to the Borough to the new President in spite of an order made by the Government under Sec. 23A of the Bombay Municipal Boroughs Act, 1925, hereinafter called the "Bombay Act" to that effect. Pursuant to orders made by the Divisional Commissioner and the Deputy Commissioner the new President filed a complaint against Kanavi for an offence punishable under Section 23A (3) of the Bombay Act. The appellant was convicted and sentenced to pay a fine of Rs. 50/-. A question arose whether the complaint filed by the new President was competent as it was not filed in accordance with the procedure laid down in that Act. Section 200 of the Bombay Act provided that the Standing Committee, and subject to the provisions of sub-section (3), the Chief Officer may order proceedings to be taken for the recovery of any penalties and for the punishment of any persons offending against the provisions of the aforesaid Act. This Court was of the opinion that the complaint which had been filed by the new President was for initiating the proceedings for the punishment of Kanavi who had offended against the provisions of sub-section (2) of Section 23A and as the new President was not the Chief Officer and he had not filed the complaint under any direction made by the Standing Committee the complaint could not be entertained. In that case also the High Court had taken the view that Section 200 (1) was only an enabling section which gave the power to the Standing Committee and the Chief Officer to make a direction for taking of proceedings and it could not be held to be exhaustive of the authorities

who could make directions for initiation of proceedings. The High Court had taken notice of the fact that there was no provision in that Act forbidding cognizance of offences being taken except on a complaint made under a direction of the Standing Committee or the Chief Officer. This is what was observed by this Court:—

"We are unable to accept the interpretation put by the High Court on S. 200 (1) of the Act. It is true that there is no specific provision in the Act laying down that cognizance of an offence under the Act is not to be taken except on a complaint filed in accordance with a direction made under Section 200 (1), but the scheme of the Act and the purpose of this provision in Section 200 (1) makes it clear that the legislature intended that such proceedings should only be instituted in the manner laid down in that sub-section. The word "may" was used only because the legislature could not have enacted a mandatory provision requiring the Standing Committee or the Chief Officer to make a direction for institution of proceedings in all cases. This word was intended to give a discretion to the Standing Committee or the Chief Officer to make directions for taking proceedings only when they considered it appropriate that such a direction should be made and to avoid compelling the Standing Committee or the Chief Officer to make such directions in all cases. The use of this word "may" cannot be interpreted as laying down that if a proceeding for punishment of any person for contravention of any of the provisions of the Act is to be instituted, it can be instituted in any manner without complying with the requirements of Section 200 (1) of the Act. If the interpretation put by the High Court on this provision is accepted, it would mean that this provision was totally unnecessary, because there would be no need to confer power on the Standing Committee or the Chief Officer to make such directions if such directions could be made or proceedings instituted at the instance of any private individual. We cannot accept the submission that this provision was made in the Act simply by way of abundant caution. In fact, if the provision had been made with such an object in view, there is no reason why the power should have been expressed to be conferred on the Standing Committee and the Chief Officer only and not on the President of the Municipality. We, consequently, hold that, if any proceeding

for punishment of any person for contravention of any of the provisions of the Act is to be instituted, it must be instituted in the manner laid down in Section 200 (1) of the Act and in that manner only." It may be mentioned that the expression of the above opinion was based on a consideration of the previous decisions of this Court. Following the ratio of the above decision it would be legitimate to hold that the complaint, in the present case, could be filed under Rule 16 only by the Secretary of the Panchayat and by no one else. It may be pointed out that in the Act Sec. 213 (3) is analogous to Section 23A (3) of the Bombay Act. On a parity of reasoning it could not be suggested that if there had been any contravention of Section 213 (3) any voter or member of the public could have filed a complaint in the matter. The other provisions also of the Act which follow, namely, Sections 214 to 219 indicate that it was never contemplated that a complaint for infringement or contravention of the prohibition contained therein could be lodged before a magistrate having jurisdiction under Section 233 by any private individual in the presence of a specific rule that the Secretary shall have the power to file a complaint on behalf of the Panchayat. Most of these sections i.e., Sections 217 and 218 postulate infractions of orders of the Panchayat for which the Panchayat alone would be interested in filing a complaint. We are satisfied that the scheme of the Act also supports the view which we are taking that a complaint could be filed only under Rule 16 of Mysore Panchayat Secretaries' Powers and Duties Rules 1961 and could not have been filed by a private complainant.

3. The High Court seems to have relied on Section 236 of the Act which deals with powers of police officers. This section provides that any police officer may arrest any person committing in his presence any offence against any of the provisions of the Act or of any rule, regulation or bye-law made thereunder. The person arrested has to be produced before the nearest magistrate within a period of 24 hours of arrest. The police officer effecting the arrest must give immediate information to the Chairman or the Secretary of the Panchayat of the commission of such offence and give all assistance in the exercise of his lawful authority. The High Court was of the view that under the provision of this section the police officer could submit a charge-sheet under Section 173 of the Criminal

Procedure Code after necessary investigation for offences committed under the Act. Chapter II of the Act relates to establishment and constitution of Panchayats. There are certain sections in it which by express words make offences committed under them cognizable but in the same Chapter there are other sections which do not contain any such provision; for instance, Sections 15, 17, 21 and 22 expressly provide that the offences committed under them would be cognizable but Sections 16, 18, 19 and 20 do not contain any such provision. In other words the offences committed under them must be deemed to be not cognizable. Section 23 in the same Chapter says that no Court shall take cognizance of an offence punishable under Section 16 or Section 17 or under Section 19 (2) (a) unless there is a complaint made by an order of or under authority from the Deputy Commissioner. The High Court was, therefore, not right in saying that all offences committed under the various provisions contained in the Act would be cognizable owing to the general powers conferred on police officers by Section 236. Indeed that section gives only a limited power to the police officer to effect arrest if an offence is committed in his presence. There is authority for the view that this will make an offence cognizable within the meaning of Section 4 (f) of the Criminal Procedure Code; vide *Public Prosecutor v. A. V. Ramiah*, AIR 1958 Andh Pra 392. In the absence of any express provision in Section 220 with which we are concerned we doubt whether, that the offence committed under it would be cognizable and a police officer could carry on investigation in respect of it under Chapter XIV of the Criminal Procedure Code and finally submit a charge-sheet under Section 173 of that Code.

4. It may also be pointed out that in the present case we are not concerned with the powers which a police officer can exercise in respect of an offence committed under Section 220 of the Act. What has to be seen is whether a private person or an individual could file a complaint. In the presence of Rule 16 and for the reasons given in *Cri. App. No. 145 of 1965, D/- 18-4-1968 = (AIR 1968 SC 1339)* we are of the opinion that it was the Secretary of the Panchayat who alone was competent to file the complaint. It must be remembered that it would be the panchayat that would be largely interested in taking action against any of its members and employees for the contravention of

Section 220. The Secretary would, therefore, be entitled to file a complaint on behalf of the panchayat. The difficulty felt by the High Court that a Secretary who is subordinate to the Chairman may find it embarrassing to file a complaint against him can hardly be accepted as serious hurdle in the way of coming to the conclusion at which we have arrived. The Secretary has to act on behalf of the Panchayat and it is the panchayat that would be vitally interested in preventing and stopping any contravention of provisions like Section 220 of the Act. The Secretary acts on behalf of the panchayat and the question of his subordination to any of its office bearers is of no consequence.

5. In the view we have taken the appeal is allowed and the conviction and sentence imposed on each of the appellants is set aside.

Appeal allowed.

**AIR 1970 SUPREME COURT 819
(V 57 C 176)**

**S. M. SIKRI, J. M. SHELAT, V.
BHARGAVA, G. K. MITTER AND
C. A. VAIDIALINGAM, JJ.**

**Hari Vishnu Kamath, Petitioner v.
Gopal Swarup Pathak, Respondent.**

Election Petn. No. 6 of 1969, D/- 18-12-1969.

Presidential and Vice-Presidential Elections Act (1952), Secs. 5, 21, Rules under Presidential and Vice-Presidential Elections Rules, 1952, Rules 4, 5 and 6 — Nomination papers must be presented in person either by the candidate or proposer or the seconder — Presentation by post is not a proper presentation.

Rule 4 of the Presidential and Vice-Presidential Elections Rules provides only one delivery either in person by the candidate or by his proposer or seconder. It can be delivered only between the hours of eleven in the forenoon and three in the afternoon. A nomination paper sent by post cannot be said to be validly presented. (Para 11)

Rule 5 proceeds on the basis that the presentation of a nomination paper must be in person because it requires the returning officer to sign thereon a certificate stating the date and time of the presentation of the same and to inform the per-

son, the date, time and place fixed for scrutiny. This is again evident from Rule 6 which directs the Returning Officer inter alia to give the candidates and other authorised persons present reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in Rule 4. (Para 13)

Mr. Sarjoo Prasad, Senior Advocate (M/s. P. Parameswara Rao and K. C. Dua, Advocate with him), for Petitioner; M/s. M. C. Setalvad, N. A. Palkhivala and M. C. Chagla, Senior Advocates (M/s. J. B. Dadachanji, Ravinder Narain and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co. with them), for Election Commission of India and Attorney General for India; Mr. Jagadish Swarup, Solicitor-General of India and Dr. L. M. Singhvi, Senior Advocate, (Mr. S. P. Nayar Advocate, with them), for Respondent.

The Judgment of the Court was delivered by

SIKRI, J.: This is a petition under Article 71 of the Constitution and Section 14 of the Presidential and Vice-Presidential Elections Act (XXXI of 1952)—hereinafter referred to as the Act—praying for a declaration that the election of Shri Gopal Swarup Pathak, respondent, to the office of the Vice-President of India is void.

2. The main ground on which this declaration is sought is that the nomination paper of Dr. Ram Sharan Dass Sakhuja was wrongly rejected by the Returning Officer on August 6, 1969. The respondent apart from meeting this ground has raised a number of other issues including the issue whether the nomination paper of Dr. Ram Sharan Dass Sakhuja was genuine, and if not, whether the petition is maintainable. The learned counsel for the respondent strongly pressed on us that we should first try this issue suggested by him but as we have come to the conclusion that the petition must fail on the ground that the nomination paper of Dr. Ram Sharan Dass Sakhuja was rightly rejected on August 6, 1969, it is not necessary to consider the other issues that arise out of the pleadings of the parties.

3. The two issues suggested by the petitioner which we propose to discuss are:

1. Whether the nomination of Dr. Ram Sharan Dass Sakhuja has been wrongly rejected on the ground that the nomination paper was not delivered in person;

2. Whether the Returning Officer had power to reject the nomination even before the date of scrutiny.

4. The relevant facts for determining these issues may now be set out. On 19th or 20th July, 1969, the office of the Vice-President of India fell vacant on the resignation of the then incumbent, Shri V. V. Giri. The Election Commission appointed Shri B. N. Banerjee Secretary, Rajya Sabha, as returning officer for the election of the Vice-President of India. The Election Commission issued a notification under Section 4 appointing August 9, 1969, as the last date for filing nomination for election to the office of the Vice-President of India and August 11, 1969, for scrutiny of nomination papers. A number of candidates filed nomination papers and on August 11, 1969, the Returning Officer made a record of proceedings. The relevant part of the proceedings reads as follows:

"I held the scrutiny of nomination papers for the Vice-Presidential Election today, the 11th August, 1969, at 11 a. m. in my office (Room No. 29) in Parliament House, New Delhi; 24 nomination papers were delivered to me within the time and in the manner laid down in Rule 4 of the Presidential and Vice-Presidential Elections Rules, 1952. These nomination papers related to:—

- | | |
|--|-------------------------------|
| 1. Shri S. Nagappa | (One nomination paper) |
| 2. Shri G. S. Pathak | (Seventeen nomination papers) |
| 3. Shri Sivashanmugam (Jagannathan Pillai) | (Two nomination papers) |
| 4. Smt. Manohara Nirmala Holkar | (One nomination paper) |
| 5. Shri B. P. Mahaseth | (One nomination paper) |
| 6. Shri Hari Vishnu Kamath | (Two nomination papers) |

.....

3. I gave the candidates and the others present all facilities for examining the nomination papers of all the candidates delivered to me. The nomination papers were examined by them. No objection was raised to any nomination papers by any candidate or his representative. I scrutinised all the nomination papers and I found that they satisfied the requirements of a valid nomination paper. I accordingly accepted all the nomination papers as valid and made endorsements on all the 24 nomination papers accepting them.

4. I also brought to the notice of those present that I had received some nomination papers, and some other papers purporting to be nomination papers, by post, and that I could not treat them as valid nomination papers as they were not delivered to me in accordance with sub-r. (1) of Rule 4 of the Presidential and Vice-Presidential Elections Rules, 1952, and that they also did not comply with the provisions of law in other respects. I further mentioned to those present that there were in addition three other papers which, though presented to me in person, did not comply with the requirements of the law as they were not accompanied by the certified extracts from the electoral roll and suffered from other defects. I had not given any serial number to any of these papers and had rejected all of them."

5. One of the nominations referred to in para 4 of the proceedings was that of Dr. Ram Sharan Dass Shakuja. It appears that the nomination papers of Dr. Shakuja alleged to be complete in every respect, were not delivered in person either by Dr. Shakuja or by the proposer or seconder in person to the Returning Officer but were received by him by post on August 6, 1969. On that very day, the Returning Officer did not treat the papers as valid as they were not delivered to him in accordance with sub-rule (1) of Rule 4 of the Presidential and Vice-Presidential Elections Rules, 1952.

6. In order to discuss the issues mentioned above it is necessary to set out the relevant statutory provisions. Under Section 4 of the Act the Election Commission by notification appoints for every election (a) the last date for making nominations, (b) the date for scrutiny of nominations, (c) the last date for the withdrawal of candidatures, and (d) the date on which poll shall, if necessary, be taken. Under Section 5 any person may be nominated as a candidate for election to the office of Vice-President if he is qualified to be elected to that office under the Constitution. Sub-section (2) of Sec. 5 prescribes that each candidate shall be nominated by a nomination paper completed in the prescribed form and subscribed by the candidate himself as assenting to the nomination and by two electors as proposer and seconder.

7. We may assume for the purpose of this case that the conditions laid down in Section 5 (2) were complied with.

8. Section 6 deals with the withdrawal of candidature and provides that any

candidate may withdraw his candidature by a notice in writing in the prescribed form subscribed by him and delivered before three O'clock in the afternoon on the date fixed under Clause (c) of sub-section (1) of Section 4, to the Returning Officer either by such candidate in person or by his proposer or seconder who has been authorised in this behalf in writing by such candidate.

9. The learned counsel for the petitioner rightly conceded that if a candidate wants to withdraw his candidature the notice in writing must be delivered to the Returning Officer in person by such candidate or by his proposer or seconder who has been authorised. In other words no candidate can withdraw by sending a notice in writing by post.

10. Section 18 gives the grounds for declaring the election of a returned candidate to be void. One of the grounds is:

"If the Supreme Court is of opinion that the nomination of any candidate has been wrongly rejected or the nomination of the successful candidate or of any other candidate who has not withdrawn his candidature has been wrongly accepted, the Supreme Court shall declare the election of the returned candidate to be void." Section 21 gives powers to the Central Government to make rules and the two matters, among others, on which rules can be made are:

"(d) the form and manner in which nominations may be made and the procedure to be followed in respect of the presentation of nomination papers;

(e) the scrutiny of nominations and, in particular, the manner in which such scrutiny shall be conducted and the conditions and circumstances under which any person may be present or may enter objections thereat."

In pursuance of these powers rules were framed.

Rule 4 deals with the presentation of nomination papers and is in the following terms:

"4. (1) On or before the date appointed under Clause (a) of sub-section (1) of Section 4, each candidate shall, either in person or by his proposer or seconder, between the hours of eleven in the forenoon and three in the afternoon, deliver to the Returning Officer at the place specified in this behalf in the public notice a nomination paper completed in Form 2 in the case of a Presidential Election, and in Form 3 in the case of a Vice-Presidential election, together with a certified

copy of the entry relating to the candidate in the electoral roll for the Parliamentary constituency in which he is registered.

(2) Any nomination paper which is not received before three O'clock in the afternoon on the last date appointed under clause (a) of sub-section (1) of Section 4 or to which the certified copy referred to in sub-rule (1) of this Rule is not attached shall be rejected."

Rule 5 prescribes the procedure on receipt of nomination papers as follows:

"5. On the presentation of a nomination paper, the Returning Officer shall —

- (a) sign thereon a certificate stating the date and time of presentation of the nomination paper and enter thereon its serial number;
- (b) inform the person or persons presenting the nomination paper of the date, time and place fixed for the scrutiny of nominations; and
- (c) cause to be affixed in some conspicuous place in his office a copy of the nomination paper as certified and numbered under clause (a) of this rule."

Rule 6 provides for the scrutiny of nominations and is in the following terms:

"6. (1) The candidates, one proposer and one seconder of each candidate, and one other person duly authorised in writing by such candidate, shall be entitled to be present at the time of scrutiny of nominations; and the Returning Officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in Rule 4.

(2) The Returning Officer shall then examine the nomination papers and decide all objections which may be made to any of them.

(3) The Returning Officer may, either on such objection or on his own motion, and after such summary inquiry, if any, as he thinks necessary, reject a nomination paper on any of the following grounds namely:—

(a) that the candidate is not eligible for election as President or Vice-President, as the case may be, under the Constitution; or

(b) that the proposer or seconder is not qualified to subscribe a nomination paper under sub-section (2) of Section 5; or

(c) that the signature of the candidate, proposer or seconder is not genuine or has been obtained by fraud; or

(d) that the nomination paper has not been duly completed and the defect or irregularity is of a substantial character or

(e) that the proposer or seconder has subscribed, whether as proposer or seconder, another nomination paper received earlier by the Returning Officer at the same election.

(4) The Returning Officer shall hold the scrutiny on the date appointed in this behalf under Clause (b) of sub-section (1) of section 4 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control;

Provided that, in case an objection is made, the candidate concerned shall, if he so requires, be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the Returning Officer shall record his decision on the date on which the proceedings have been adjourned.

(5) The Returning Officer shall endorse on each nomination paper his decision either accepting or rejecting it and if the nomination paper is rejected, he shall record in writing a brief statement of his reasons for rejecting it."

11. The question whether a candidate is entitled to send his nomination papers by post to the Returning Officer may now be considered. It will be noticed that Rule 4 provides only one manner of presentation, i. e. delivery either in person by the candidate or by his proposer or seconder. Further, it mentions the time within which it can be delivered, i. e., between the hours of eleven in the forenoon and three in the afternoon. It seems to us that if the nomination paper is not presented in person either by the candidate or by the proposer or the seconder it cannot be deemed to have been presented at all. There seems to be good reason for making this rule because otherwise not only the authenticity of the person sending the nomination paper will be in doubt but also the time of the delivery of the nomination paper would be in doubt.

12. Be that as it may, if the rule provides one method of presentation that method of presentation must be followed. That this is the only method of presentation of nomination papers is borne out by subsequent provisions. Sub-rule (2) of Rule 4 provides that any nomination paper which is not received before

3 O'clock in the afternoon on the last date appointed under Cl. (a) of sub-sec. (1) of Section 4 shall be rejected. This shows that even if a nomination paper is presented personally but after 3 O'clock in the afternoon it has to be rejected. The rule proceeds on the basis that the presentation must have been either in person or by the proposer or the seconder. If a nomination paper is received by post it would be difficult to say that it has been presented and received before 3 O'clock on the last date appointed under Clause (a) of sub-section (1) of Section 4.

13. Rule 5 also proceeds on the basis that the presentation of a nomination paper must be in person because it requires the Returning Officer to sign thereon a certificate stating the date and time of presentation of the nomination paper and inform the person or persons presenting the nomination paper of the date, time and place fixed for the scrutiny of nominations. It is clear that Rule 5 contemplates only one method of presentation. This is again evident from Rule 6 which directs the Returning Officer *inter alia* to give the candidates and other authorised persons present reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in Rule 4. In other words, the nomination papers which have not been delivered within time and in the manner laid down in Rule 4 have not to be shown for purposes of scrutiny.

14. The learned counsel for the petitioner contends that sub-rule (2) of Rule 4 gives two grounds of rejection, one that the nomination paper is not received before 3 O'clock in the afternoon of the last date appointed under Clause (a) of sub-section (1) of Section 4, and the second that the certified copy referred to in sub-rule (1) of Rule 4 is not attached. He further says that Rule 6 gives five more grounds of rejection. He says that the ground on which the nomination paper of Dr. Ram Sharan Dass Shakuja has been rejected is not covered by either sub-rule (2) of Rule 4 or Rule 6 and accordingly the nomination paper of Dr. Ram Sharan Dass Shakuja could not have been validly rejected.

15. It seems to us that this nomination paper could be rejected on the ground that it has not been presented in person and received before 3 O'clock in the afternoon on the last date appointed under Cl. (a) of sub-r. (1) of R. 4. Such a nomination paper could not be treat-

ed to have been received within the meaning of sub-rule (2) of Rule 4 and the Returning Officer was entitled to reject it.

16. There is no force in the second submission that at any rate the Returning Officer should have waited till the date of the scrutiny because as soon as he finds that a nomination paper has not been duly represented he must reject it outright at the time it is handed over to him.

17. The learned counsel contends that even if there has been a breach of R. 4(1) the rule is not mandatory and the breach of it should not be deemed fatal. We are unable to agree with this submission. As we have mentioned before, the rules contemplate only one method of presentation and if that method is not followed the nomination papers cannot be held to be validly presented and must be rejected outright. To hold otherwise would lead to utter confusion and delay in the completion of the election. The Returning Officer would not know who and where to inform about the date of scrutiny, he would not be certain whether it is genuine and would have to take evidence as to whether it is a genuine nomination paper or a forged paper.

18. In the result the petition fails and is dismissed with costs. The petitioner will pay to the respondent Rs. 500 as total amount of costs.

Petition dismissed.

AIR 1970 SUPREME COURT 823 (V 57 C 177)

(From: Bombay at Nagpur)*

J. M. SHELAT AND V. BHARGAVA, JJ.
The Manager, M/s. Pyarchand Kesari-
mal Porval Bidi Factory, Appellant v.
Onkar Laxman Thenge and others, Res-
pondents.

Civil Appeal No. 793 of 1966, D/- 27-
9-1968.

C. P. and Berar Industrial Disputes
Settlement Act (23 of 1947), Section 16
— Contract Act (1872), Section 73 —
Contract of service — Incidents of —
Services of employee lent to third person
— Original employment does not cease
— Third person cannot dismiss employee.

*(Spl. Civil Appln. No. 353 of 1963, D/-
21-8-1964—Bom. at Nag.)

CN/CN/E890/68/SNV/B

When an employer lends services of his employee to third person, the employee still continues to be in the employment of his employer and hence the third person cannot terminate the services of the employee. (Para 8)

A contract of service being incapable of transfer unilaterally a transfer of service from one employer to another can only be effected by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract of service and to make a new contract between the employee and the third party. So long as the contract of service is not terminated, a new contract is not made and the employee continues to be in the employment of the employer. When an employer orders him to do a certain work for another person, the employee still continues to be in his employment. The employee has the right to claim his wages from the employer and not from the third party. Such third party-hirer may pay his wages but that is because of his agreement with the employer. The hirer may also exercise control and direction in the doing of the thing for which he is hired or even the manner in which it is to be done. But the hirer third party cannot dismiss him. The right of dismissal vests in the employer. Spl. Civil Appln. No. 353 of 1963, D/- 21-8-1964 (Bom), Approved; AIR 1961 SC 627, Dist-
ing. (Para 8)

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| <i>v. Northern Ireland Road Trans-</i> | |
| <i>port Board</i> | 7 |
| (1940) 1940-3 All ER 549 = 109 | |
| LJ KB 865 (HL), <i>Nokes v. Don-</i> | |
| <i>caster Amalgamated Collieries</i> | |
| <i>Ltd.</i> | 7 |
| (1898) 2 QB 565 = 67 LJ QB 895, | |
| <i>Jones v. Scullard</i> | 7 |
| (1840) 6 M & W 499 = 151 ER | |
| 509, <i>Quarman v. Burnett</i> | 7 |

5. As to the first contention, it would not be correct to say that the High Court made out a new case for the first time for Respondent 1 which was not pleaded by him before the Assistant Commissioner. In Para 1 of his application he had expressly averred that about three years after his employment in the factory he had been ordered to work in the head office. In reply to the application the appellants conceded that though Respondent 1 was first employed in the factory and had worked there for about three years, he had thereafter been transferred to and been working as a clerk in the head office. There was, however, no averment in that reply that the contract of service of Respondent 1 with the said factory was at any time put an end to or that when he was directed to work in the head office a fresh contract of service was entered into between him and the head office. The Assistant Commissioner in his said order held that the head office and the factory were two separate establishments registered under two different Acts, and, therefore, subject to different provisions of law. He further held that since Respondent 1 was not actually working in the factory and his name did not figure in the factory's muster roll and was not paid his wages by the factory, the applicant could not be said to be an employee of the said factory. In his revision application before the Industrial Court, Respondent 1 made an express plea that when he was directed to work in the Head office, he had received no notice from the factory that his services were terminated there or that he had henceforth become the employee of the head office. It is clear from these pleadings that it was not for the first time in the High Court that Respondent 1 contended as to the incompetence of the head office to take disciplinary action against him and to pass the order of dismissal. The first contention of Mr. Phadke, therefore, cannot be accepted.

6. As regards the second and the third contentions, there is no dispute that though the head office and the said factory belong to the same proprietors, they were always treated as two distinct entities registered under two different Acts, that Respondent 1 was employed first in the factory where he worked for 2 or 3 years and was thereafter ordered to work at the head office where admittedly he worked for about six years before the impugned order terminating his services was

passed. The question, therefore, which the Assistant Commissioner and the Industrial Court had to decide, in view of the pleadings of the parties, was whether Respondent 1 had ceased to be the employee of the factory and was in the employment of the head office at the time when the impugned order was passed, or whether his services were simply lent to the head office and he continued all along to be the employee of the factory?

7. The general rule in respect of relationship of master and servant is that a subsisting contract of service with one master is a bar to service with any other master unless the contract otherwise provides or the master consents. A contract of employment involving personal service is incapable of transfer. Thus, where a businessman joins a partnership firm and takes his personal staff with him into the firm, his staff cannot be made the staff of the firm without the consent of the other partners. (cf. *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.*, 1947 AC 1 at p. 17). In certain cases, however, it is possible to say that an employee has different employers, as when the employer, in pursuance of a contract between him and a third party, lends or hires out the services of his employee to that third party for a particular work. Such an arrangement, however, does not effect a transfer of the contract of service between the employer and his employee, but only amounts to a transfer of the benefit of his services. (cf. *Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board*, 1942 AC 509.) In such cases where a third party engages another person's employee it is the general employer who is normally liable for the tortious acts committed by the employee and his liability is not affected by the existence of a contract between him and the third party under which the services of the employee are lent or hired out for a temporary period to such third party. In order to absolve the employer from the liability and to make the person who temporarily engages the employee or hires his services it is necessary to prove that the relationship of master and servant was temporarily constituted between such third party and the employee, and that it existed at the time when the tortious act was committed by the employee. There is, however, a presumption against there being such a transfer of an employee as to make the hirer or the person on whose behalf the employee is temporarily working and a heavy burden rests

on the party seeking to establish that the relationship of master and servant has been constituted *pro hac vice* between the temporary employer and the employee; (1917 AC 1 (*supra*)). In cases where an employer has hired out or lent the services of his employee for a specific work and such an employee has caused damage to another person by his tortious act, the question often arises as to who of the two i.e., the employer or the person to whom such services are hired out or lent, is vicariously responsible for such damage. In cases commonly known as cranes and carriage cases, courts in England evolve the rule of the employee being temporarily the employee of such third party to impose the responsibility on him if it was established that in the matter of the act, in the performance of which the tortious act was committed such third party had exercised control and direction over the performance of the act in question and the manner in which it was to be performed. The classic case commonly cited and in which this rule was applied is *Quarman v. Burnett*, (1840) 6 M & W 499. (cf. also *Jones v. Scullard*, (1893) 2 QB 565 where Lord Russell applied the test of the power to direct and control the act in performance of which damage was caused to another person). The position in law is, therefore, clear that except in the case of a statutory provision to the contrary, a right to the service of an employee cannot be the subject matter of a transfer by an employer to a third party without the employee's consent. Thus, in *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, 1940-3 All ER 549 where an order was made under Section 154 of the Companies Act, 1929 transferring all the assets and liabilities of a company to another company, Viscount Simon held that such an order did not mean that contracts of service between the appellant and the transferor-company also stood transferred. The principle that even in cases where the services of an employee are lent to a third party temporarily for a particular work, the employee still remains the employee of the employer is illustrated in *Denham v. Midland Employers Mutual Assurance Ltd.*, 1955-2 QB 437. There *Eastwoods Ltd.*, employed *Le Grands* to make test borings on their property. *Le Grands* provided two skilled drillers with plant and tackle to carry out the borings and *Eastwoods Ltd.* agreed to provide one of the labourers, one *Clegg*, to assist those skilled men free of charge to *Le Grands*. While the said

work was being carried out, *Clegg* was killed in circumstances in which *Le Grands* were liable to pay damages to his widow on the ground that his death was caused on account of the negligence of *Le Grands* or their servants. *Le Grands* sought to be indemnified by their insurers against their said liability. They were covered by two policies, one with the *Midland Employers Mutual Assurance Ltd.* in respect of their liability to the employees and the other with *Lloyds* in respect of their liability to the public in general. The policy issued by the *Midland Employers Mutual Assurance Ltd.* provided that if any person "under a contract of service" with the insured were to sustain any personal injury by accident caused during the period of employment, and if the insured became liable to pay damages for such injury the association would indemnify the insured against all sums for which he would be so liable. The policy issued by the *Lloyds* indemnified *Le Grands* for any sums for which they might become liable to pay in respect of death or accidental bodily injury to persons and loss or damage to property arising in or out of the business of borings carried out by *Le Grands*. The question was whether at the time of his death *Clegg* was the servant of *Le Grands* and under "a contract of service" with them as provided in their policy with the *Midland Assurance Ltd.* Dealing with that question, *Denning, L. J.*, observed that the difficulty which surrounded such a subject arose because of the concept that a servant of a general employer may be transferred to a temporary employer so as to become for the time being his servant. Such a concept was, he said, a very useful device to place liability on the shoulders of the one who should properly bear it, but did not affect the contract of service itself. No contract of service can be transferred from one employer to another without the servant's consent and such consent is not to be raised by operation of law but only by the real consent in fact of the man express or implied. He further observed:

"In none of the transfer cases which has been cited to us had the consent of the man been sought or obtained. The general employer has simply told him to go and do some particular work for the temporary employer and he has gone. The supposed transfer, when it takes place, is nothing more than a device — a very convenient and just device, mark

you — to put liability on to the temporary employer; and even this device has in recent years been very much restricted in its operation. It only applies when the servant is transferred so completely that the temporary employer has the right to dictate, not only what the servant is to do, but also how he is to do it."

Applying these principles to the facts before him, he observed that he had no doubt that if a third person had been injured by the negligence of Clegg in the course of his work, Le Grands and not Eastwoods would be liable to such third person. So, also when Clegg himself was killed, Le Grands were liable to his widow on the same footing that they were his masters and not merely inviters. These results were achieved in law by holding that Clegg became the temporary servant of Le Grands. He further observed that there was no harm in thus describing him so long as it was remembered that it was a device designed to cast liability on the temporary employer. However, on the question whether Clegg was "under a contract of service" with Le Grands, he held that he was not, for his contract of service was with Eastwoods. They had selected him and paid his wages and they alone could suspend or dismiss him. Clegg was never asked to consent to a transfer of the contract of service and he never did so. If he was not paid his wages or if he was wrongfully dismissed from the work, he could sue Eastwoods for the breach of contract and no one else. If he failed to turn up for work, Eastwoods alone could sue him. He could, therefore, see no trace of a contract of service with Le Grands except the artificial transfer raised by law so as to make Le Grands liable to others for his faults or liable to him for their own faults and that the artificial transfer so raised cannot be said to be a contract of service within the said policy of assurance. Le Grands, therefore, were not entitled to be indemnified by the Midland Assurance Company under the employer's liability policy but were entitled to be indemnified by Lloyds under their public liability policy.

8. A contract of service being thus incapable of transfer unilaterally, such a transfer of service from one employer to another can only be effected by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract of service by mutual con-

sent and to make a new contract between the employee and the third party. Therefore, so long as the contract of service is not terminated, a new contract is not made as aforesaid and the employee continues to be in the employment of the employer. Therefore, when an employer orders him to do a certain work for another person, the employee still continues to be in his employment. The only thing that happens in such a case is that he carries out the orders of master. The employee has the right to claim his wages from the employer and not from the third party to whom his services are lent or hired. It may be that such third party may pay his wages during the time that he has hired his services, but that is because of his agreement with the employer. That does not preclude the employee from claiming his wages from the employer. The hirer may also exercise control and direction in the doing of the thing for which he is hired or even the manner in which it is to be done. But if the employee fails to carry out his directions he cannot dismiss him and can only complain to the employer. The right of dismissal vests in the employer.

9. Such being the position in law, it is of the utmost importance in the present case that the appellants at no time took the plea that the contract of employment with the factory was ever terminated or that the respondent gave his consent, express or implied, to his contract of service being transferred to the head office, or that there was a fresh contract of employment so brought about between him and the head office. Unless, therefore, it is held from the circumstances relied upon by Mr. Phadke that there was a transfer of the consent of service or that Respondent 1 gave his consent, express or implied, to such a transfer, Respondent 1 would continue to be the servant of factory. Since the case has been remanded to the Assistant Commissioner, we refrain from making any observations as regards the effect of the admissions said to have been made by Respondent 1 and relied on by the Assistant Commissioner.

10. Mr. Phadke, however, relied on *Jestamani Gulabrai Dholkia v. Scindia Steam Navigation Co.*, 1961-2 SCR 811 = (AIR 1961 SC 627) in support of his contention that there was a transfer of the contract of employment and that it was not a mere transfer of the benefit of the services of Respondent 1. In that case

the appellants were originally in the service of the Scindia Steam Navigation Company. In 1937 Air Services of India Ltd., was incorporated. In 1943, the Scindias purchased the ASI and by 1946 ASI became a full-fledged subsidiary of the Scindias. Between 1946 to 1951 the Scindias transferred several of their employees including the appellants to the ASI. The Scindias had a number of such subsidiary companies and it was usual for them to transfer their employees to such companies and also to recall them whenever necessary. In 1953, the Government of India decided to nationalise the airlines operating in India with effect from June 1953. On April 6, 1953 the appellants wrote to the Scindias to recall them to their original posts but the Scindias refused to do so as they were not in a position to absorb them. They pointed out that a Bill, called the Air Corporation Bill, 1953, was pending before Parliament, that under clause 20 thereof persons working with ASI on the appointed day would become the employees of the Corporation, that under that clause they had the option to resign if they did not wish to join the Corporation and that if the appellants exercised that option, the Scindias would treat them as having resigned from their service. The Act was passed on May 28, 1953. Section 20 of the Act provided that every employee of an existing air company employed by such company prior to July 1, 1952 and still in its employment immediately before the appointed day, shall, in so far as such employee is employed in connection with the undertaking which has vested in the Corporation by virtue of the Act, become as from the appointed date, the employee of the Corporation in which the undertaking has vested. On June 8, 1953 the appellants made a demand that if the Corporation were to retrench any person from the staff loaned to ASI within the first five years, the Scindias should take them back. The Scindias refused. None of the appellants had exercised the option provided by Section 20 (1). On August 1, 1953, ASI became vested in the Corporation and Section 20 (1) came into force as from that date. The appellants contended inter alia that the contract of service between them and the Scindias was not transferable. The contention was rejected on the ground that by reason of Section 20 (1) the contract of service of the appellants stood transferred to the Corporation and that though the appellants were not originally recruited by ASI

and were transferred by the Scindias to the said company, they were the employees of ASI and were such employees on the appointed day and since they had not exercised the option under Section 20 (1) they became the employees of the Corporation by operation of that provision. The Scindias, therefore, were no longer concerned with them. It is true that the appellants were transferred to ASI on condition that they would receive the same remuneration and other benefits as they were getting in the Scindias and further that it was possible to contend that Scindias alone could dismiss them. But the learned Judge explained that these were special terms applicable to the appellants. But in spite of them they still had become the employees of the ASI and were such employees on the appointed day. It seems that this conclusion was reached on the footing that since ASI was the subsidiary company of the Scindias like several other subsidiary companies, and it was usual for the Scindias to transfer any of their employees to such subsidiary companies, the appellants on their transfer were deemed to have commenced to become the employees of ASI in spite of the right of the Scindias to recall them whenever necessary and further that the appellants continued to be and were the employees of the ASI on the appointed day and were, therefore, governed by Section 20 (1) of the Act. It is clear that this was a case of employees becoming the employees of the Corporation by virtue of the operation of a statute. The decision, therefore, is not an authority for the proposition that an employer can transfer his employee to a third party without the consent of such employee or without terminating the contract of employment with him. That being the position the case of 1961-2 SCR 811 = (AIR 1961 SC 627) (supra) cannot assist Mr. Phadke.

II. In our view the High Court was right in setting aside the order of the Assistant Commissioner and the Industrial Court on the ground that unless a finding was reached on the facts of the case that the contract of service with the said factory came to an end and a fresh contract with the head office came into being Respondent 1 continued to be in the employment of the factory and the head office, therefore, was not competent to dismiss him. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 829

(V 57 C 178)

(From: Punjab)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

M/s. Motibhai Fulabhai Patel and Co.,
Appellant v. R. Prasad, Collector of Central
Excise, Baroda and others, Respondents.

Civil Appeal No. 13 of 1966, D/- 30-10-1968.

Central Excise Rules (1944), Rule 40 —
Construction of — Unlawful mixing of
duty-paid tobacco with non-duty paid
tobacco — Confiscation of mixture — So
much of mixture representing non-duty
paid tobacco can only be confiscated —
AIR 1961 Bom 48, Overruled — (Civil
P. C. (1908), Pre. — Interpretation of Statutes).

Where a dealer has contravened R. 40
of the Central Excise Rules (1944), by unlawfully
mixing duty-paid tobacco with the non-duty paid
tobacco the entire mixture cannot be confiscated but
only so much of the mixture as can reasonably
represent the value of the non-duty paid tobacco
can be confiscated. (Para 11)

Rule 40 relates to forfeiture and is a
penal provision. Its scope cannot be extended
by reading into it words which are not there.
Rule 40 permits the Central Excise authorities
to confiscate only those goods on which duty has
not been paid. It is not permissible for the
Collector to confiscate the entire tobacco mixture.
If by the wrongful act of a party he renders it
impossible for the authorities to confiscate under
Rule 40 the non-duty paid goods it is open to those
authorities to confiscate from out of the goods
seized, goods only of the value reasonably
representing the value of the non-duty paid
goods mixed in the goods seized. AIR 1961 Bom 48,
Overruled.

(Para 11)

Variety of tobacco	Quantity	Rate of duty
Biri Patti	Bmds. 251. 8	Rs. 1.20 nP per lb
Stems Kandi	" 287.20	Rs. 0.50 -do-
Rava	" 1326.14	Rs. 0.50 -do-
Stalk Kandi	" 57.20	Rs. 0.06 -do-

3. On December 13, 1958 the appellants
obtained permission from the Local Central
Excise Authorities to mix the above lots of tobacco.
The percentage of

*(Civil Writ No. 557-D of 1961, D/- 13-1-1964 — Punj.)

CN/CN/F521/68/DVT/C

Cases Referred:	Chronological	Paras
(1961) AIR 1961 Bom 48 (V 48)=		
62 Bom LR 634, M/s. Valimshomad Gulsmhusain Sonavala & Co. v. C. T. A. Pillai		7, 8
(1894) 1894 AC 494=	71 LT 157,	
Smurthwaite v. Hannay		10
(1868) LR 3 CP 427=	37 LJCP 169,	
Spence v. Union Marine Insurance Co., Ltd.		9
(1863) 3 B & S 566=	1 New Rep 357,	
Buckley v. Gross		9
(1841) 4 Y & C Ex. 351=	10 LJ Ex Eq 11,	
Jones v. Moore		9

M/s. M. P. Vashi, Dilip K. Kapur, S. V. Tambwekar and A. G. Ratnaparkhi, Advocates, for Appellant; Mr. D. Narasaraju, Senior Advocate, (M/s. R. M. Mehta and S. P. Nayar, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

HEGDE, J.:— In this appeal by certificate though several contentions were raised in the memo of appeal only two of them were pressed at the time of hearing. They are: (1) under the circumstances of the case the confiscation ordered by the Collector, Central Excise is illegal and (2) under any circumstances he could not have confiscated the entire quantity of tobacco used in the mixture.

2. The appellants are tobacco merchants in Dashrath village near Baroda in Gujarat State. At the relevant time they were holding Central Excise licence in form L-2 and L-5 for the purpose of storing, selling and processing duty paid and non-duty paid tobacco. They had their own duty paid and non-duty paid godowns. In about December 1958 according to their books they possessed the following lots of different varieties of tobacco.

different varieties of tobacco when mixed would have been as under:

Rava	—	68.97%
Stems Kandi	—	14.86%
Biri Patti	—	13.07%
Stalk Kandi	—	3.00%

4. On December 23, 1958 when the process of mixing was still going on the

Superintendent of Central Excise, Preventive Headquarters, Baroda and his party raided the duty paid premises of the appellants. There he seized the entire mixture tobacco weighing Mds. 200.43 srs. i.e., 1,64,834.50 lbs. of tobacco. According to that Superintendent when experiments were conducted he found in the above mixture percentage of different varieties as under

Rava	— 44.00%
Biri Patti	— 51.50%
Stems Kandi	— 3.74%

From this he concluded that considerable quantity of non-duty paid Biri Patti tobacco had been utilised in the manufacture of the mixture. Hence notice was issued to the appellants on January 6, 1959 to show cause why action should not be taken against them under Rule 40 of the Central Excise Rules 1944 inasmuch as they brought into duty paid premises 60,770 lbs. of Biri Patti tobacco without payment of duty. It was also alleged in that notice that the appellants had removed certain quantity of Rava tobacco from L-2 premises. The appellants submitted their reply on 13-3-1959. At the hearing before the Collector as the appellants challenged the correctness of the experiments conducted by the Superintendent, Central Excise, the Collector himself in the presence of the appellants conducted a fresh experiment. On the basis of that experiment he came to the conclusion that the results obtained by the experiment conducted by the Superintendent, Central Excise are by and large correct.

5. By his order dated April 13, 1959, the Collector, Central Excise held the appellants guilty of contravening Rule 40 and consequently levied on them a penalty of Rs. 2,000/- as well as the duty payable under law. He also ordered the confiscation of the seized tobacco weighing 1,64,834.50 lbs. But he gave an option to the appellants of redeeming the same on payment of a fine of Rs. 1 lac. The appellants paid the amount of fine under protest and got the goods released.

6. Thereafter they moved the High Court of Bombay under Article 226 of the Constitution for quashing the order of the Collector but that application was withdrawn as the appellants first wanted to exhaust their remedy under the Central Excise Act. The appellants unsuccessfully went up in appeal and thereafter in revision under the Central Excises and Salt Act, 1944 against the order of the

Collector. After the 3rd respondent dismissed their revision petition they filed in the High Court of Punjab at Delhi Civil Writ No. 557-D of 1961 challenging the legality of the order made by the Collector of Central Excise on 13-4-1959. That petition was dismissed by a Division Bench of that Court on January 13, 1964. This appeal is brought against that decision.

7. In this Court the finding of the Collector of Central Excise that the appellants were guilty of mixing the duty paid tobacco with non-duty paid tobacco and thereby they contravened Rule 40 was not challenged. Nor was there any dispute about the quantity of non-duty paid tobacco used in the mixture. The main contention of Mr. M. P. Vashi, learned Counsel for the appellants was that under Rule 40, the Collector could not have confiscated the tobacco mixture as it consisted of both, duty-paid tobacco as well as tobacco on which duty had not been paid. His alternative contention was that under any circumstances the Collector could not have confiscated anything more than 60,770 lbs. of the mixture which can be said to represent Biri Patti tobacco on which duty had not been paid. In support of his first contention he heavily relied on the decision of K. T. Desai, J., in *M/s. Vulimshomad Gulsmhusain Sonavala Co. v. C. T. A. Pillai*, 62 Bom L.R. 634= (AIR 1961 Bom 48).

8. The seized tobacco mixture weighed 1,64,834.50 lbs. That included 60,770 lbs. of Biri Patti tobacco on which duty had not been paid. But on the remaining quantity duty had been paid. The tobacco seized was found in the godown licenced to store duty paid tobacco. Hence the appellants were clearly guilty of contravening Rule 40 of the Central Excise Rules which reads:

"Except as provided in the proviso to sub-rule (1) of Rule 32 and in Rule 171 no wholesale purchaser of unmanufactured tobacco for the purpose of trade or manufacture and no wholesale purchaser of other unmanufactured products from a curer shall receive into any part of his premises or into his custody or possession, any unmanufactured tobacco or other unmanufactured products other than tobacco or other unmanufactured products imported from a foreign country otherwise than under a valid permit granted by an officer showing that the proper duty has been paid; and every such wholesale purchaser who receives or has in his cus-

tody or possession any such goods, in contravention of this rule shall, in respect of every such offence, be liable to pay the duty leviable on such goods, and to a penalty which may extend to two thousand rupees, and the goods shall also be liable to confiscation."

In view of this rule the legality of the order made by the Collector in so far as he levied duty as well as penalty cannot be challenged and was not challenged before us. But so far as the confiscation is concerned it was urged that under the rule in question only tobacco on which duty had not been paid could alone have been confiscated. In the instant case even according to the finding of the Collector only on 66,770 lbs. of Biri Patti tobacco the duty had been paid; but on the remaining tobacco seized duty had not been paid, it was not possible to separate the duty paid tobacco from the non-duty paid tobacco; hence it was impermissible for the Collector to confiscate the said tobacco under Rule 40 as that rule permitted the confiscation of only non-duty paid tobacco. In *Sonavala's case*, 62 Bom LR 634= (AIR 1961 Bom 48) referred to earlier *Desai, J.*, had held that the right to confiscate smuggled goods under Section 167 (8) of the Sea Customs Act, 1878 does not carry with it the right to confiscate unsmuggled goods. The words 'such goods' appearing in Section 167 (8) of the Act cannot be interpreted to mean similar goods. It is not open to the Customs authorities to confiscate similar goods even though they may be of the same quality, bulk and value. The words 'such goods' mean the very goods which have been smuggled. If the smuggled goods lose their identity, it would not be open to the Customs officer to confiscate any part of those goods. Where, therefore, gold that has been smuggled has in the melting process got so mixed up with gold that is unsmuggled that it is impossible to separate the smuggled gold from the unsmuggled one, the right to confiscate smuggled gold ceases when the two get inextricably mixed up. The broad proposition laid down by *Desai, J.*, undoubtedly supports the contention advanced on behalf of the appellants. We shall presently show that this statement of the law is not correct but it is necessary to mention at this juncture that in the *Sonavala's case*, 62 Bom LR 634= (AIR 1961 Bom 48) an innocent third party had purchased the smuggled gold for proper value and mixed the same with unsmuggled gold, which

circumstance had an important bearing on the decision of the case.

9. In *Institutes of Justinian* at page 104 dealing with the topic *Commixtio* it is observed:

"If the things mixed, still remaining the property of their former owners, were easy to separate again, as for instance, cattle united in one herd, when one owner brought his claim by vindictio his property was restored to him without difficulty but if there was difficulty in separating the materials from each other, as in dividing the grains of wheat in a heap, the obvious mode would be to distribute the whole heap in shares proportionate to the quantity of wheat belonging to the respective owners. But it might happen that the wheat mixed together was not all of the same quality, and therefore the owner of the better kind of wheat would lose by having a share determined in amount only by the quantity of his wheat; and the judge therefore was permitted to exercise his judgment how great an addition ought to be made to his share to compensate for the superior quality of the wheat originally belonging to him." In *Williams on Personal Property* (18th Edn.) at p. 50, it is observed:

"The acquisition of ownership by accession or confusion of substances also presupposes a previous title. Thus the young of a domestic animal belong to the owner of the mother. If any substances, for instances tallow, belonging to various owners be mixed by consent or accidentally, the mass appears to belong to the owners of parts in common. And if the confusion be made wilfully by one without the other's leave, the mass belongs to the latter, whose ownership is thus unlawfully invaded."

Dealing with the same topic it is observed in *Halsbury's Laws of England* 3rd Edn. (Vol. 29) at p. 378:

"Ownership of goods may be acquired by confusion or intermixture, if the goods, when mixed, are indistinguishable. If the goods are mixed by agreement or consent the proprietors have an interest in common in proportion to their respective shares; if mixed by accident or the act of a third party, for which neither owner is responsible, the proprietors become owners in common of the mixed property in proportion to the amounts contributed. Where, however, one man wilfully mixes his goods with those of another without the approbation or know-

ledge of the other, the whole belongs to the latter."

The law on this topic was stated by Bovill, C. J., as early as 1868 in *Spence v. The Union Marine Insurance Co., Ltd.*, (1868) LR 3 CP 427 thus:

"In our own law there are not many authorities to be found upon this subject but, as far as they go, they are in favour of the view, that, when goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportions which they have severally contributed to it. The passage cited from the judgment of Blackburn, J., in the case of the tallow which was melted and flowed into the sewers, is to that effect: *Buckley v. Gross*, (1863-3 B & S 506). And a similar view was adopted by Lord Abinger in the case of the mixture of oil by leakage on board ship in *Jones v. Moosa*, (1841-4 Y & C Ex. 351).

"It has been long settled in our law, that where goods are mixed so as to become undistinguishable, by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion, or any part of the property, from the other owner, but no authority has been cited to shew that any such principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of the two owners; and there is no authority nor sound reason for saying that the goods of several persons be the property of their several owners, and become bona vacantia."

10. The same principle was again reiterated by the House of Lords in *Smurthwaite v. Hannay*, 1894 AC 494.

11. The rules enunciated above are of assistance in finding out a solution to the problem before us though they do not govern the same. In the instant case there is no doubt that the appellants were guilty of an unlawful act in mixing duty paid tobacco with the non-duty paid tobacco but the fact remains that they were the owners of both those lots at the time they mixed them and hence the legal principles set out earlier do not cover such a case. It must also be remembered that in dealing with a provision, relating to forfeiture we are dealing with a penal provision. It would not be proper for us to extend the scope of that provision by reading into it words which are not there and thereby widen the scope of the

provision relating to confiscation. Rule 40 permits the Central Excise authorities to confiscate only those goods on which duty has not been paid. It does not permit them either specifically or by necessary implication to confiscate other goods. Therefore it was not permissible for the Collector to confiscate the entire tobacco mixture. At the same time no person can be permitted to benefit by his wrongful act. No rule of law should be so interpreted as to permit or encourage its circumvention. If by the wrongful act of a party he renders it impossible for the authorities to confiscate under Rule 40 the non-duty paid goods, it is in our opinion open to those authorities to confiscate from out of the goods seized, goods of the value reasonably representing the value of the non-duty paid goods mixed in the goods seized. Applying that rule to the facts of this case, it follows that the Collector, Central Excise could have confiscated out of the tobacco seized, so much of it as can be held to reasonably represent the value of the tobacco on which the duty had not been paid.

12. As noticed earlier the tobacco confiscated had been returned to the appellants after realising from them a sum of Rs. 1 lac as fine. The Counsel for the parties agreed at the hearing that the value of the Biri Patti tobacco used in the mixture for which no duty had been paid could be fixed at Rs. 35,000/-. In view of this agreement it is not necessary for us to remit the case back to the Collector of Central Excise for assessing the value of the tobacco on which duty had not been paid. In view of our earlier findings the fine to be levied on the appellants in lieu of the confiscation that could have been ordered has to be fixed at Rs. 35,000/-. From this it follows that the Collector has to refund to the appellants a sum of Rs. 65,000/- which he has collected from them in excess of the aforementioned Rs. 35,000/-. The appeal is allowed to that extent. In the circumstances of the case we direct the parties to bear their own costs both in this Court as well as before the High Court.

Order accordingly.

AIR 1970 SUPREME COURT 833

(V 57 C 179)

(From: Punjab)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.Satish Kumar and others, Appellants v.
Surinder Kumar and others, Respondents.Civil Appeal No. 822 of 1966, D/- 27-
9-1968.

Arbitration Act (1940), Sections 14, 17
and Schedule 1 Rule 7 — Reference to
arbitration by parties — Arbitration with-
out intervention of Court — Award not
made rule of court — Binding effect on
parties — Extent of — Private award
effecting partition of immovable property
worth more than Rs. 100 — Registration of
award before making it rule of Court is
necessary — AIR 1958 Pat 252 (FB) & AIR
1968 Punj & Har 204 (FB), Overruled —
Registration Act (1908), Section 17 (1) (b).

An award given under the Arbitration
Act on a private reference requires reg-
istration under Section 17 (1) (b) of the
Registration Act, if the award effects par-
tition of immovable property exceeding
the value of Rs. 100/-. Civil Revn. No.
841 of 1964, D/- 27-4-1965 (Punj),
Affirmed; AIR 1958 Pat 252 (FB) & AIR
1968 Punj & Har 204 (FB), Overruled;
AIR 1938 Bom 422 & AIR 1939 Nag 233
(FB) & AIR 1940 Rang 228 and AIR 1945
Cal 19, Approved. (Paras 16, 18)

The award is not a mere waste paper
but has some legal effect. It is final and
binding on the parties and it cannot be
said that it is a waste paper unless it is
made a rule of the Court. The confer-
ment of exclusive jurisdiction on a Court
under the Act does not make an award
any the less binding than it was under
the provisions of the Second Schedule
of the Code of Civil Procedure. The
award is, in fact, a final adjudication of
a Court of the parties' own choice, and
until impeached upon sufficient grounds
in an appropriate proceeding, an award,
which is on the face of it regular, is con-
clusive upon the merits of the contro-
versy submitted. As between the parties
and their privies, an award is entitled to
that respect which is due to judgment of
a court of last resort. Case law discuss-
ed. (Paras 8, 9, 13, 14)

The award does create rights in prop-
erty but those rights cannot be enforced

*(Civil Revn. No. 841 of 1964, D/- 27-4-
1965 — Punj.)

CN/CN/E888/68/DVT/M

1970 S. C./53 VI G—3

until the award is made a decree of the
Court. It is one thing to say that a right
is not created, it is an entirely different
thing to say that the right created cannot
be enforced without further steps. For
the purpose of Section 17 (1) (b) of the
Registration Act, all that is necessary is
whether the award purports or operates to
create or declare, assign, limit or extin-
guish whether in present or future any
right, title or interest whether vested or
contingent of the value of one hundred
rupees and upwards to or in immovable
property. If it does, it is compulsorily
registrable. Section 17 does not concern
itself with the enforcement of rights.

(Para 19)

Cases Referred: Chronological Paras

(1968) AIR 1968 Punj & Har 204

(V 55)= ILR (1967) 1 Punj &
Har 622 (FB), Sardool Sing v.

Hari Singh

5

(1962) Civil Appeal No. 296 of 1960,

D/- 6-12-1962 (SC), Sheonarain

Lal v. Rameshwari Devi

10

(1962) Civil App. No. 162 of 1962,

D/- 11-10-1962 (SC), M/s. Uttam

Singh Dugal & Co. v. Union of

India

8, 10

(1961) AIR 1961 SC 1077 (V 48)=

(1961) 3 SCR 792, Kashinathsa

Yamasa Kabadi v. Narsinghsa

Bhaskarsa Kabadi

12

(1960) AIR 1960 SC 629 (V 47)=

(1960) 2 SCR 810, Champalal v.

Mst. Samarth Bai

11

(1958) AIR 1958 Pat 252 (V 45)=

ILR 37 Pat 252 (FB), Sheonarain

Lal v. Prabhu Chand

4, 6, 10, 16

(1945) AIR 1945 Cal 19 (V 32)=

48 Cal WN 721, Nani Bala Saha

v. Ram Gopal Saha

4

(1940) AIR 1940 Rang 223 (V 27)=

1940 Rang LR 372, U Keltaha

v. U Pannawa

4

(1939) AIR 1939 Nag 233 (V 26)=

ILR (1939) Nag 607 (FB), Mohd.

Azizulla Khan v. Mohd. Noorullah

Khan

4

(1938) AIR 1938 Bom 422 (V 25)=

40 Bom LR 952, Chimanlal Gir-

dhar Ghanchi v. Dahyabhai Nathu-

bhai Gandhi

4

(1909) ILR 33 Cal 881= 4 Cal LJ

162, Bhajahari Saha Banikya v.

Behary Lal Basak

8

Mr. Sarjoo Prasad, Senior Advocate,

(Mr. D. N. Mishra, Advocate, and Mr.

Ravinder Narain, Advocate of M/s. J. B.

Dadachanji and Co. with him), for Ap-

pellants; M/s. A. K. Sen and S. V. Gupte,

Senior Advocates, (M/s. B. P. Maheshwari

and R. K. Maheshwari, Advocates with them), for Respondent No. 1.

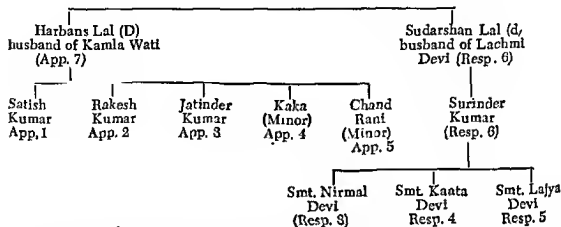
The following judgments of the Court were delivered by

SIKRI, J. (On behalf of himself and Bachawat, J.)— This appeal by special leave is directed against the judgment

dated April 27, 1965, of the High Court of Punjab at Chandigarh (S. B. Kapoor, J.) dismissing Civil Revision No. 841 of 1964. The Civil Revision arose out of the following facts.

2. The following pedigree table shows the relationship between the parties:

Sohan Lal (Deed.) Husband of Cujri



3. On the death of Sohan Lal, Behari Lal was appointed as arbitrator by Harbans Lal, Surinder Kumar (then a minor through his mother Smt. Lachmi Devi) and Smt. Cujri, widow of Sohan Lal, for partition of the joint property. Behari Lal, by his award dated October 21, 1956, divided the property into two equal shares, between Harbans Lal and Surinder Kumar. Harbans Lal and Surinder Kumar signed the award. Harbans Lal died on May 20, 1960, upon which Surinder Kumar filed a suit for partition of the properties, the subject-matter of the award. This suit was dismissed as withdrawn on March 13, 1962. On March 11, 1962, Behari Lal, arbitrator, filed an application under Section 14 of the Indian Arbitration Act 1940 (X of 1940) — hereinafter referred to as the Act — for filing the award in Court and for making the same a rule of the Court. Surinder Kumar entered appearance and filed objections under Section 30 of the Act. One of the objections was that the award dated October 21, 1956, was not admissible in evidence for want of proper stamp and registration and could not, therefore, be made a rule of the Court. On January 31, 1963, the objections were dismissed by Miss Harmohinder Kaur, Subordinate Judge, First Class, Ludhiana, as time-barred, but she did not make the award a rule of the Court as there was a further objection to the effect that the

award not having been executed on a properly stamped paper and not having been registered, was not admissible in evidence. This objection was dealt with by Shri Om Parkash Saini, Subordinate Judge, First Class, Ludhiana, who, by his order dated June 5, 1963, held that the award in question was not admissible in evidence as it was executed on delicately stamped paper and was not registered. He accordingly dismissed the application.

4. An appeal was taken to the District Judge, and the Additional District Judge, by his order dated November 23, 1964, upheld the order of the Subordinate Judge. A revision was then taken to the High Court. Kapoor, J., held that the award actually effected a partition and required registration under S. 17 (1) (b) of the Indian Registration Act, 1908. The learned Judge dissented from the decision of a Full Bench of the Patna High Court in *Seonarain Lal v. Prabhu Chand*, ILR 37 Pat 252 = (AIR 1958 Pat 252) (FB) and preferred to follow the view expressed by the Bombay High Court in *Chimanlal Cirdhar Chanchi v. Dabyabhai Nathubhai Candhi*, AIR 1938 Bom 422, by the Nagpur High Court in *M. A. M. Salamullah Khan v. M. Noorullah Khan*, AIR 1939 Nag 233 at p. 235, by the Rangoon High Court in *U Keltaba v. U Pannawa*, AIR 1940 Rang 228 and by the Calcutta High Court in *Nani Bela Saha v. Ram Gopal Saha*, AIR 1945 Cal 19 at pp. 21,

22. He accordingly dismissed the revision petition.

5. The decision of the Patna High Court was, however, later followed by a Full Bench of the Punjab and Haryana High Court in Sardool Singh v. Hari Singh, ILR (1967) 1 Punj & Har 622= (AIR 1968 Punj & Har 204), judgment dated November 8, 1966.

6. The question which arises before us is whether an award given under the Act on a private reference requires registration under Section 17 (1) (b) of the Indian Registration Act, if the award effects partition of immovable property exceeding the value of Rs. 100/-. The main reason given by Sinha, J., speaking for the Patna Full Bench in ILR 37 Pat 252= (AIR 1958 Pat 252 (FB)) for holding that such an award does not require registration is that under the scheme of the Act a private award, unless a decree is passed in terms of the award, has no legal effect. This, according to him, follows from the conclusion that once a matter has been referred to arbitration, it comes within the immediate control of the Court under the Act, and no other authority has any jurisdiction to deal with the matter except as provided for in Section 35 of the Act. He thought that what distinguishes the provisions in the Arbitration Act from the provisions in the Second Schedule in the Code of Civil Procedure is that the Act bars jurisdiction of all Courts to pronounce upon the validity, effect or existence of an award or arbitration agreement except the Court under the Act itself. Sinha, J., looking at it from another point of view, namely, that an award is only effective when a decree follows the judgment upon the award, observed that such an award may be covered by the exception mentioned in Section 17 (2) (vi) (any decree or order of a Court) of the Registration Act.

7. The Punjab Full Bench has followed this reasoning, and indeed reproduced paras 5 to 15 of the Patna Full Bench judgment in its own judgment. Mahajan, J., with whom the two other Judges agreed, observed:

"I am in respectful agreement with the entire line of reasoning in the Patna case barring the underlined observation:—

"....an award is only effective when a decree follows the judgment on the award 'such an award may be covered by the exception mentioned in S. 17 (2)

(vi)' (any decree or order of a Court) of the Registration Act."

If these observations are meant to convey that award as such is covered by the exception (vi) of Section 17 (2) of the Registration Act, I am unable to agree. But the decree that follows the award when it is made a rule of the Court, no exception can be taken to the view that such a decree is covered by the exception."

The Punjab Full Bench gave two additional reasons:

"(1) If an award is registered, it is still a waste paper unless it is made a rule of the Court. Thus registration does not, in any manner, add to its efficacy or give it any added competence. Section 32 of the Arbitration Act is specific for no right can be founded on an award as such after coming into force of the 1940 Arbitration Act;

(2) It is not disputed and indeed it could not be that the Court has the power under Section 16, to remit the award from time to time. If registration of an award is an essential pre-requisite before it could be made a rule of the Court under Section 17, every time an award is remitted and a new award is made, the new award will require registration. The result would be that, in the same controversy, there can be not only one registration but a number of registrations regarding the same title, a situation which is not even envisaged by the Registration Act."

8. It seems to us that the main reason given by the two Full Benches for their conclusion is contrary to what was held by this Court in its unreported decision in M/s. Uttam Singh Dugal and Co. v. Union of India, Civil Appeal No. 162 of 1962, D/- 11-10-1962 (SC). The facts in this case, shortly stated, were that M/s. Uttam Singh Dugal and Co. filed an application under Section 33 of the Act in the Court of the Subordinate Judge, Hazaribag. The Union of India, respondent No. 1, called upon respondent No. 2, Col. S. K. Bose, to adjudicate upon the matter in dispute between respondent No. 1 and the appellant company. The case of M/s. Uttam Singh Dugal and Co. was that this purported reference to respondent No. 2 for adjudication on the matters alleged to be in dispute between them and respondent No. 1 was not competent because by an award passed by respondent No. 2 on April 23, 1952, all the relevant disputes

between them had been decided. The High Court held *inter alia* that the first award did not create any bar against the competence of the second reference. On appeal this Court after holding that the application under Section 83 was competent observed as follows:

"The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference. As has been observed by Mookerjee, J. in the case of Bhajahari Saha Banikya v. Behary Lal Basak, (1909) ILR 33 Cal 881 at p. 898, 'the award is, in fact, a final adjudication of a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive.....in reality, an award possesses all the elements of vitality even though it has not been formally enforced and it may be relied upon in a litigation between the parties relating to the same subject-matter.' This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed."

This Court then held on the merits "that the dispute in regard to over payments which are sought to be referred to the arbitration of respondent No. 2 by the second reference are not new disputes; they are disputes in regard to claims which the Chief Engineer should have made before the arbitration under the first reference." This Court accordingly allowed

the appeal and set aside the order passed by the High Court.

9. This judgment is binding on us. In our opinion this judgment lays down that the position under the Act is in no way different from what it was before the Act came into force, and that an award has some legal force and is not a mere waste paper. If the award in question is not a mere waste paper but has some legal effect it plainly purports to or affects property within the meaning of Section 17 (1) (b) of the Registration Act.

10. We may mention that an appeal was filed in this Court against the decision of the Division Bench of the Patna High Court, which had referred the case of ILR 37 Pat 252 = (AIR 1958 Pat 252) (FB) to the Full Bench for opinion on certain questions and which decided the case in accordance with that opinion, and the same was dismissed by this Court in Sheonarain Lal v. Rameshwari Devi, Civil Appeal No. 296 of 1960, D/- 6-12-1962 (SC) in which the judgment was delivered by the same Bench which decided the case of Civil Appeal No. 162 of 1962, D/- 11-10-1962 (SC). It is true that this Court in Civil Appeal No. 296 of 1960, D/- 6-12-1962 (SC) did not expressly rule on the validity of the answer given by the Patna Full Bench in ILR 37 Pat 252 = (AIR 1958 Pat 252 (FB)) that such awards did not require registration, but decided the case on the point whether the award in dispute in that case in fact purported or operated to create a right, title or interest of the value of more than Rs. 100 in immovable properties. But after holding that the document did not operate to create or extinguish any right in immovable property, this Court observed:

"The position would have been otherwise if the arbitrators had directed by the award itself that this shop would go to Prabhu Chand without any further document. In that case the award itself would have created in Prabhu Chand a right to these properties. That is not, however, the provision in the award. In the absence of a registered document, Prabhu Chand would get no title on the award and Sheonarain's title would remain in the shop."

11. In this connection we may mention two other decisions of this Court. In Champalal v. Mst. Samarath Bai, (1960) 2 SCR 810 at p. 816 = (AIR 1960 SC 629 at p. 631), Kapur, J., speaking for the Court, observed as follows:

"The second question that the award required registration and would not be filed by the arbitrators before it was registered is equally without substance. The filing of an unregistered award under Section 49 of the Registration Act is not prohibited; what is prohibited is that it cannot be taken into evidence so as to affect immovable property falling under Section 17 of the Act. That the award required registration was rightly admitted by both parties."

12. Again in *Kashinathsa Yamosa Kabadi v. Narsingsa Bhaskarsa Kabadi*, (1961) 3 SCR 792 at p. 806 = (AIR 1961 SC 1077 at p. 1084), Shah, J., speaking for the Court observed:

"The records made by the Panchas about the division of the properties, it is true, were not stamped nor were they registered. It is however, clear that if the record made by the Panchas in so far as it deals with immovable properties is regarded as a non-testamentary instrument purporting or operating to create, declare, assign, limit or extinguish any right, title or interest in immoveable property, it was compulsorily registrable under Section 17 of the Registration Act and would not in the absence of registration be admissible in evidence."

13. In view of the above decisions it is not necessary to refute the other reasons given by both the Full Benches, but out of respect for the learned Judges we deal with them. We may mention that no comment was made in these cases on the provisions of Para 7 of Schedule 1 to the Act. This para provides:

"7. The award shall be final and binding on the parties and persons claiming under them respectively." If the award is final and binding on the parties it can hardly be said that it is a waste paper unless it is made a rule of the Court.

14. We are unable to appreciate why the conferment of exclusive jurisdiction on a Court under the Act makes an award any the less binding than it was under the provisions of the Second Schedule of the Code of Civil Procedure. The Punjab Full Bench held that the registration does not in any manner add to its efficacy or give it any added competence. We cannot concur with these observations. If an award affects immovable property over the value of Rs. 100 its registration does get rid of the disability created by Section 49 of the Registration Act.

15. Regarding the difficulty pointed out by the Punjab Full Bench that there may be many registrations we are not called upon to decide whether these difficulties would arise because the language of Section 17 of the Registration Act is plain. It may be that no such difficulties will arise because under Section 16 (2) of the Act what the arbitrator submits to the Court is his decision and it may be that the decision may not be registrable under Section 17 of the Registration Act. But as we have said before we are not called upon to decide this point.

16. In our opinion, Capoor, J. was right in dissenting from the Patna Full Bench in ILR 37 Pat 252 = (AIR 1958 Pat 252) (FB) and holding that the award in dispute required registration.

17. In the result the appeal fails and is dismissed with costs.

18. We may make it clear that we are dealing only with an award made on a reference by the parties without the intervention of court.

19. HEGDE, J.: I agree. But I would like to add few words. Arbitration proceedings, broadly speaking may be divided into two stages. The first stage commences with arbitration agreement and ends with the making of the award. And the second stage relates to the enforcement of the award. Paragraph 7 of the First Schedule to the Arbitration Act lays down that "the award shall be final and binding on the parties and persons claiming under them respectively." Therefore it is not possible to agree with the Full Bench decisions of the Patna High Court and that of the Punjab and Haryana High Court that an award which is not made a decree of the Court has no existence in law. The learned Judges who decided those cases appear to have proceeded on the basis that an award which cannot be enforced is not a valid award and the same does not create any rights in the property which is the subject matter of the award. This in my opinion is not a correct approach. The award does create rights in that property but those rights cannot be enforced until the award is made a decree of the Court. It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps. For the purpose of Section 17 (1) (b) of the Registration Act, all that we have to see is whether the award in question

purports or operates to create or declare, assign, limit or extinguish whether in present or future any right, title or interest whether vested or contingent of the value of one hundred rupees and upwards to or in immoveable property. If it does, it is compulsorily registrable. In the aforementioned Full Bench decisions sufficient attention has not been given to Section 17 of the Registration Act. The focus was entirely on the provisions of the Arbitration Act and there again on the enforcement of the award and not in the making of the award. A document may validly create rights but those rights may not be enforceable for various reasons. Section 17 does not concern itself with the enforcement of rights. That Section is attracted as soon as its requirements are satisfied. There is no gainsaying the fact that the award with which we are concerned in this case, at any rate, purported to create rights in immoveable property of the value of rupees more than one hundred. Hence it is compulsorily registrable.

Appeal dismissed.

AIR 1970 SUPREME COURT 838 (V 57 C 180)

(From Punjab: (1962) 64 Pun LR 1091)
S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Smt. Kaushalya Devi and others, Appellants v. K. L. Bansal, Respondent.

Civil Appeal No. 98 of 1960, D/- 3-12-1968.

Houses and Rents — Delhi and Ajmer Rent Control Act (38 of 1952), Section 13 — Decree passed by Court in ejectment with an award of compromise, without satisfying itself if the grounds for eviction existed — Decree is in contravention of Section 13 and a nullity and cannot be executed — (Civil P. C. (1903), Sec. 47).

Where in a suit under Delhi and Ajmer Rent Control Act for ejectment of the defendant the parties entered into a compromise that the decree for ejectment be passed against the defendant, executable after certain date, and that a new standard rent at a certain amount be fixed, to be payable from a certain date and the Court recorded the following order:

"In view of the statement of the parties' counsel and the written compromise, a decree is passed in favour of the plaintiff against the defendant",

and the decree was drawn up accordingly.

Held that the decree passed on the basis of an award was in contravention of Section 13 (1) of the Act because the Court had passed the decree in terms of the award without satisfying itself that the ground of eviction existed. Accordingly the decree in so far as it directed delivery of possession of the premises to the landlord was a nullity and could not be executed. (1969) 1 SCWR 51, Foll.; (1962) 64 Punj LR 1091, Affirmed.

(Paras 3, 5)

Cases Referred: Chronological Paras
(1968) Civil Appeals Nos. 2464 and
2468 of 1966, D/- 18-10-1968 =
(1969) 1 SCWR 51, Bahadur Singh
v. Muni Subrat Dass 1, 5, 6

Mr. S. P. Sinha, Sr. Advocate, (M/s. G. Bhimseoa Rao and M. I. Khosla, Advocates, with him), for Appellants; Mr. I. N. Shroff, Advocate, for Respondent.

The Judgment of the Court was delivered by

SIKRI, J.: This appeal by certificate granted by the Circuit Bench of the Punjab High Court at Delhi is governed by the decision of this Court in Bahadur Singh v. Muni Subrat Dass, Civil Appeals Nos. 2464 and 2468 of 1966, D/- 18-10-1968 (reported in (1969) 1 SCWR 51).

2. The facts out of which the present appeal arises are these. One Raghunath Sharma, predecessor-in-interest of the appellants—hereinafter referred to as the plaintiff—instituted on February 7, 1956, suit No. 53 of 1950 in the Court of Sub-Judge Ist Class, Delhi, for the eviction of his tenant, K. L. Bansal, hereinafter referred to as the defendant. He gave three grounds for ejectment in the plaint: (1) that the premises were required bona fide by the plaintiff for occupation as residence for himself and other members of the family, and that he had no other suitable accommodation to meet his bona fide residential requirements; (2) that the defendant already owned a house in Delhi which was suitable for him; and (3) that the defendant had defaulted in payment of rent.

3. The defendant filed a written statement denying these allegations. Appropriate issues were framed on April 4, 1956. On June 5, 1956, an application was filed by the plaintiff and the defendant that a compromise had been effected on the following terms:

"(a) Decree for ejectment be passed in favour of the plaintiff against the defendant, the decree will be executable after

the 31st December, 1958 if the defendant does not give possession till then.

(b) The standard rent of the premises be fixed at Rs. 40 per mensem, instead of Rs. 50 paid at present payable from the 1st July, 1956, till the defendant vacates the premises.

(c) The amount in deposit with this Court be paid to the plaintiff which will be adjusted between the parties."

On July 6, 1956, the counsel for the parties and the plaintiff made a statement on solemn affirmation to the same effect, and on the same day, the Court recorded the following order:

"In view of the statement of the parties' counsel and the written compromise a decree is passed in favour of the plaintiff against the defendant."

The decree was drawn up accordingly.

4. The defendant, however, did not vacate the premises on December 31, 1958. On the other hand, he presented an application on February 16, 1959, under Section 47, C. P. C., challenging the validity of the decree alleging that the same had been passed in contravention of the provisions of Section 13 of the Delhi and Ajmer Rent Control Act, 1952 (XXXVIII of 1952) (hereinafter referred to as the Act) and hence the decree was a nullity. He failed before the Sub-Judge, and also on appeal before the Senior Sub-Judge, Delhi.

5. The High Court, on revision, held that the decree was a nullity as the Order passed on the basis of the compromise did not indicate that any of the statutory grounds mentioned in Section 13 of the Act existed. In Bahadur Singh's case, Civil Appeals Nos. 2464 and 2468 of 1966, D/- 16-10-1968 = (reported in (1969) 1 SCWR 51) this Court held that the decree passed on the basis of an award was in contravention of Section 13 (1) of the Act because the Court had passed the decree in terms of the award without satisfying itself that the ground of eviction existed. Bachawat, J., speaking for the Court, observed that "on the plain wording of Section 13 (1) the Court was forbidden to pass the decree. The decree is a nullity and cannot be enforced in execution." This Court, accordingly, declared inter alia that "the decree in so far as it directs delivery of possession of the premises to the landlord is a nullity and cannot be executed."

6. The present case is also governed by the provisions of Section 13 (1) of the Act and, as we have said before, this ap-

peal must fail, in view of the judgment of this Court in Bahadur Singh's case, Civil Appeals Nos. 2464 and 2468 of 1966 D/- 16-10-1968 = (reported in (1969) 1 SCWR 51). In the result the appeal is dismissed but there will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 839 (V 57 C 181)

(From Calcutta: AIR 1963 Cal 198)

V. RAMASWAMI AND I. D. DUA, JJ.

C. Mackertich, Appellant v. Steuart & Co., Ltd., Respondent.

Civil Appeals Nos. 1933 and 1934 of 1966, D/- 14-10-1969.

(A) Transfer of Property Act (1882), Section 106 — Premises let out to partners of partnership firm carrying on business as coach builders under registered lease — Partners entering into agreement with company to sell entire business along with general assets and lease-hold properties — Company entering into possession of lease-hold premises — Object of company to carry on trade or business of coach and carriage builders and to buy, sell, import, manufacture, repair, let on hire, otherwise deal in carriages and vehicles of every description — Separate deed of transfer of premises in favour of company not executed — Lessor treating company as monthly tenant — Failure of Company to prove that lease was dominantly for manufacture purpose — Tenancy was monthly and terminable by 15 days' notice. AIR 1963 Cal 198, Reversed. (Paras 3, 5)

(B) Transfer of Property Act (1882), Section 106 — Whether for applying the presumption under Section 106 the test is exclusiveness of manufacturing purpose. (Quaere). (Para 5)

(C) Civil P. C. (1908), Sections 100-101 — New Point — Point not raised in written statement — Cannot be allowed to be raised. (Para 3)

Cases Referred: Chronological Paras

(1957) AIR 1957 Cal 198 (V 44) =
97 Cal LJ 1, Ramesh Chandra v.
Surya Properties 5

(1952) AIR 1952 Cal 320 (V 39) =
86 Cal LJ 12, Sati Prasanna v.
Md. Fazel 5

LM/AN/F191/69/YPB/M

(1951) 1951-1 KB 614 = (1951) 1

All ER 320, *Howkins v. Jardine* 5

The Judgment of the Court was delivered by

RAMASWAMI, J.: These appeals are brought by certificate from the judgment of the Calcutta High Court dated March 27, 1962 in appeals from original decrees Nos. 55 and 263 of 1956.

2. By a registered lease dated December 22, 1913, M. Mackertich and Frank Earnest Bushby let out the subject matter of Title Suit No. 31/53, that is, a portion of the premises No. 38/1 Panditla Road, covering an area of approximately 7 bighas, 9 cottahs, 5 chittacks and 9 square ft. of land to four persons, namely Walter Bushby, Frank Earnest Bushby, Geoffrey B. Page and William Shenton carrying on business as coach builders. The term of the lease was for 50 years from January 1, 1915. By another registered lease dated January 31, 1919 between the same lessors and the lessees the premises which are the subject-matter of Title Suit No. 30/53 were leased out for a period of 46 years and three months from October 1, 1918. By memorandum and Articles of Association dated December 4, 1919 a company limited by shares namely Steuart and Co. Ltd., was incorporated. The objects of the company were to carry on the trade or business of coach and carriage builders and to buy, sell, import, export, manufacture, repair, let on hire, otherwise deal in carriages and vehicles of every description. On December 17, 1919 an agreement was made and signed between the partners of the partnership firm (Frank Earnest Bushby Geoffrey Berridge Page and William Shenton) and Steuart and Co. Ltd., wherein it was stated that the partners of the partnership firm would sell the business and transfer all the assets of the firm with effect from the 31st day of December, 1919 to the incorporated company viz. Steuart and Co. Ltd. It was stipulated that the partners would sell and the incorporated company would purchase with effect from December 31, 1919 the goodwill of the business, the leasehold properties of the firm, machinery, office furniture etc., of the firm and generally all the assets of the firm. Under this agreement the incorporated company entered into possession of the leasehold premises of the partnership firm and also took charge of the business of the partnership firm and began to carry on the business itself. No separate deed of trans-

fer in respect of the leasehold properties was executed by the partnership firm in favour of the new incorporated company. But the lessors treated the incorporated company as monthly tenants and accepted rents from them. Frank Earnest Bushby ultimately sold his interest as owner of the property to M. Mackertich. The plaintiff C. Mackertich is the son of M. Mackertich and has inherited all his interests and is, therefore, the sole landlord of two premises in suit. He claimed that the tenancies were governed by the West Bengal Premises Rent Control Act, 1950 and on the ground that there had been default of payment of rent from May, 1952 to March, 1953 he claimed that the defendant company had forfeited the protection against eviction. Notice determining the tenancy was issued on March 12, 1953 by registered post and served on the defendant company on March 13, 1953 calling upon the defendant company to vacate the premises. As the defendant company did not give up possession of the premises, the plaintiff instituted the two suits on May 26, 1953 seeking decrees for the ejectment against the defendant company and a decree for Rs. 5,500 for arrears of rent for 11 months from May, 1952 to March, 1953 in Title Suit No. 31 of 1953 and a decree for arrears of Rs. 2,200 for the 11 months from May, 1952 to March, 1953 in Title Suit No. 30 of 1953. Plaintiff also claimed decrees for damages from the 1st of April, 1953 in both the suits. The defendant contested the suits on the ground that the tenancies were governed by the terms of the lease deeds dated December 22, 1913 and January 31, 1919 and that in the circumstances the tenancies were not governed by the West Bengal Premises Rent Control Act, 1950 and could not be determined by service of 15 days' notice. The defendant denied that there was any arrears of rent and contended that for repairs of the premises which had become dilapidated the defendant company incurred expenditure to the extent of Rs. 22,000 and until there was adjustment of the account between the parties it could not be said that there was any arrear of rent due by the defendant company. The Subordinate Judge found that the defendant company being a separate legal entity from the partnership firm the members of which had been granted two leases the leasehold could not be transferred to the defendant company without registered documents and in the absence of such registered docu-

mients the defendant company could not claim to be lessees governed by the registered lease deeds Ex. L and L (I). The Subordinate Judge held that the plaintiff accepted rent for many years from the defendant company as a tenant. In the circumstances the defendant company must be deemed to be tenant from month to month terminable by 15 days' notice under Section 106 of the Transfer of Property Act, 1882. The Subordinate Judge rejected the claim of the defendant company that the purpose of the tenancy was manufacturing and that therefore six months' notice ending with the year of tenancy was necessary. As regards the claim of the defendant company for adjustment the Subordinate Judge observed that the defendant company was not entitled to avail of any condition contained in the registered lease deed Ex. L and L (I) and that as between the defendant company and the plaintiff there was no evidence of any agreement that the plaintiff would ever undertake repairs of the premises. In the circumstances the Subordinate Judge held that the plaintiff was not bound to carry out the repairs and that therefore the defendant company could not claim a set-off for the cost of the repairs against the arrears of rent. The Subordinate Judge, therefore granted the plaintiff decree for ejectment as well as arrears of rent and mesne profits in both the suits. Against this decision the defendant company preferred appeals to the Calcutta High Court. By its judgment dated March 27, 1962 the High Court held that the plaintiff was not entitled to a decree for eviction as the purpose of the lease was manufacturing and, therefore, the notice was bad. The High Court, however, upheld the findings of the Subordinate Judge and held that the suit should be decreed in part for arrears of rent claimed but dismissed so far as the claim for ejectment and damages and mesne profits is concerned.

3. In support of these appeals it was submitted on behalf of the appellant that the High Court was in error in holding that the tenancy was for manufacturing purpose and that six months' notice terminable with a year of tenancy was required. It was said that the onus of proving that the tenancy was for manufacturing purpose was upon the defendant and as that point was not raised in the written statement the High Court should not have allowed the respondent to raise the question. In our opinion there is sub-

stance in this argument. But we shall assume in favour of the respondent that such an objection could have been taken by it even without a specific plea in the written statement. Even upon that assumption we are of opinion that there is no evidence in the case to support the finding of the High Court that the purpose of the lease was dominantly for manufacturing purpose. Exhibit W is the Memorandum and Articles of Association. The objects of the company are given in paragraphs 3 and 4 and are to the following effect:

"(3) To carry on the business of motor-cab, motor-car, motor-omnibus, motor-boat and motor-van proprietors, motor-engineers, manufacturers, builders, painters, decorators, and repairers of motor cars, cabs, omnibuses, vans and other vehicles of every description so constructed as to progress whether on land or water or in the air.

(4) To carry on the business of harness-makers and wheel-wrights, mechanical engineers and manufacturers of and dealers in lamps, whips, rugs, leather goods, India-rubber goods, wheels, springs, axles, upholsterings, India-rubber tyres and all component parts of any carriage or vehicle and other articles used in the manufacture or fitting up of the above mentioned or any similar articles, and manufacturers or factors of or dealers in all products or substances which may be used in or in connection with the said business or any of them or in which it may be considered advantageous to deal." It cannot be said from these paragraphs that the object of the company was dominantly manufacturing purpose. The High Court has in this connection referred to the evidence of Mr. J. N. Ghose, the Managing Director of the defendant company. In reply to question 235 the witness said that the company had business as "Automobile engineers, coach builders, refrigerators, motor, mechanical engineer, body builders and the like and that business is continuing". In answer to question No. 247 the witness said that the company had agency to deal in Austin cars. It is true that in the registered lease deed Ex. L and L (I) there is the description of the lessee as coach-builder. But it is obvious that the defendant company cannot claim to be holding under the registered lease deed Ex. L and L (I) and so the purpose mentioned in the lease deed cannot be taken into

consideration. In our opinion neither the evidence of Mr. J. N. Ghose nor the statement in Ex. W, Memorandum and Articles of Association, can be taken as sufficient evidence to prove that the purpose of the lease was exclusively or even dominantly for a manufacturing purpose. It follows, therefore, that the High Court was in error in holding that the dominant purpose of the lease was manufacture and so 15 days' notice ending with the month of each tenancy must be held to be insufficient.

4. The High Court expressed the view that the test for applying the presumption of Section 106 of the Transfer of Property Act is to ascertain what was the dominant purpose of the lease and not whether the lease was exclusively for manufacturing purpose. Section 106 of the Transfer of Property Act states:

"In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

5. Counsel on behalf of the appellant referred to the decision of the Court of Appeal in *Howkins v. Jardine*, 1951-1 KB 614. In that case the landlord granted to the tenant a tenancy from year to year, terminable within six months, of seven acres of land and three cottages on the land. The lease contained provisions usual in a lease of an agricultural holding. The tenant, who farmed other land in addition to the seven acres, sub-let the three cottages to persons who were not engaged in agriculture. After the death of the landlord his executors served on the tenant twelve months' notice to quit

the cottages, and land under Section 23, sub-section (1) of the Agricultural Holdings Act, 1948. The tenant thereupon served a counter notice under Section 24, sub-section (1) of the Act. The Minister of Agriculture having given his assent to the notice to quit, the tenant appealed to the Agricultural Land Tribunal, who allowed his appeal, holding that the notice to quit was inoperative. Proceedings were then brought in the county court by the executors as landlords, and they were granted by the county court judge a declaration that they were entitled to possession of the cottages and to mesne profits on the ground that the decision of the tribunal rendered the notice to quit invalid so far as it related to the land as distinct from cottages. In this state of facts, it was decided by the Court of Appeal that Section 1 of the Act of 1948 which defined 'Agricultural holding' as meaning "the aggregate of the agricultural land comprised in a contract of tenancy" did not effect a severance of agricultural land and non-agricultural land, and as the lease in question was in substance a lease of an agricultural holding, therefore, the whole of the subject-matter of the contract of tenancy came within the protection of the Act and the appeal of the tenant was accordingly allowed. It was submitted on behalf of the respondents that a similar principle must be applied in construing Section 106 of the Transfer of Property Act and if the purpose of the lease was mainly or in substance a manufacturing purpose, a presumption of yearly tenancy will arise and that it was incumbent upon the landlord to give a notice expiring with the end of the year of tenancy if the lease was to be validly determined. The opposite point of view is put forward on behalf of the appellant. It was argued that the test was exclusiveness of manufacturing purpose for applying the presumption under Section 106 of the Transfer of Property Act. Reliance was placed upon the decision of the Calcutta High Court in *Ramesh Chandra v. Surya Properties*, AIR 1957 Cal 193 and *Sati Prasanna v. Md. Fazel*, AIR 1952 Cal 320. But we do not propose in this case to express our concluded opinion regarding Section 106 of the Transfer of Property Act. We shall proceed on the assumption that the argument of the respondent is correct and that the test applicable under Section 106 of the Transfer of Property Act is not exclusiveness of purpose

but what is the main or substantial purpose of the lease. As we have already shown there is no proper material on the record of the case from which it can be inferred that the dominant purpose of the lease was manufacture or that the respondent substantially used the premises for manufacturing purposes. It follows, therefore that the trial court was right in holding that the tenancy was monthly and notices Exs. I and I-A were legally valid for termination of the tenancy.

6. For these reasons we set aside the judgment of the High Court dated March 27, 1962 in both the appeals and restore the judgment of the Subordinate Judge, Second Court, Alipore in Title Suits Nos. 30 and 31 of 1953. The appeals are accordingly allowed with costs. One set of hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 843

(V 57 C 182)

(From: Patna)

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

Hari Sao and another, Appellants v.
The State of Bihar, Respondents.

Criminal Appeal No. 240 (N) of 1966,
D/- 15-10-1969.

Penal Code (1860), Sections 415 and 420
— Inducing Station Master to make out
Railway Receipt — Railway Receipt made
out stating that consignment was said to
contain 251 bags of chillies with letters
L/U endorsed meaning that responsibility
for loading and unloading vested with
consignor — Wagons found to contain
only 197 bags of chaff — Charge of cheat-
ing station master, held could not be estab-
lished, as railway did not incur any ad-
ditional liability by the false representa-
tion that consignment contained 251 bags
and the issue of the railway receipt there-
fore was not likely to cause any damage
or harm to the railway. No question of
cheating the railway or the Station Mas-
ter therefore arose. AIR 1950 Nag 85
and AIR 1956 Mad 176, Ref.; Decision of
Patna High Court, Reversed. (Para 12)

Cases Referred: Chronological Paras

(1956) AIR 1956 Mad 176 (V 43) =

1955 Mad WN 983, Union of
India v. S. P. L. Lekhu Reddiar

(1950) AIR 1950 Nag 85 (V 37) =

ILR (1950) Nag 212, Dominion

LM/AN/F199/69/GGM/P

of India v. Firm Museram Kishun
Prasad

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The Judgment of the Court was deli-
vered by

MITTER, J.: This appeal by special leave is from a judgment and order of the High Court of Patna upholding the conviction of the two appellants under Section 420, I. P. C. read with Section 34 but reducing the sentence of imprisonment on each of them by awarding rigorous imprisonment for three years in place of seven years. The imposition of fine of Rs. 6,000 on each of the appellants by the Sessions Judge was maintained by the High Court. The two appellants were charged with having cheated the Assistant Station Master of Sheonarayanpur Railway Station on or about the period 13th May, 1960 to 12th May, 1963 by dishonestly inducing him to make a railway receipt with false particulars which was capable of being converted into a valuable security and thereby committed an offence punishable under Section 420, I. P. C. Five other persons were charged along with the appellants with having committed an offence punishable under Section 120-B read with Section 420 of the Indian Penal Code but they were acquitted. The appellants were also charged under Section 468 of the Indian Penal Code but they were acquitted of this.

2. The facts about which there can be no dispute are as follows. The appellant Shankar Sah met the Station Master of Sheonarayanpur Railway Station on May 11, 1960 and produced a forwarding note for booking a consignment of dry chillies to Calcutta. A wagon was allotted to him and stabled in the shed on May 12, 1960. On the day following both the appellants came to the Station Master and the necessary allotment entry was made in the forwarding note. The loading was done by the appellants without any help from any railway employee and the appellants wanted to be supplied with rivets after the wagon was loaded by them. Such supply being given by the Station Master they put the rivets on the wagon. A railway khalasi examined the rivets, sealed the wagon and fixed card labels on both sides of the wagon prepared by the Station Master. The railway receipt for the goods was made out by the Station Master to the effect that the consignment was "said

to contain" 251 bags of dry chillies. The letters L/U were endorsed on the railway receipt meaning that the responsibility for loading and unloading of the consignment rested with the consignor. There was no facility for weighing the goods at the station and a note was made that the weight was as given by the consignor. This was indicated by the endorsement S. W. A. (sender's weight accepted). The wagon was attached to a goods train on the same day and carried forward out of the station on its way to Calcutta. There were frequent checking of the rivets and the seals of the wagon during the night of 13th May but on the morning of the 14th the seal on one side of the wagon was broken and the seal card lying on the ground. The wagon was detached and taken to a goods shed and checked at about 2 p. m. on 15th May. It was found that the wagon contained only 197 bags of chaff (Bbusa) instead of 251 bags of dry chillies. An entry was made in the station diary and a first information report was lodged on 18th May. The police submitted a charge sheet against the accused and the case proceeded to trial after the commitment enquiry. The prosecution examined several witnesses to establish that the appellants had brought straw to the goods shed at Sheonarayanpur in place of chillies and loaded the wagon therewith. The Sessions Judge did not accept the evidence of some of them but relied upon that of P. W. 8, a cartman who gave testimony to the effect that he along with others had loaded straw in the wagon mentioned.

3. There was evidence before the Sessions Judge that the appellants had obtained a sum of Rs. 5,500 from one Murarilal Jhunjhunwala by handing over the railway receipt to him by representing that they had hooked 251 bags of chillies. The Sessions Judge held that the station master had not checked the goods or verified the weight thereof but had acted on the representation of the appellants. According to him the appellants were guilty of an offence under Section 420 read with Section 34, I. P. C. and he sentenced them as already mentioned.

4. In appeal the learned Judge of the High Court after discussing the evidence felt satisfied that what was found as a result of the checking at 2 p. m. on 15th May, 1960 to be present in the wagon was nothing but the consignment which

had been originally loaded by the appellants at Sheonarayanpur on the afternoon of 13th May, 1960". He further held that

"...the representation made by the appellants to the Station Master (P. W. 39) both orally and in the forwarding note which they had presented to him was a false representation and on the strength of such false representation the appellants had induced the Station Master to make out for them the railway receipt in respect of 251 bags of dry chillies. It is manifest that a valuable security such as a railway receipt is, in respect of 251 bags of chillies had been delivered to the appellants by the Station Master on the basis of the false representation which they had made to him both orally and in the forwarding note". The learned Judge therefore held that the appellants had committed the offence of cheating acting together in pursuance of their common intention.

5. It had been urged that the appellants were not guilty of cheating inasmuch as the Station Master had written on the railway receipt that the consignment in question was said to be 251 bags of dry chillies and thus he could not be said to have acted upon the declaration of the appellants being correct. Similarly with regard to the other endorsement on the railway receipt, "S. W. A." meaning "senders' weight accepted" it was made by the Station Master acting upon the declaration of the appellants.

6. Under Section 415 of the Indian Penal Code a person is said to cheat when he by deceiving another person fraudulently or dishonestly induces the person so deceived to deliver any property to him or to consent that he shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he was not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. There can be no doubt that the appellants had by deceiving the Station Master induced him to deliver a railway receipt which could be used as a valuable security, but assuming that the appellants thereby induced the Station Master to make out the railway receipt it will still have to be shown that the making out of the receipt was likely to cause damage or harm to the railway or the Station Master.

7. We have therefore to examine whether the issue of the railway receipt with the endorsements "said to contain" and "S. W. A." were likely to cause any damage to the railway. Under Sec. 58 of the Indian Railways Act the owner or person having charge of any goods which are brought upon a railway for the purpose of being carried thereon, has to deliver to a railway servant appointed in that behalf an account in writing signed by such owner or person and containing such description of the goods as may be sufficient to determine the rate which the railway administration is entitled to charge in respect thereof. This section casts an obligation on the owner or person having charge of goods to be carried by a railway to give a correct description thereof. Failure in this respect may, under sub-section (3) entitle the railway administration to charge in respect of the carriage of the goods at a rate not exceeding double the highest rate which may be in force at the time on the railway for any class of goods. Under Section 72 a person delivering to a railway administration goods to be carried by railway has to execute a note (forwarding note) in which the sender or his agent has to give such particulars in respect thereof as may be required. Section 73 provides for the general responsibility of a railway administration as a carrier of animals and goods except from any of the causes specified therein. But under the proviso to the section even in the case of loss, destruction etc. from any of the said causes the railway administration is not relieved of its responsibility for the loss, destruction etc., of the goods unless it proves that it has used reasonable foresight and care in the carriage of the goods. Under Section 74 where goods are tendered to a railway administration for carriage at a special reduced rate known as 'the owner's risk rate' then, notwithstanding anything contained in Section 73, the railway administration is not to be responsible for any loss, destruction, damage etc., from whatever cause arising, except upon proof that such loss, damage, destruction etc., was due to negligence or misconduct on the part of the railway administration or any of its servants. Under Section 106 a person requested under Section 58 to give an account with respect to any goods and giving one which is materially false may be punished with fine which may extend to Rs. 150/- for every quintal or

part of a quintal of the goods in addition to any rate or other charge to which the goods may be liable.

8. It is therefore clear that the railway administration may be liable for loss, destruction or non-delivery of the goods under Section 73 if it fails to use reasonable foresight and care in the carriage of the same and would also be similarly liable even in respect of goods carried at special reduced rate if there was negligence and misconduct on its part or any of its servants. Such liability on the part of the railway arises whenever it issues a railway receipt. The question therefore arises as to whether the railway ran any additional risk or liability in acting upon the representation of the appellants and mentioning in the railway receipt the goods consigned were said to be 251 bags of chillies when in fact they were only 197 bags of straw. There can be little doubt that the railway did not run any additional risk. In case the goods were consumed by fire or even stolen from the wagon due to any negligence on the part of railway administration the owner would have to prove that he had put on rail 251 bags of chillies. He would also have to prove the weight of the chillies and the approximate value thereof. For this he would have to call evidence to show how and when he acquired the goods and the price he paid for them and exactly what quantity he loaded in the wagons. There would be no presumption that the goods put in the wagon were chillies because the railway did not accept the consignment as such and described it as 251 bags allegedly containing chillies. Nor was there any acceptance of the weight of the goods by the railway. The endorsement 'S. W. A.' would negate the plea, if any, that the weight was accepted by the railway. The endorsement "L/U" emphasised that the loading and unloading being in charge of the consignor the railway could not be held liable for any negligence in loading or unloading.

9. In this connection reference may be made to the Goods Tariff Rules. Rule 15 of Part I of the Goods Tariff shows that:

"The weight, description and classification of goods and quotation of rates as given in the railway receipt and forwarding note are merely inserted for the purpose of estimating the railway charges and the railway reserves the right of re-measurement, re-weighment, re-classifica-

tion of goods and re-calculation of rates and other charges and correction of any other errors at the place of destination and of collecting any amount that may have been omitted or undercharged. No admission is conveyed by a railway receipt that the weight as shown therein has been received or that the description of goods as furnished by the consignor is correct."

Under Rule 22 (1) every consignment of goods when handed to the railway for despatch must be accompanied by a forwarding note which must be signed by the sender or his authorised agent and must contain a declaration of the weight in accordance with Section 53 of the Indian Railways Act and destination of the goods consigned. Under Rule 24 (2) if a materially false account is delivered with respect to the description of any goods, the person who gives such false account, and if he is not the owner, the owner also, is, on conviction by a Magistrate, liable to a fine which may extend to Rs. 50/- per maund or part of a maund of the goods, and such fine will be in addition to the rate to which the goods may be liable.

10. In *Dominion of India v. Firm Museram Kishunprasad*, AIR 1930 Nag 85 a railway receipt was issued to the consignor qualified with the statement that the wagon was said to contain 255 bags of coconuts. As only 251 bags were received at the destination, the plaintiff made a claim for the price of the 4 bags of coconuts by way of damages. It was held by the Nagpur High Court that there was no proof that 255 bags had in fact been loaded. Referring to Rule 22 of the Goods Tariff General Rules it was said that the receipt issued "qualified the number of stating that the wagon was 'said to contain' 255 bags and the number was mentioned merely to calculate the freight." Reference was also made to Rule 15 under which the mentioning of the weight in the railway receipt did not amount to an admission of the correctness of the statement and according to Nagpur High Court "this rule applies with even more vigour where the railway receipt in addition contains the 'said to contain' remark."

11. In *Union of India v. S. P. L. Lakhu Reddiar*, AIR 1956 Mad 176 a claim was made against the railway for short delivery of 11 bags. The railway receipt showed that the wagon was said to contain 200 bags of white toor. It was urged

there that as the seals were intact at the end of the journey the responsibility for the shortage must lie with the railway. It was pointed out that this would be so if the railway staff had loaded the goods after verifying them and in the circumstances of the case the railway could not be held responsible for any shortage so long as there was no proof of tampering with the seals. The decision in the Nagpur case (*supra*) was followed in Madras and it was held that the endorsement to the effect that the consignment was 'said to contain' a certain number of bags did not amount to any admission on the part of the railway administration that the said number of bags had in fact been loaded.

12. It appears to us that the false representation made by the appellants in obtaining the railway receipt in the form in which it was issued did not cast any additional liability on the railway and the issue of the railway receipt therefore was not likely to cause any damage or harm to the railway. No question of cheating the railway or the Station Master therefore arose in this case and the appeal must be allowed. The appellants are directed to be set at liberty. The fine, if paid, must be refunded.

Appeal allowed.

AIR 1970 SUPREME COURT 840
(V 57 C 183)

(From: Andhra Pradesh)

J. C. SHAH AND K. S. HECDE, JJ.

Somnath Berman, Appellant v. Dr. S. P. Raju and another, Respondents.

Civil Appeal No. 2342 of 1968 with C. M. P. No. 3588 of 1968, D/- 18-10-1969.

Specific Relief Act (1963), Section 9 — Action for ejectment against trespasser — Prior possession of plaintiff is sufficient title notwithstanding that suit is brought more than six months after dispossession. (1883) ILR 9 Cal 130 & (1890) ILR 17 Cal 258 & (1899) ILR 26 Cal 579, Overruled.

Section 9 is no way inconsistent with the position that as against a wrong doer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrong doer cannot successfully resist the suit by showing

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that the title and right to possession are in a third person. Therefore a person having possessory title can get a declaration that he was the owner of the land in suit and an injunction restraining the defendant from interfering with his possession. (1893) 20 Ind App 99 & (1903) ILR 26 Mad 514 & (1884) ILR 8 Bom 371 and AIR 1914 All 54 (2) & (1891) ILR 13 All 537 & AIR 1950 Pat 222, Approved; (1883) ILR 9 Cal 130 & (1890) ILR 17 Cal 256 & (1899) ILR 26 Cal 579, Overruled. (Para 10)

Cases Referred:	Chronological	Paras
(1950) AIR 1950 Pat 222 (V 37) = 31 Pat LT 100, Subodh Gopal Bose v. Province of Bihar		10
(1914) AIR 1914 All 54 (2) (V 1)= ILR 36 All 51, Umrao Singh v. Ramji Das		10
(1903) ILR 26 Mad 514, Narayan Row v. Dharmachar		10
(1899) ILR 26 Cal 579= 3 Cal WN 568, Nisa Chand Gaita v. Kanchiram Bagani		10
(1893) 20 Ind App 99= ILR 20 Cal 834, Ismail Ariff v. Mahomed Ghouse		9
(1891) ILR 13 All 537= 1891 All WN 196, Wali Ahmad Khan v. Ajudhia Kundu		10
(1890) ILR 17 Cal 256, Parmeshur Chowdhry v. Brijo Lal Chowdhry		10
(1884) ILR 8 Bom 371, Krishnarao Yeshwant v. Vasudeo Appaji Ghalikar		10
(1883) ILR 9 Cal 39= 11 Cal LR 342, Debi Churn Baido v. Issur Chunder Manjee		10
(1883) ILR 9 Cal 130= 11 Cal LR 393, Ertaza Hossein v. Bany Mistry		10

The Judgment of the Court was delivered by.

HEGDE, J.:— This appeal has been brought by the 1st defendant in O. S. No. 210 of 1958 on the file of the 1st Additional Judge, City Civil Court, Hyderabad. That was a suit brought by the 1st respondent-plaintiff for possession of the suit property. That suit was dismissed by the trial Court but in appeal the High Court of Andhra Pradesh reversed the decree of the trial Court and decreed the plaintiff's suit for possession. Thereupon this appeal has been brought after obtaining a certificate under Article 133 (1) (a) of the Constitution.

2. The subject matter of the suit is a piece of land in Himayatnagar measuring 2856 sq. yards. The plaintiff's case is that he purchased this land from one Jamsheer Khan with other plots in the vicinity under two sale deeds marked Exhs. P-2 and P-3; thereafter he was in possession of the same; when he was in possession, the second defendant trespassed into the said property and took possession of the same, thereafter he illegally sold the same to the 1st defendant. The defendants denied the plaintiff allegations. They denied that the plaintiff had any title to the suit property or that he was in possession of the same at any time. On the other hand they pleaded that the second defendant who had acquired title to the suit property by adverse possession had sold the same to the 1st defendant in the year 1946.

3. The trial Court came to the conclusion that the plaintiff has not established his title to the suit property. It also held that the plaintiff has not satisfactorily proved that he was in possession of the suit property at any time. In view of those findings it thought that it was not necessary to go into the defendant's plea of adverse possession. In the result it dismissed the plaintiff's suit. In appeal the High Court agreed with the trial Court that the plaintiff has not proved his title to the suit property. It rejected the plea of the defendants that they have perfected their title to the suit property by adverse possession. But differing from the trial Court it came to the conclusion that the plaintiff was put into possession of the suit property by his vendor Jamsheer Khan Sahab in about the year 1930 and he was in possession of the same till about the year 1945, when the second defendant trespassed on the same and took possession of it.

4. In view of the concurrent finding reached by the trial Court and the High Court that the plaintiff has not proved his title, that question was not reopened in this Court. The finding of the High Court that the defendants have not established their plea of title by adverse possession was challenged though feebly. It was contended before us that the plaintiff who based his suit on title and prior possession having failed to establish his title, his suit has to fail. Further the finding of the High Court that the plaintiff was in possession of the said property between 1930 to 1945 was also assailed before us.

5. The appellant claims that he came into the possession of the suit property on the strength of the sale deed executed by the second defendant in his favour on 1-10-1946. The suit from which this appeal arises was initially instituted on the original side of the High Court of Hyderabad in the year 1949. Therefore to establish his claim of title by adverse possession, the 1st defendant must primarily depend on the fact that the second defendant was in possession of the suit property for a period of over nine years before he sold the same to him. Though the second defendant filed a written statement supporting the case of the 1st defendant and though he was present at the time of hearing on several occasions, he was not examined as a witness in this case to support the plea of adverse possession put forward by the defendants. No explanation is forthcoming for his non-examination. This circumstance goes a long way to discredit the defendant's plea of adverse possession. The 1st defendant's evidence as regards adverse possession is of very little significance as his knowledge of the suit property prior to the date he purchased the same is very little. The only other evidence relied on in support of the plea of adverse possession is that of D. W. 2, Shammhu Prashad who claims to have taken the suit property on lease from the second defendant. The lease deed said to have been executed by him is marked as Exh. D/1. It is not explained how the 1st defendant came into possession of Exh. D/1. Though the suit was filed as far back as 1949, Exh. D/1 was produced into Court for the first time in the year 1960. No explanation has been given for this inordinate delay in producing Exh. D/1, (an unregistered document) in Court. According to D. W. 2, the 1st defendant knew about this document as far back as 1950. Under these circumstances, the High Court was fully justified in rejecting the testimony of D. W. 2 and not relying on Exh. D/1. The other evidence adduced by the 1st defendant relating to the plea of adverse possession was not commended for our acceptance. Therefore we need not consider the same. Hence we agree with the High Court that the defendants have failed to establish their plea of adverse possession.

6. Now coming to the evidence relating to the plaintiff's possession of the suit property from the year 1930 to 1945, we

have firstly the oral testimony of the plaintiff. The High Court has accepted the plaintiff's evidence as creditworthy. The plaintiff is a responsible person. He held important offices both under the State Government as well as under the United Nations. Prima facie his evidence is worthy of acceptance. This would be particularly so in view of the non-examination of the second defendant. The question before the trial Court and the High Court was whether the plaintiff was in possession of the suit property between 1930 to 1945 or whether the second defendant was in possession of the same during that period? On this aspect, the evidence is really one sided. The evidence of the plaintiff that he came into possession of the suit property under Exhs. P-2 and P-3 is supported by the recitals in those documents. In considering the question whether Jamsheer Khan, the vendor under Exhs. P-2 and P-3, had put the plaintiff into possession of the suit property, the fact that Jamsheer Khan had no title to the same is not very material. There is no reason to think that the recitals contained in Exhs. P-2 and P-3 as to the delivery of possession are false recitals. There is documentary evidence to show that the plaintiff paid the 'Nazul' for the properties purchased by him under Exhs. P-2 and P-3 after his purchase. It is true that those documents do not show how much 'Nazul' was paid in respect of the suit property but the second defendant has produced no documents to show that he had paid any 'Nazul' in respect of the suit property. Exhibit P-4 is a stamped revenue receipt on a printed form executed in favour of the plaintiff by the Magtadar on August 16, 1939 for Rs. 331/14/4 pies. It relates to the lands which belonged to Jamsheer Khan and situate at Narayanguda. Evidently that recital refers to the lands covered by Exts. P-2 and P-3. It recites that a sum of Rs. 331/14/4 Ps. was received from the plaintiff as 'Nazul' for the period from 15th Ahn 1338 Fasli to the end of the Ahn 1346 Fasli at the rate of Rupees 41/4/5 Ps. per year. The sale under Exhs. P-2 and P-3 was made in 1930. Evidently the 'Nazul' in respect of those properties was in arrears till 1939. The 'Nazul' due under Exhs. P-2 and P-3 comes to Rs. 41/- and odd per year as seen from Exh. P-6.

7. Exhibit P-5 is a letter dated 11-12-1937 received by the plaintiff from Mr.

J. D. M. Dean (P. W. 2), First Divisional Engineer, Hyderabad City. It relates to the construction of a road from Museerabad to Bashir Bagh. It states that under the Firman dated 29th Shaban 56 Hijri, H. E. H. The Nizam was pleased to accord sanction to the acquisition of 20 per cent of the land without any compensation for the construction of road, from the owners of the land and that for the excess land required, compensation will be paid. That letter further mentions that total area of the land belonging to the plaintiff was 7815 sq. yds. out of which 3112 sq. yds. were required for the construction of the road; out of that 1563 sq. yds. being the 20 per cent of the entire area was to be taken without any compensation and the value of the remaining 549 sq. yds. will be paid to the plaintiff. That letter further informed the plaintiff that the value of the additional area which might finally be determined after the marking may be obtained from the department. It is established that road from Musheerabad to Bashir Bagh was laid not only across the plot covered under P. 3 but also across the site purchased under Ex. P-2 in which the suit land is situate. That was obvious because if the road did not touch any portion of Exh. P-2, the entire area of the land belonging to plaintiff would have been only 5114 sq. yds. and not 7815 sq. yds. as mentioned in Exh. P-5. It also establishes that the plaintiff was recognised by the City Improvement Board as the person entitled to compensation in respect of that land. Evidence further discloses that the plaintiff was paid compensation in respect of the land taken from him in excess of 20 per cent referred to earlier. The oral evidence adduced in the case coupled with Exhs. P-2, P-4 and P-5 satisfactorily establishes the fact that the plaintiff was in possession of the suit property till about 1945.

8. In addition to the evidence referred to earlier, the High Court has also relied on two other documents namely Exts. D-8 and D-9, but those documents were produced as additional evidence in the High Court. Their connection with the suit property is not satisfactorily established. Therefore we have excluded them from consideration. If we bear in mind the fact that the question for decision is whether the plaintiff or the 2nd defendant was in possession of the suit property between the years 1930 to 1945, there is

hardly any doubt that the preponderance of evidence is in favour of the plaintiff's case. As seen earlier, the defendants have not produced any reliable evidence to support their case. Hence we agree with the High Court that the plaintiff has succeeded in establishing that he was in possession of the suit property prior to 1945.

9. It was next contended on behalf of the appellant that in a suit for possession brought on the basis of title, the plaintiff cannot succeed unless he proves his title to the suit property as well as its possession within 12 years. According to the appellant, except in a suit under Section 9 of the Specific Relief Act, the plaintiff for succeeding in the suit, has to prove both existing title to the suit property and its possession within 12 years. We are unable to accept this contention as correct. In our opinion the possession of the plaintiff prior to 1945 is a good title against all but the true owner. The defendants who are mere trespassers cannot defeat the plaintiff's lawful possession by ousting him from the suit property. Possessory title is a good title as against everybody other than the lawful owner. In *Ismail Ariff v. Mahomed Ghouse*, (1893) 20 Ind App 99 (PC), the Judicial Committee came to the conclusion that a person having possessory title can get a declaration that he was the owner of the land in suit and an injunction restraining the defendant from interfering with his possession. Therein it was observed that the possession of the plaintiff was a sufficient evidence of title as owner against the defendant.

10. In *Narayana Row v. Dharmachar*, (1903) ILR 26 Mad 514 a bench of the Madras High Court consisting of Bhashyam Ayyangar and Moore, JJ., held that possession is, under the Indian, as under the English law, good title against all but the true owner. Section 9 of the Specific Relief Act is in no way inconsistent with the position that as against a wrongdoer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrongdoer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The same view was taken by the Bombay High Court in *Krishnarao Yashwant v. Vasudev Appaji Ghotikar*, (1884) ILR 8 Bom 371. That was also the view taken by the

Allahabad High Court—See Umrao Singh v. Ramji Das, ILR 38 All 51= (AIR 1914 All 54 (2)), Wali Ahmed Khan v. Ajudhia Kandu, (1891) ILR 13 All 537. In Subodh Gopal Bose v. Province of Bihar, AIR 1950 Pat 222 the Patna High Court adhered to the view taken by the Madras, Bombay and Allahabad High Courts. The contrary view taken by the Calcutta High Court in Debi Churn Boldo v. Issur Chunder Manjee, (1883) ILR 9 Cal 39; Ertaza Houssein v. Bany Mistry, (1883) ILR 9 Cal 130, Purmeshur Chowdhry v. Brij Lal Chowdhry, (1890) ILR 17 Cal 256 and Nisa Chand Gaita v. Kanchiram Bagani, (1899) ILR 26 Cal 579, in our opinion does not lay down the law correctly.

ii. In the result this appeal fails and the same is dismissed with costs. We see no reason to accept any additional evidence in this Court. Hence C. M. P. No. 3588 of 1968 is dismissed, but no costs. Appeal dismissed.

AIR 1970 SUPREME COURT 530

(V 57 C 181)

(From: Bombay)

J. C. SHAH AND K. S. HEGBDE, JJ.

Dattatrayaya Shankarilal Ambalgi and others, Appellants v. The Collector of Sholapur and another, Respondents.

Civil Appeals Nos. 2313 and 2314 of 1966, D/- 17-10-1967.

Land Acquisition Act (1894), Section 54 — Appeal to Supreme Court — Interference with valuation made by High Court — Normal rule — Decision of Bombay High Court, Reversed.

be enforced because it was not executed in the manner required by Article 299 (1) of the Constitution and which was conclusive evidence the valuation by the High Court could not be sustained. Decision of Bombay High Court, Reversed.

(Pars 2, 3)

Cases Referred: Chronological Pars

(1959) AIR 1959 SC 429 (V 46)=

(1959) Supp (1) SCR 401, Spl.

Land Acquisition Officer, Banga-

lore v. T. Adinarayan Setty

The judgment of the Court was delivered by

SHAH, J.:— The appellant is the owner of Final Plot No. 22 in Town Planning Scheme No. III, Sholapur. The land is within the limits of the Sholapur Municipality and admeasures 71 acres. A part of the land measuring 31 acres, 7 gunthas, and 63 2/9 sq. yards was notified on January 23, 1958, under Section 4 of the Land Acquisition Act for compulsory acquisition for a public purpose, viz., a Polytechnic Institute. The Land Acquisition Officer awarded the appellant compensation for the land at the rate of Rs. 2,000/- per acre. In a reference made under Section 18 of the Land Acquisition Act, the Civil Judge, Senior Division, Sholapur, enhanced the compensation to Rs. 3,500/- per acre. The Land Acquisition Officer and the appellant appealed to the High Court of Bombay. In appeal the High Court awarded compensation at the rate of Rs. 2,000/- per acre. With certificate granted by the High Court these two appeals are preferred by the appellant.

3. In valuating the land the High Court failed to appreciate the full significance of a very important piece of evidence which, in our judgment, is practically conclusive. The Government of Bombay desired to acquire the land of the appellant by private agreement. In the view of the Consulting Surveyor to the Government the value of the land could not be less than Rs. 6,000/- per acre. The Sub-Divisional Officer of Sholapur wrote on July 27, 1957 to the City Survey Officer that the land may be purchased from the appellant at the rate of Rs. 6,000/- per acre and an agreement may be obtained from him. Negotiations were then started and on November 20, 1957 a formal agreement was executed by the appellant and the Collector for sale of the land to the Government of Bombay at the rate of Rs. 5,000/- per acre for the Polytechnic Institute. Possession of the land was delivered pursuant to the agreement. But this agreement was not executed in the manner required by Article 299 (1) of the Constitution and was on that account not enforceable against the Government. The State authorities apparently sought to take advantage of this infirmity.

4. The Deputy Secretary to the Government of Bombay, Education Department, wrote to the Collector of Sholapur on March 7, 1958, the following letter:

"Subject:— District Polytechnic, Sholapur — Acquisition of land for locating of the —

Reference:— Your letter No. X/337 dated the 15th February, 1958, on the subject mentioned above.

2. The private property enforcement agreement executed between you and the owners of the land proposed to be acquired for locating the District Polytechnic, Sholapur, is not expressed to be made by the Governor as required by Article 299 (1) of the Constitution and is not binding on Government. In view of this you are requested to direct the Land Acquisition Officer as under:—

(1) In case the amount under the award would be less than the amount of agreement, he should not recognise the agreement and recommend to Government or sanctioning authority the lower amount i.e., the amount under the award.

(2) In case the amount under the award is higher than the amount of the agreement he should accept the lower amount and recommend to Government or sanctioning authority the lower amount under the agreement.

(3) x x x x
Sd/-

Dy. Secy. to the Govt. of Bombay,
Education Department."

A copy of the letter was forwarded to the Prant Officer, Sholapur Division for "immediate necessary action" and it was intimated that the instructions given by Government should be very rigidly followed and compliance reported early.

5. Execution of the agreement to purchase the property is admitted in the letter. The Collector was asked to "direct" the Land Acquisition Officer not to "recognise the agreement" if the amount of compensation payable under the award was less than the rate stipulated in the agreement, and to hold the appellant bound by the agreement if in his view the amount of compensation was "higher" than the stipulated rate. This letter establishes that on behalf of the Government of Bombay the Collector had agreed to purchase the land. There is no dispute that the rate agreed upon was Rs. 5,000/- per acre. This agreement was executed only a few months before the date of the notification under Section 4. The agreement related to the land itself and was strongly probative of the value of the land at Rs. 5,000/- per acre. It is clear from the record that the Collector acted with authority. The Government of Bombay was informed of the agreement, and it never protested against the agreement. If the appellant claimed compensation at a rate higher than the agreed rate his claim would obviously not have been entertained. We fail to see why the rate at which the Government agreed through its Collector to purchase the land is not good and strong evidence of the value of the land. A suit instituted for enforcement of the agreement may not have been enforceable, because the agreement was not executed in the manner required by Article 299 (1) of the Constitution, but the agreement furnished strong evidence of the offer made by the Collector to purchase the land on behalf of the Government at the rate of Rs. 5,000/- per acre.

6. Unfortunately the Trial Court as well as the High Court failed to appreciate the full significance of the letter dated March 7, 1958 which the Deputy Secretary to the Government of Bombay, Education Department, wrote to the Collector. It was undoubtedly open to the Land Acquisition Officer to establish

that the Collector had with a view to benefit the claimant entered into an agreement at an inflated rate. But no such attempt was made. We see no reason to hold that evidence furnished by the letter dated March 7, 1958 of the value of the land under acquisition should be ignored and the value of the land should be determined on the basis of transactions relating to other pieces of land far removed from the date on which the notification under Section 4 of the Land Acquisition Act was issued.

7. The appeals are allowed. The appellant is entitled to compensation at the rate of Rs. 5,000/- per acre, inclusive of 15% solatium. The appellant will be entitled to interest on the amount of compensation at the rate of 4% per annum from the date on which possession was taken. The State will pay the cost of the appellant in this Court as well as in the High Court. One hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 852 (V 57 C 185)

J. C. SHAH, V. RAMASWAMI
AND A. N. GROVER, JJ.

Pushkar Mukherjee and others, Petitioners v. The State of West Bengal, Respondent.

Writ Petn. No. 179 of 1968, D/- 7-11-1968.

(A) Public Safety — Preventive Detention Act (1950), Section 3 (1) (a) and (2) — Preventive detention — Satisfaction of detaining authority — Subjective and not objective, and hence not justiciable — Validity of detention can, however, be challenged on ground of mala fides or that grounds supplied are irrelevant or vague — (Constitution of India, Article 22.)

The satisfaction of the detaining authority to which Section 3 (1) (a) refers is subjective and not objective satisfaction, and so is not justiciable. Therefore, it would not be open to the detenu to ask the Court to consider the question as to whether the said satisfaction of the detaining authority can be justified by the application of objective tests. The reasonableness of the satisfaction of the detaining authority cannot be questioned in a Court of law; the adequacy of the material on which the said satisfac-

tion purports to rest also cannot be examined in a Court of law, except where some of the grounds furnished to the detenu are found to be vague or irrelevant while considering the application of Cls. (i) to (iii) of Section 3 (1) (a) and in that sense are foreign to the Act. AIR 1951 SC 157 Rel. on.

(Paras 5, 6)

The detenu may also challenge the validity of his detention on the ground of mala fides. The detenu may say that the passing of the order of detention was an abuse of the statutory power and was for a collateral purpose. In support of the plea of mala fides, the detenu may urge that along with other facts which show mala fides, the grounds served on him cannot rationally support the conclusion drawn against him by the detaining authority. It is only in this incidental manner that this question can become justiciable; otherwise the reasonableness or propriety of the said satisfaction contemplated by Section 3 (1) (a) cannot be questioned before the Courts.

(Para 7)

(B) Public Safety — Preventive Detention Act (1950), Section 3 (1) — 'Public order', meaning of — Detention can be ordered to prevent subversion of public order but not in aid of maintenance of law and order.

The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection a line of demarcation must be drawn between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals, and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act. A District Magistrate is therefore entitled to take action under Section 3 (1) of the Act to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances. AIR 1966 SC 740 Rel. on.

(Para 8)

(C) Public Safety — Preventive Detention Act (1950), Sections 3 and 7 — Order of preventive detention — Grounds

supplied to detenu containing valid and invalid grounds — Order of detention is illegal — It is not possible to gauge in such cases to what extent bad reasons operated on mind of detaining authority — (Constitution of India, Articles 22 (5) and 32) AIR 1966 SC 740 and AIR 1954 SC 179, Rel. on. (Para 10)

(D) Constitution of India, Articles 22 (5) and 32 — Order of preventive detention — One of grounds extremely vague and not giving sufficient particulars — Constitutional guarantee is infringed — Detention is illegal.

Where the ground of preventive detention supplied to the detenu is extremely vague and gives no particulars to enable the petitioner to make an adequate representation against the order of detention it infringes the Constitutional safeguard provided under Article 22 (5). AIR 1951 SC 157, Rel. on. (Para 14)

The Constitutional requirement that the grounds must not be vague must be satisfied with regard to each of the grounds communicated to the person detained subject to the claim of privilege under Cl. (6) of Article 22 of the Constitution and therefore even though one ground is vague and the other grounds are not vague, the detention is not in accordance with procedure established by law and is therefore illegal. AIR 1953 SC 318 Rel. on. (Para 15)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 740 (V 53) =
1966-1 SCR 709 = 1966 Cri LJ
608, Ram Manohar Lohia v. State
of Bihar 8

(1954) AIR 1954 SC 179 (V 41) =
1954 SCR 418 = 1954 Cri LJ
456, Shibbanlal Saksena v. State
of U. P. 10

(1953) AIR 1953 SC 318 (V 40) =
1953 SCR 708 = 1953 Cri LJ
1241, Ram Krishan Bhardwaj v.
State of Delhi 15

(1951) AIR 1951 SC 157 (V 38) =
1951 SCR 167 = 52 Cri LJ 373,
State of Bombay v. Atma Ram
Shridhar Vaidya 5, 14

Mr. R. L. Kohli, Advocate, amicus
curiae, for Petitioners; Mr. Debabrata
Mukherjee, Sr. Advocate, (Mr. P. K.
Chakravarti, Advocate, with him), for
Respondent.

The following Judgment of the Court
was delivered by

RAMASWAMI, J.: In this case the
petitioners have obtained a rule calling

upon the respondent, viz., the State of
West Bengal to show cause why a writ
of habeas corpus should not be issued
under Article 32 of the Constitution
directing their release from detention
under orders passed under Section 3 (2)
of the Preventive Detention Act, 1950
(Act IV of 1950), hereinafter called the
'Act'.

2. Cause has been shown by Mr.
Debabrata Mukherjee and other Coun-
sel on behalf of the respondent to whom
notice of the rule was ordered to be
given.

3. The case of the petitioners will be
considered in the following three groups:
(1) Petitioners Nos. 2, 4, 5, 6, 16, 17, 20
and 26, (2) Petitioners Nos. 1, 3, 7, 10,
12, 13, 19 and 22, (3) Petitioners Nos. 8,
9 and 21. By the order of this Court
dated October 18, 1968, the cases as re-
gards Petitioners Nos. 11, 14, 15, 18, 23,
24, 25, 27 to 30 were dismissed as they
were reported to have been released.

4. As regards Petitioner No. 5, Subhas
Chandra Bose @ Kanta Bose, the order
of detention was made on January 20,
1968 by the District Magistrate, Howrah
and reads as follows:

"No. 202/C Dated, Howrah, the 20th
January, 1968.

WHEREAS I am satisfied with respect
to the person known as Shri Kanta Bose
@ Subhas Chandra Bose son of Shri
Sishir Kumar Bose of 26, Milmoni Mallick
Lane, P. S. and Distt. Howrah, that with
a view to preventing him from acting in
any manner prejudicial to the mainte-
nance of public order it is necessary so
to do; I, therefore, in exercise of the
powers conferred by Section 3 (2) of the
Preventive Detention Act, 1950 (Act IV
of 1950), I make this order directing that
the said Shri Kanta Bose @ Subhas
Chandra Bose be detained.

Given under my hand and seal of office.
Sd/- D. C. Mookherjee
District Magistrate
Howrah."

On the same date the following grounds
of detention were communicated to the
detenu:

"You are being detained in pursuance
of a detention order made under sub-
section (2) of Section 3 of the Preven-
tive Detention Act, 1950 (Act IV of 1950)
on the following grounds:

2. You have been acting in a manner
prejudicial to the maintenance of public
order by commission of offences of rio-

tous conduct, criminal intimidation and assault as detailed below:—

(a) That on 8-11-65 at about 17.30 hrs. you assaulted Shri Ashutosh Dutta son of Shri Pyari Mohan Dutta of 55, M. C. Ghosh Lane, P. S. Howrah at the crossing of Panchanantala Road and M. C. Ghosh Lane, with knife causing bleeding injuries on his hand.

(b) That on 8-10-60 at about 16.00 hrs. which Shri Mahesh Prosad Bhagat son of Balgobinda Bhagat of 16, Bellilious Road P. S. Howrah was playing in an open field, you along with your associates demanded money from him and on his refusal you hurled cracker on him causing grievous injury on his right leg.

(c) That on 8-6-67 at about 11.40 hrs. you accosted one Sushanta Kumar Ghosh son of Manmatha Ghosh of 2/1/I, Danesh Sk. Lane inside a saloon at 255, Panchanantala Road on previous grudge and being intervened by Shri Shyamal Biswas son of Sandhya Biswas of 255, Panchanantala Road, P. S. Howrah, you whipped out a dagger and assaulted Shri Biswas with the dagger causing injury on his hand.

(d) That on 23-11-67 at about 22.45 hrs. you hurled cracker on A. S. I. B. Kundu of Bantra P. S. while he was coming to Howrah along Panchanantala Road in a wireless van and caused injury to the A. S. I. and damages to the wireless van.

(e) That on 7-1-68 at about 18-20 hrs. you threatened one Satya Narayan Prosad son of Late Purnasattam Prosad of 10, Debnath Banerjee Lane, P. S. Howrah with assault at the crossing of M. C. Ghosh Lane and Bellilious Road.

3. You are hereby informed that you may make a representation to the State Government within 30 days of the receipt of the detention order and that such representation should be addressed to the Assistant Secretary to the Government of West Bengal, Home Department Special Section, Writers' Buildings, Calcutta and forwarded through the Superintendent of the Jail in which you are detained.

4. You are also informed that under Section 10 of the Preventive Detention Act, 1950 (Act IV of 1950) the Advisory Board shall if you desire to be heard in person and that if you desire to be so heard by the Advisory Board you should intimate such desire in your representation to the State Government.

Sd/- D. G. Mookerjee
District Magistrate
Howrah.

On March 19, 1968 the Advisory Board made a report under Section 10 of the Act stating that there was sufficient cause for detention of Sri Kanta Bose @ Subhas Ch. Bose. On March 30, 1968 the Governor of West Bengal confirmed the detention order under Section 11 (1) of the Act.

5. Section 3 of the Act provides:

"3. (1) The Central Government or the State Government may:—

(a) If satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to:—

(i) the defence of India, the relation of India with foreign powers or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance or supplies and services essential to the community, or

(b) if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act 1946 (XXXI of 1946), that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.

(2) Any of the following officers, namely,—

(a) District Magistrates,

(b) Additional District Magistrates specially empowered in this behalf by the State Government,

(c) the Commissioner of Police for Bombay, Calcutta, Madras or Hyderabad,

(d) Collector in the State of Hyderabad,

may if satisfied as provided in sub-cl. (2) and (3) of Clause (a) of sub-section (1) exercise powers conferred by the said sub-section.

(3) When any order is made under this section by an officer mentioned in sub-section (2) he shall forthwith report the fact to the State Government to which he is subordinate together with grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order made after the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by State Government.

(4) When any order is made or approved by the State Government under this section, the State Government shall, as soon as may be, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have bearing on the necessity for the order."

Section 7 is to the following effect:

"7. (1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but not later than five days from the date of detention, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose".

It will be noticed that before an order of detention can be validly made by the detaining authorities specified by Section 3 (2) of the Act, the authority must be satisfied that the detention of the person is necessary in order to prevent him from acting in any prejudicial manner as indicated in Clauses (i) to (iii) of Section 3 (1) (a). It is well settled that the satisfaction of the detaining authority to which Section 3 (1) (a) refers is a subjective satisfaction, and so is not justiciable. Therefore it would not be open to the detenu to ask the Court to consider the question as to whether the said satisfaction of the detaining authority can be justified by the application of objective tests. It would not be open, for instance, to the detenu to contend that the grounds supplied to him do not necessarily or reasonably lead to the conclusion that if he is not detained, he would indulge in prejudicial activities. The reasonableness of the satisfaction of the detaining authority cannot be questioned in a Court of law; the adequacy of the material on which the said satisfaction purports to rest also cannot be examined in a Court of law. That is the effect of the true legal position in regard to the satisfaction contemplated by Section 3 (1) (a) of the Act — See the decision of this Court in the State of Bombay v. Atma Ram Shridhar Vaidya, 1951 SCR 167 = (AIR 1951 SC 157).

6. But there is no doubt that if any of the grounds, furnished to the detenu are found to be irrelevant while considering the application of Clauses (i) to (iii) of Section 3 (1) (a) and in that sense are foreign to the Act, the satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed. Similarly, if some of the grounds supplied to the detenu are so vague that they would virtually deprive the detenu of his statutory right of making a representation, that again may make the order of detention invalid. If, however, the grounds on which the order of detention proceeds are relevant and germane to the matters which fall to be considered under Section 3 (1) (a) of the Act, it would not be open to the detenu to challenge the order of detention by arguing that the satisfaction of the detaining authority is not reasonably based on any of the said grounds.

7. It is also necessary to emphasise in this connection that though the satisfaction of the detaining authority contemplated by Section 3 (1) (a) is the subjective satisfaction of the said authority, cases may arise where the detenu may challenge the validity of his detention on the ground of mala fides. The detenu may say that the passing of the order of detention was an abuse of the statutory power and was for a collateral purpose. In support of the plea of mala fides the detenu may urge that along with other facts which show mala fides, the grounds served on him cannot rationally support the conclusion drawn against him by the detaining authority. It is only in this incidental manner that this question can become justiciable; otherwise the reasonableness or propriety of the said satisfaction contemplated by Section 3 (1) (a) cannot be questioned before the Courts.

8. The question to be considered in the present case is whether grounds (a), (b) and (c) served on Subhas Chandra Bose are grounds which are relevant to "the maintenance of public order". All these grounds relate to cases of assault on solitary individuals either by knife or by using crackers and it is difficult to accept the contention of the respondent that these grounds have any relevance or proximate connection with the maintenance of public order. In the present case we are concerned with detention under Section 3 (1) of the Preventive Detention Act which permits apprehen-

sion and detention of a person likely to act in a manner prejudicial to the maintenance of public order. Does the expression "public order" take in every kind of infraction of order or only some categories thereof? It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act. A District Magistrate is therefore entitled to take action under Section 3 (1) of the Act to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances. In *Ram Manohar Lohia v. State of Bihar*, 1960-1 SCR 709 = (AIR 1960 SC 740), it was held by the majority decision of this Court that the expression "public order" was different and does not mean the same thing as "law and order". The question at issue in that case was whether the order of the District Magistrate, Patna under Rule 30 (1) (b) of the Defence of India Rules, 1962 against the petitioner was valid. Rule 30 (1) (b) provided that a State Government might, if it was satisfied with respect to a person that with a view to preventing him from acting in a manner prejudicial to 'public safety and maintenance of public order' it is necessary to do so, order him to be detained. The order of the District Magistrate stated that he was satisfied that with a view to prevent the petitioner

from acting in any manner prejudicial to the 'public safety and the maintenance of law and order', it was necessary to detain him. Prior to the making of the order the District Magistrate had, however, recorded a note stating that having read the report of the Police Superintendent that the petitioner's being at large was prejudicial to 'public safety' and 'maintenance of public order', he was satisfied that the petitioner should be detained under the rule. The petitioner moved this Court under Article 32 of the Constitution for a writ of *habeas corpus* directing his release from detention, contending that though an order of detention to prevent acts prejudicial to public order may be justifiable an order to prevent acts prejudicial to law and order would not be justified by the rule. It was held by the majority judgment that what was meant by maintenance of public order was the prevention of disorder of a grave nature, whereas, the expression 'maintenance of law and order' meant prevention of disorder of comparatively lesser gravity and of local significance. At page 746 of the Report, *Hidayatullah, J.*, as he then was, observed as follows in the course of his judgment:

"It will thus appear that just as 'public order' in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting 'security of State, law and order' also comprehends disorder of less gravity than those affecting 'public order'. One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression 'maintenance of law and order' the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules." The order no doubt mentioned another ground of detention, namely, the prevention of acts prejudicial to public safety, and in so far as it did so, it was clearly within the rule. But the order of detention must be held to be illegal, though it mentioned a ground on which a legal order of detention could have been based because it could not be said in what manner and to what extent the valid and invalid grounds operated on the mind

of the authority concerned and contributed to the creation of his subjective satisfaction. It was accordingly held that the order of detention made by the District Magistrate was invalid and the petitioner should be set at liberty. In our opinion, the principle laid down in this case governs the decision in the present case also and the order of the District Magistrate, Howrah dated January 20, 1968 must be held to be ultra vires and illegal.

9. The difference between the concepts of 'public order' and 'law and order' is similar to the distinction between 'public' and 'private' crimes in the realm of jurisprudence. In considering the material elements of crime, the historic tests which each community applies are intrinsic wrongfulness and social expediency which are the two most important factors which have led to the designation of certain conduct as criminal. Dr. Allen has distinguished 'public' and 'private' crimes in the sense that some offences primarily injure specific persons and only secondarily the public interest, while others directly injure the public interest and affect individuals only remotely—(See Dr. Allen's Legal Duties, p. 249). There is a broad distinction along these lines, but differences naturally arise in the application of any such test. The learned author has pointed out that out of 331 indictable English offences 203 are public wrongs and 128 private wrongs.

10. The argument was, however, stressed by Mr. Mukherjee on behalf of the respondent that the other grounds, viz., (c) and (d) mentioned in the order of the District Magistrate dated January 20, 1968 are more serious in character and may be held prejudicial to public order. We shall assume in favour of the respondent that grounds (c) and (d) are matters prejudicial to public order. But even upon that assumption the order of detention must be held to be illegal. It is now well established that even if any one of the grounds or reasons that led to the satisfaction is irrelevant, the order of detention would be invalid even if there were other relevant grounds, because it can never be certain to what extent the bad reasons operated on the mind of the authority concerned or whether the detention order would have been made at all if only one or two good reasons had been before them. — (See the decisions of this Court in *Shibban Lal Saxena v. The State of Uttar*

Pradesh, 1954 SCR 418 = (AIR 1954 SC 179) and *Dr. Ram Manohar Lohia v. State of Bihar*, 1966-1 SCR 709 = (AIR 1966 SC 740).)

11. For these reasons we hold that the order of detention made by the District Magistrate, Howrah under S. 3 (2) of the Act dated January 20, 1968 against the petitioner Subhas Chandra Bose @ Kanta Bose and the consequent order made by the Governor dated March 30, 1968 confirming the order of detention under Section 11 (1) of the Act must be declared to be illegal and accordingly the petitioner, Subhas Chandra Bose @ Kanta Bose is entitled to be released from custody forthwith.

12. In the case of petitioners 2, Sukumar Chaudhury, No. 4, Tarapada Bhowmick, No. 6, Golam Rasul Mollick, No. 16 Sk. Sharafat, No. 17, Hanif Mirza, No. 20, Sk. Mana, and No. 26, Chittaranjan Majhi, the orders of detention suffer from the same defect as that in the case of petitioner No. 5, Subhas Chandra Bose @ Kanta Bose. For the reasons already given we hold that the orders of detention made under Section 3 (2) of the Act and the orders of confirmation by the State Government under S. 11 (1) of the Act in the case of all these petitioners are illegal and ultra vires and these petitioners are also entitled to be set at liberty forthwith.

13. We pass on to consider the case of the petitioners mentioned in Group 2. As regards Pushkar Mukherjee, Petitioner No. 1, the order of detention was made by the District Magistrate, 24-Parganas on September 19, 1967 and reads as follows:

"Whereas I am satisfied with respect to the person known as Shri Puskar Mukherjee, son of Late Jaladhar Mukherjee, Madhyamgram (Bireshpally), P. S. Baraset, Dist. 24-Parganas that with a view to preventing him from acting in a manner prejudicial to the maintenance of public order, it is necessary so to do.

And, therefore, in exercise of the power conferred by Section 3 (2) of the Preventive Detention Act, 1950 (Act IV of 1950) I make this order directing that the said Shri Puskar Mukherjee, son of Late Jaladhar Mukherjee be detained.

Sd/- B. Majumdar,
District Magistrate
24-Parganas."

The grounds of detention were served upon the detenu on the same date and are to the following effect:

"Grounds for detention under sub-section (2) of Section 3 of the Preventive Detention Act 1950 (Act IV of 1950). —

To

Shri Pushkar Mukherjee,
s/o Late Jaladhar Mukherjee,
of Madhyamgram (Biresb Pally),
P. S. — Baraset, District, 24-Parganas,

In pursuance of the provision of Section 7 of the Preventive Detention Act, 1950 (Act IV of 1950) as amended by the Preventive Detention (Amendment) Acts, 1952 and 1954, you Shri Puskar Mukherjee, s/o Late Jaladhar Mukherjee of Madhyamgram (Biresb Pally), P. S. Baraset, 24-Parganas are hereby informed that you are being detained under Section 3 (1) (a) (ii) of the Preventive Detention Act, 1950 on the following grounds:

I. That you have been acting in a manner prejudicial to the maintenance of public order by the commission of offences of riotous conduct, criminal intimidation and assault as detailed below:—

(i) That on 26-3-1967 at about 11.00 hrs. you along with your associates Harisikesh Samadder and others being armed with dagger, spear and iron rods demanded money for drinks from Shri Joy Nath Roy in his Khatal at Katakhal Ganga Nagar, P. S. Baraset and on his refusal to pay the money you along with your associates dragged him out of his room and assaulted him and his friend Sudhir Ghose causing injuries on their persons.

(ii) That on 19-6-1967 evening you along with your associates threatened Sushil Kumar Chakraborty of Madhyamgram with assault when he was returning home from New Barrackpore Rly. Station apprehending that he might inform the police for your arrest in connection with Baraset P. S. Case No. 58 dated 24-3-1967 u/s 302/394 I. P. C. which was pending investigation.

(iii) That on 8-7-1967 at about 22.00 hrs. you along with your associates Kalyan Chakraborty and others again threatened Shri Sushil Kumar Chakraborty of Madhyamgram with assault out of previous grudge when he was returning to his house from New Barrackpore Rly. Stn.

(iv) That you were detained for your rowdy activities u/s 30 (1) of the D. I. Rules 1902 from 22-4-1964 under Government Order No. 1233 H. S. dated 15-4-1964 and was released from detention on 4-10-1965.

(v) That for your rowdy activities you were detained on 19-9-1963 under P. D.

Order No. 163/66 which was confirmed under Govt. Order No. 8999 H. S. dated 26-11-1966 and you were released from such detention on 13-3-1967 under Order No. 1095 H. S. dated 13-3-1967, during general release.

II. Thus from your activities subsequent to your release from detention under the P. D. Act on 13-3-1967 it appears that the detention did not produce the sobering effect on you. You have become a menace to the society and there have been disturbance and confusion in the lives of peaceful citizens of Baraset and Khardah P. S. areas under 24-Parganas District and the inhabitants thereof are in constant dread of disturbances of public order.

III. For the above reasons, I am satisfied that you are likely to act in a manner prejudicial to the maintenance of public peace and order, and therefore, I have passed an order for your detention to ensure the maintenance of Public Order.

IV. You are further informed that you have right to make a representation in writing against this order under which you are detained. If you wish to make such a representation, you should address it to the Assistant Secretary Govt. of West Bengal (Home Special) Department Writers' Buildings, Calcutta through the Superintendent of your Jail as soon as possible. Your case will be submitted to the Advisory Board within 30 days of your detention and your representation if received later, may not be considered by the Board.

V. You are also informed that under Section 10 of the Preventive Detention Act 1950 (Act IV of 1950), the Advisory Board, shall, if you desire to be heard, hear you in person and that if you desire to be so heard by the Advisory Board you should intimate such desire in your representation to the State Government.

Sd/- B. Majumdar

District Magistrate, 19-9-67.
24-Parganas."

On May 23, 1968, the Advisory Board reported that there was sufficient cause for detention of the detenu. On June 12, 1968 the Government of West Bengal confirmed the order of detention under Section 11 (1) of the Act.

14. It appears to us that ground No. 2 is extremely vague. Ground No. 2 states "You have become a menace to the society and there have been disturbances"

and confusion in the lives of peaceful citizens of Baraset and Khardah P. S. areas under 24-Parganas District and the inhabitants thereof are in constant dread of disturbances of public order." It is manifest that this ground is extremely vague and gives no particulars to enable the petitioner to make an adequate representation against the order of detention and thus infringes the Constitutional safeguard provided under Article 22 (5). Reference may be made in this connection to the decision of this Court in 1951 SCR 167 = (AIR 1951 SC 157) in which Kania, C. J., observed as follows:

"What is meant by vague? Vague can be considered as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. It is however improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it. That is a matter of detail which has to be examined in the light of the circumstances of each case. If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague. The only argument which could be urged is that the language used in specifying the ground is so general that it does not permit the detained person to legitimately meet the charge against him because the only answer which he can make is to say that he did not act as generally suggested. In certain cases that argument may support the contention that having regard to the general language used in the ground he has not been given the earliest opportunity to make a representation against the order of detention. It cannot be disputed that the representation mentioned in the second part of Article 22 (5) must be one which on being considered may give relief to the detained person."

15. It was, however, argued by Mr. Debabrata Mukherjee on behalf of the respondent that even though ground No. 2 may be vague, the other grounds supplied to the detenu are not vague and full and adequate particulars have been furnished. But it is well established that

the Constitutional requirement that the grounds must not be vague must be satisfied with regard to each of the grounds communicated to the person detained subject to the claim of privilege under clause (6) of Article 22 of the Constitution and therefore even though one ground is vague and the other grounds are not vague, the detention is not in accordance with procedure established by law and is therefore illegal—(See the decision of this Court in *Ram Krishan Bhardwaj v. The State of Delhi*, 1953 SCR 708 = (AIR 1953 SC 318). For these reasons we hold that the order of detention made against the petitioner, Pushkar Mukherjee by the District Magistrate, 24-Parganas on September 19, 1967 and the consequent order of the Governor of West Bengal dated June 12, 1968 confirming the order of detention were illegal and ultra vires and the petitioner is entitled to be set at liberty forthwith.

16. In the case of Petitioners No. 3, Barun Kumar Hore, No. 7, Kartick Dey, No. 10, Ajit Basak, No. 12, Sk. Idris, No. 13, Shamsuddin Khan, No. 19, Khokan Nitra and No. 22, Ranjit Kumar Ghosal, the orders of detention suffer from the same legal defect as the order of detention in the case of Petitioner No. 1, Pushkar Mukherjee. For the reasons already stated, we hold that the orders of detention and the orders of confirmation made by the State Government under Section 11 (1) of the Act in the case of these seven petitioners also are illegal and ultra vires and these petitioners are also entitled to be set at liberty forthwith.

17. As regards the cases of the remaining petitioners, Nos. 8, 9 and 21, Chandan P. Sharma, Sk. Sahajahan and Bind Parmeshwar Prasad alias Binde-swari Prasad respectively, we have perused the orders of detention and the grounds supplied to these petitioners. It is not shown by learned Counsel on their behalf that there is any illegality in the orders of detention or in the subsequent procedure followed for confirming these orders. In our opinion, no ground is made out for grant of a writ of habeas corpus so far as these petitioners are concerned. Their applications for grant of a writ of habeas corpus are accordingly rejected.

18. We desire to say that we requested Mr. Kohli to assist us on behalf of the petitioners and we are indebted to him for his assistance.

Order accordingly.

AIR 1970 SUPREME COURT 860
(V 57 C 186)

(From: Industrial Tribunal—Andhra Pradesh)*

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

Workmen of the Indian Leaf Tobacco Development Co., Ltd., Guntur, Appellants v. The Management of Indian Leaf Tobacco Development Co. Ltd., Guntur, Respondent.

Civil Appeal No. 556 of 1960, D/- 27-9-1968.

Industrial Disputes Act (1947), Section 10 (1) (d) — Industrial Tribunal — Powers to entertain reference — Decision by Company to close down some of its depots — Tribunal cannot interfere with it — Retrenchment whether justified can, however, be considered.

No Industrial Tribunal, even in a reference under Section 10 (1) (d) can interfere with discretion exercised by a company in the matter of closing down some of its branches or depots. Even if such closure may not amount to closure of business of the Company, the Tribunal has no power to issue orders directing a Company to reopen a closed depot or branch, if the Company, in fact, closes it down and that closure is genuine and real. The closure may be treated as stoppage of part of the activity or business of the Company. Such stoppage of part of a business is an act of management which is entirely in the discretion of the Company carrying on the business. Of course, if a Company closes down a branch or a depot the question can always arise as to the relief to which the workmen of that branch or depot are entitled and, if such a question arises and becomes the subject-matter of an industrial dispute, an Industrial Tribunal is fully competent to adjudicate on it, and it is competent for the Tribunal to decide whether the claim of the workmen that they should not be retrenched is justified. AIR 1957 SC 95 and 1953 Lab AC 563, Explained.

(Paras 4, 6, 7 and 8)

Where the closure of some depots by a Company is genuine and real and not only a device adopted for carrying on the same business in a different manner,

* (Industrial Dispute No. 41 of 1963, D/- 13-8-1964—Indl. Tribunal — Andhra Pra.)

the workmen who are retrenched due to such closure are entitled to retrenchment compensation only and cannot claim any re-employment or reinstatement.

(Para 10)

Cases Referred: Chronological Paras
(1957) AIR 1957 SC 95 (V 41)=

1950 SCR 872, Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union 4, 8

(1953) 1953 Lab AC 563, Employees of M/s. India Reconstruction Corporation Ltd., Calcutta v. M/s. India Reconstruction Ltd., Calcutta 4, 8

Mr. M. K. Ramamurthi, Mrs. Shyamala Pappu and Mr. Vineet Kumar, Advocates, for Appellants; M/s. K. Srinivasamurthy and Naunit Lal, Advocates, for Respondent.

The Judgment of the Court was delivered by

BHARGAVA, J.: This appeal, by special leave, has arisen out of an award made by the Industrial Tribunal, Andhra Pradesh, at Hyderabad in an industrial dispute between the respondent, the Indian Leaf Tobacco Development Company Limited, Guntur (hereinafter referred to as 'the Company'), and its workmen. Admittedly, the Company is an associate of the Imperial Tobacco Company Ltd., and the main business carried on by the Company is that of purchasing tobacco of all varieties and qualities, stemming, grading and packing of tobacco and supplying it to the Imperial Tobacco Company as well as exporting the tobacco to various foreign countries in the world. The Company has been carrying on this business for about 40 years and handles almost 35 per cent of the tobacco grown in the State of Andhra Pradesh. For the work of stemming, grading and packing tobacco, the Company has two factories, one at Anaparthi in East Godavari District, and the other at Chirala in Guntur District. In connection with this business, the Company, in the year 1962, was maintaining 21 depots where, according to the workmen, the appellants, the Company was carrying on the work of collecting tobacco though the Company's case was that the principal work done at these depots was that of handling the tobacco purchased at other places and only included the work of purchasing tobacco on a small scale.

2. On 16th August, 1963, the Company gave a notice to the Union of the

appellant workmen that 8 out of 21 depots mentioned therein would be closed down with effect from 30th September, 1963. Thereafter, an industrial dispute was raised by the workmen which related to the closure of these 8 depots, as well as to a number of other demands, including revision of basic wages and dearness allowance, additional discomfort allowance, etc. The State Government, by its order dated 14th November, 1963, referred the dispute for adjudication under Section 10 (1) (d) of the Industrial Disputes Act, 1947 to the Industrial Tribunal, Hyderabad. The first issue, which was referred for adjudication, was as follows:—

“How far the demands of the union, viz., (i) that no depot which worked during 1962 season should be closed, and (ii) that no workman who worked in 1962 season should be retrenched are justified?” There were ten other issues, but we need not reproduce them, as we are not concerned with them in this appeal.

3. In the proceedings for adjudication, the Company took a preliminary objection that the closure of the depots was a managerial function, that there could not be an industrial dispute over such closure, that the Government, therefore, had no power to refer this issue for adjudication, and that the Tribunal also had no power to adjudicate on it. Thereupon, the Tribunal framed a preliminary issue as to “whether the employer is justified in alleging that Issue No. 1 framed by the Government cannot be deemed to relate to an industrial dispute, and as such, whether the Government had the power to refer it for adjudication.” The Tribunal decided this preliminary issue by giving an interim award on the 13th August, 1964. The preliminary objection was allowed and a further direction was made that the effect of this decision on Issue No. 1 will be decided later after hearing the parties. Thereafter, the Tribunal proceeded to hear the reference on this question as well as on all other issues referred to it and ultimately, gave its award on 11th December, 1964. In that award, both the parts of issue No. 1 were decided against the workmen. The workmen have now come up in this appeal against the interim award dated 13th August, 1964 as well as against the final award insofar as it relates to issue No. 1.

4. The decision given by the Tribunal in the interim award, holding that

the reference covered by issue No. 1 was not competent, has been challenged by learned counsel for the appellants on the ground that the closure of a depot does not amount to closure of business in law and, since the same business was continued by the Company at at least 13 other depots, the closure of the 8 depots in question was unjustified. For the proposition that the closure of the depots did not amount to closure of business, learned counsel relied on the views expressed by this Court in *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union*, 1956 SCR 872 = (AIR 1957 SC 95), where the Court explained the reason for the decision given by the Labour Appellate Tribunal in the case of *Employees of M/s. India Reconstruction Corporation Ltd., Calcutta v. M/s. India Reconstruction Corporation Ltd., Calcutta*, 1953 Lab AC 563. It, however, appears to us that this question raised on behalf of the appellants is totally immaterial insofar as the question of the jurisdiction of the Tribunal to decide the first part of issue No. 1 is concerned. The closure of the 8 depots by the Company, even if it is held not to amount to closure of business of the Company, cannot be interfered with by an Industrial Tribunal if, in fact that closure was genuine and real. The closure may be treated as stoppage of part of the activity or business of the Company. Such stoppage of part of a business is an act of management which is entirely in the discretion of the Company carrying on the business. No Industrial Tribunal, even in a reference under S. 10 (1) (d) of the Industrial Disputes Act, can interfere with discretion exercised in such a matter and can have any power to direct a Company to continue a part of the business which the Company has decided to shut down. We cannot possibly accept the submission made on behalf of the appellants that a Tribunal under the Industrial Disputes Act has power to issue orders directing a Company to reopen a closed depot or branch, if the Company, in fact, closes it down.

5. An example may be taken of a case where a Bank with its headquarters in one place and a number of branches at different places decides to close down one of the branches at one of those places where it is functioning. We cannot see how, in such a case, if the employees of that particular branch raise an industrial dispute, the Bank can be directed

by the Industrial Tribunal to continue to run that branch. It is for the Bank to decide whether the business of the branch should be continued or not, and no Bank can be compelled to continue a branch which it considers undesirable to do.

6. In these circumstances, it is clear that the demand contained in the first part of Issue No. 1 was beyond the powers and jurisdiction of the Industrial Tribunal and was incorrectly referred for adjudication to it by the State Government.

7. Of course, if a Company closes down a branch or a depot, the question can always arise as to the relief to which the workmen of that branch or depot are entitled and if such a question arises and becomes the subject-matter of an industrial dispute, an Industrial Tribunal will be fully competent to adjudicate on it. It is unfortunate that, in this case, when dealing with the preliminary issue, the Tribunal expressed its decision in the interim award in general words, holding that Issue No. 1 as a whole was beyond its jurisdiction. If the reasoning in the interim award is taken into account, it is clear that the Tribunal on that reasoning only came to the conclusion that it was not competent to direct reopening of the 8 depots which had been closed, so that the Tribunal should have held that the first part of Issue No. 1 only was outside its jurisdiction.

8. So far as the second part of that issue is concerned, as we have said above it was competent for the Tribunal to go into it and decide whether the claim of the workmen that they should not be retrenched was justified. On an examination of the interim award and the final award, we, however, find that the Tribunal in fact did do so. The case reported in *Pipraich Sugar Mills Ltd., 1956 SCR 572 = (AIR 1957 SC 95)* (supra) was also concerned only with the question as to the relief that can be granted to workmen when there is closure of a business. No question arose either before the Court or in the cases considered by the Court, of an Industrial Tribunal making a direction to the employers to continue to run or to reopen a closed branch of the business. The Labour Appellate Tribunal in the case of *Employees of Messrs. India Reconstruction Corporation Ltd., Calcutta 1953 Lab AC 563* (supra) was dealing with the question of retrenchment compensation as a result of the closure of

one of the units of the company concerned, and it held that the workmen were entitled to retrenchment compensation in accordance with law. This Court in the case of *Pipraich Sugar Mills Ltd., 1956 SCR 572 = (AIR 1957 SC 95)* (supra) only explained why the Labour Appellate Tribunal was justified in granting retrenchment compensation in that case. The opinion expressed by the Court was that, though there is discharge of workmen both when there is retrenchment and closure of business, the compensation is to be awarded under the law, not for discharge as such but for discharge on retrenchment, and if, as is conceded, retrenchment means in ordinary parlance discharge of the surplus, it cannot include discharge on closure of business. It was in this context that the Court went on to add that in the case of *Employees of M/s. India Reconstruction Corporation Ltd., Calcutta, 1953 Lab AC 563* (supra) what had happened was that one of the units of the Company had been closed which would be a case of retrenchment and not a case of closure of business. It may be noted that, at the time when this decision was given, Section 25FF and Section 25FFF had not been introduced in the Industrial Disputes Act, and the only right to retrenchment compensation granted to the workmen was conferred by Section 25F. It was in the light of the law then prevailing that the Court felt that the decision of the Labour Appellate Tribunal in the case of *Employees of M/s. India Reconstruction Corporation Ltd., 1953 Lab AC 563* (supra) granting retrenchment compensation could be justified on the ground that the services of the workmen had not been dispensed with as a result of closure of business, but as a result of retrenchment. That question does not arise in the case before us. Since then, as we have indicated above, Section 25FF and Section 25FFF have been added to the Industrial Disputes Act, and the latter section specifically lays down what rights a workman has when an undertaking is closed down. In a case where a dispute may arise as to whether workmen discharged are entitled to compensation under Section 25F or Sec. 25FFF, it may become necessary to decide whether the closure, as a result of which the services have been dispensed with, amounts to a closure in law or not. In the case before us, it was admitted by learned counsel for both par-

ties that the workmen, who have been discharged as a result of the closure of the 8 depots of the Company, have all been paid retrenchment compensation at the higher rate laid down in Section 25F, so that, in this case, it is not necessary to decide the point raised on behalf of the workmen.

9. In connection with the second part of issue No. 1, it was also urged by learned counsel for the appellants that the business, which was being carried on at the 8 depots, had not in fact been closed down and had merely been transferred to buying points situated in and around the closed depots, including two new buying points established by the Company after the closure of these 8 depots. The argument was that the workmen were old employees who had served the Company for a long time and were entitled to certain benefits as a result of that long service. The Company closed these 8 depots mala fide with the object of depriving the workmen of those benefits and merely altered the nature of the business by closing the depots and carrying on the same business at the buying points. This point urged by learned counsel cannot, however, be accepted in view of the findings of fact recorded by the Tribunal.

10. The Tribunal examined in detail the allegations made on behalf of the workmen in this respect. In fact, the interim award mentions that, for the purpose of deciding the preliminary issue and the first issue, evidence was recorded by the Tribunal for more than a week and arguments of Advocates of the parties were heard for even a longer period. After examining the evidence, the Tribunal came to the conclusion that the stoppage of the work at the depots was genuine and that the work which was being carried on at the depots had not been transferred to the buying points established by the Company. The closure of the business at the depots was necessitated by reasons of expediency inasmuch as the Company had to reduce its purchases in its quest for quality and its desire to run the business economically. The principal work, which used to be done at the depots, was not that of purchasing tobacco, but of handling it and that work was not transferred at all to any buying point. The Tribunal, thus, came to the finding that the closure of these depots was real and genuine and that the suggestion of the appellants that

only a device was adopted of carrying on the same business in a different manner had no force at all. If the same business had been continued, though under a different guise, the claim of the workmen not to be retrenched could possibly be considered by the Tribunal; but, on the finding that there was a genuine closure of the business that used to be carried on at the depots, no question could arise of the retrenchment being set aside by the Tribunal. The Tribunal could not ask the Company to re-employ or reinstate the workmen, because there was no business for which the workmen could be required. In these circumstances all that the workmen could claim was compensation for loss of their service and in that respect, as we have indicated above, the workmen have received adequate compensation.

11. Consequently, the appeal has no force and is dismissed; but we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 863
(V 57 C 187)

(From: Calcutta)*

J. C. SHAH AND V. RAMASWAMI, JJ.

Alamohan Das and others, Appellants
v. The State of West Bengal, Respondent.

Criminal Appeal No. 129 of 1966, D/-
26-10-1968.

(A) Criminal P. C. (1898), Ss. 439,
207A — Revision against order of commitment — Interference when justified.

Normally the High Court in a revision application filed against the order of commitment under Section 207A does not enter upon a reappraisal of the evidence on which the order of commitment is made. Interference in revision is justified only where a substantial question of law arises on which the correctness of the order of commitment may be effectively challenged, where there is no evidence on which the order of commitment could be made, where there has been denial of a right to fair trial, where there is reason to think because of failure to comply with the rules of procedure or conditions precedent to initiation

*(Criminal Revn. No. 309 of 1966, D/-
21-3-1966 — Cal.)

CN/CN/F504/68/DVT/A

of criminal proceedings, where by ignoring the substantive law which constitutes the offence, or misconception of evidence on matters of importance grave injustice has resulted, and on similar other grounds. But in other cases, interference with the order of the Magistrate committing the accused for trial may not be justified and the trial before the Court of Session should be allowed to run its course. Criminal Revn. No. 309 of 1966, D/- 23-3-1966 (Cal), Affirmed. (Para 7)

(B) Criminal P. C. (1898), Secs. 207A, 209 — Enquiry preparatory to commitment — Object — Accused when can be discharged.

In terms Section 209 applies to cases which are instituted otherwise than on a police report. But the principle underlying that section applies to cases which are instituted on a police report. A Magistrate holding an enquiry preparatory to commitment is not intended to act merely as a recording machine. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is his duty to discharge the accused; if there is some evidence on which a conviction may reasonably be based, he must commit the case. The Magistrate at that stage has no power to evaluate the evidence for satisfying himself of the guilt of the accused. The question before the Magistrate at that stage is whether there is some credible evidence which would sustain a conviction. (Para 10)

M/s. A. K. Sen, Senior Advocate, (M/s. P. K. Chatterjee, M. M. Kshatriya and G. S. Chatterjee, Advocates, with him), for Appellants; Mr. B. Sen, Senior Advocate (Mr. P. K. Chakravarti, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

SHAH, J.:— Mahendra Lal and Prokhat Kumar Sarkar were the promoters, and Alamohan Das was the first Chairman of the Board of Directors of the Great Indian Steam Navigation Company Ltd., Messrs. Das Brothers of which Alamohan Das was the sole proprietor became the managing agents of the Company in 1945. On July 2, 1951, Das Group Ltd. of which also Alamohan Das was the principal Director took over the managing agency.

2. The Registrar of Companies West Bengal filed a complaint in the Court of the Chief Presidency Magistrate alleging that sometime between March 1, 1945 and December 31, 1947 a sum of Rupees 7,23,031-9-6 was advanced by the Company to the Managing Agents, Messrs. Das Brothers; that on July 2, 1951 Messrs. Das Brothers resigned from the managing agency and Messrs. Das Group Ltd., took over the managing agency; that Alamohan Das was at all material times a director of the company and also a director of Messrs. Das Group Ltd., and the sole proprietor of Messrs. Das Brothers; and that the complainant had reason to believe that Alamohan Das with other directors of the company had committed offences under Sections 86-D and 87-D of the Indian Companies Act, 1913. The complainant requested that a thorough investigation be made to the matter. The Chief Presidency Magistrate, Calcutta, referred the case to the police for investigation.

3. In the course of investigation of the complaint referred to him, Sub-Inspector J. N. Mukherjee filed a First Information against eight persons (including the five appellants in this appeal) charging them with having conspired to commit criminal breach of trust in respect of the company's funds, falsification of accounts and making false returns, balance-sheets and accounts, and in furtherance of the object of the conspiracy with committing offences punishable under Sections 409 and 477-A I. P. Code and under Section 282 of the Indian Companies Act, 1913. After investigation Sub-Inspector Mukherjee submitted on February 29, 1958, a report under Section 173 of the Code of Criminal Procedure in the Court of the Chief Presidency Magistrate for those offences against seven persons including the five appellants.

4. The Presidency Magistrate, 8th Court, to whom the case was transferred for trial, rejected the contention raised by counsel for the defence that to a charge made against a director in relation to the affairs of the company, the Indian Penal Code can have no application, and the prosecution, if any, may be instituted under the provisions of the Indian Companies Act alone. The Magistrate also held that it was open to the police officer to whom the case was referred for investigation to submit a

charge-sheet of his own initiative and that the Court had jurisdiction to enquire into the charge so made without the sanction of the High Court. A revision application was filed in the High Court of Calcutta against that order, but the application was rejected.

5. Proceedings were then resumed by the Magistrate on December 5, 1961, and a large number of witnesses were examined before him and several documents were tendered in evidence. On December 3, 1963, the Presidency Magistrate committed the accused to stand trial for offences under S. 120B read with Ss. 409 and 477A, I. P. Code before the Court of Session. He observed:

"...having regard to the entire evidence on record and facts and circumstances of the case, I am convinced prima facie that good grounds exist for framing charge under Section 409 I. P. C. against accused Alamohan Das with charge under Sec. 120B read with Section 409, I. P. Code against (1) Alamohan Das, (2) Sisir K. Das (3) Nara Singha Pal, (4) Mohendra Lal Kundu and (5) Provat Kumar Sarkar, another charge under Section 467 read with Section 34 I. P. Code against (1) Alamohan Das, (2) Nara Singh Pal, and (3) Mohendra L. Kundu for forging Ext. 5, and last under Section 477A against (1) Alamohan Das, (2) Nara Singha Pal, (3) Mohendra Lal Kundu, (4) Pravat Kumar Sarkar and (5) Sisir Kumar Das in respect of falsification of shareholders minute book (Ext. 18) purporting to ratify the action of Alamohan Das regarding the funds of the G. I. S. N. and Co. Ltd."

6. Against this order, a revision application was filed in the High Court of Calcutta which was rejected in limine. Against the order passed by the High Court, this Appeal has been filed with special leave.

7. In the present case the order of commitment was made under Sec. 207A of the Code of Criminal Procedure. Normally the High Court in a revision application filed against the order of commitment under Section 207A will not enter upon a reappraisal of the evidence on which the order of commitment is made. The High Court would be justified in exercising its revisional jurisdiction where a substantial question of law arises on which the correctness of the order of commitment may be effectively challenged, where there is no evidence on which the order of commitment could be made, where there has been de-

nial of a right to fair trial, where there is reason to think because of failure to comply with the rules of procedure or conditions precedent to initiation of criminal proceedings, where by ignoring the substantive law which constitutes the offence or misconception of evidence on matters of importance grave injustice has resulted, and on similar other grounds. But in other cases, interference with the order of the Magistrate committing the accused for trial may not be justified and the trial before the Court of Session should be allowed to run its course.

8. Counsel for the appellants submitted that there was no evidence on which the order of commitment could be made. We do not think that there is any ground for so holding. It was the prosecution case that in order to commit criminal breach of trust in respect of an amount exceeding Rs. 5 lakhs by allowing it to remain with Messrs. Das Brothers — the previous managing agents of the company of which Alamohan Das was the sole proprietor and from whom Messrs. Das Group Ltd., took over the managing agency — a conspiracy was entered into between the seven named persons; and the minutes book of the meeting of the Board of Directors and the shareholders' minutes book were fabricated and criminal breach of trust was committed in respect of the funds belonging to the Company. It is true that in the balance-sheet Ext. 137 for the year ending December 31, 1952, on the assets side in an item 'Sundry Advances (Unsecured)' inclusive of Rs. 5,78,941-7-0 due by a firm in which a Director of the Company was a partner. But this, it is the case of the prosecution, was not supported by any resolution passed by the Board of Directors. By letter dated June 21, 1956, the Additional Registrar of Companies asked the Company to furnish a certified copy of the minutes of the Board of Directors in which the loan had been made to the managing agents of the Company. In reply thereto by letter dated July 12, 1956, the Managing Agents wrote that as the money was held by the managing agent and was not given or treated as a loan, there was no resolution of the Board of Directors in that connection. On September 29, 1956, Additional Registrar of Companies again wrote a letter to the Company enquiring whether the amount of Rs. 5,78,941-7-0 which was lying with the previous managing agents of the Company Messrs. Das Brothers had

since been realised, and if so, the evidence adjusting the liability, and if not, to intimate with material evidence whether any steps had since been taken by the Company for the realization of the dues and how the matter stood in the course of the investigation the officer-in-charge attached a director's minutes book Ext. 5 which contains the minutes of a resolution authorising Alamohan Das to retain the funds of the Company. Therefore, there was some evidence on which the charge for fabrication of the Directors' Minutes Book may be sustained.

9. In dealing with the charge for fabricating the Shareholders' Minutes Book the learned Magistrate has observed that the materials on the record made out a strong prima facie case that Shareholders' Minutes Book Ext. 18 is also a forged document. The circumstances which lent colour to the prosecution, in the view of the learned Magistrate were — (1) that Ext. 18 starts from February 28, 1915, although the Company was incorporated in 1912, (2) in many meetings the signatures of the shareholders were not taken although in some meetings the shareholders signed the minutes book, (3) resolutions of Amaresh Pramanik and Sudhir Kanti Sarkar are not incorporated in the minutes books, (4) some portions in the last page in the agreement (Ext. 20) with the managing agency firm Das Group appear to have been erased out and the agreement was thus tampered with, (5) the minute book Ext. 18 does not incorporate the relevant questions, and there appeared tampering with pagination, (6) the evidence of P. Ws. 8 & 10 regarding their presence or absence, and (7) the testimony of P. Ws. 15 & 24 suggested that most of the persons shown to have attended meetings were at the "beck and call of the accused Alamohan Das". Whether this evidence may justify a conviction cannot be enquired into at this stage. The evidence was prima facie sufficient to frame a charge. The Presidency Magistrate was of the view that a case for framing a charge for committing the case to the Court of Session was made out and the High Court has summarily dismissed the revision application in exercise of its jurisdiction.

10. It was contended before us that under Section 209 (1) of the Code of Criminal Procedure, a charge may be framed only if in the view of the committing Magistrate the evidence on record

is sufficient to justify conviction of the accused. Section 209 of the Code provides:

"When the evidence referred to in Section 208, sub-sections (1) and (3), has been taken, and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly."

In terms Section 209 applies to cases which are instituted otherwise than on a police report. But the principle underlying that section applies to cases which are instituted on a police report. A Magistrate holding an enquiry is not intended to act merely as a recording machine. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is his duty to discharge the accused: if there is some evidence on which a conviction may reasonably be based, he must commit the case. The Magistrate at that stage has no power to evaluate the evidence for satisfying himself of the guilt of the accused. The question before the Magistrate at that stage is whether there is some credible evidence which would sustain a conviction.

11. We do not agree with counsel for the appellants that there was no evidence on which a charge could be framed against the appellants or that the evidence was so totally unworthy of credit that an order recording the conviction against the accused could not be made thereon.

12. The appeal fails and is dismissed. We trust that the case which has been held up for a very long time will be taken up by the Court of Session for trial with the least practicable delay.

Appeal dismissed.

AIR 1970 SUPREME COURT 867

(V 57 C 188)

(From: Industrial Tribunal Punjab)*

V. BHARGAVA AND C. A.

VAIDIALINGAM, JJ.

Management of the Fertilizer Corporation of India Ltd., Appellant v. The Workmen, Respondents.

Civil Appeal No. 131 of 1968, D/- 15-11-1968.

(A) Companies Act (1956), Section 26 — Articles of Association of the Fertilizer Corporation of India Ltd. — Arts. 67 and 110 — Effect — Exercise of powers of the Board of Directors of the Company held was subject to directives by President of India — Company held bound to implement Circular of Central Government dated 26-12-1965 — Company held bound to pay ex gratia payment of bonus to workers.

Reading Articles 67 and 110 together, the exercise of the powers of the Board, of Directors of the company was apart from other restrictions subject to the directives issued by the President of India from time to time, with regard to the conduct of the business of the company or Directors. Any direction given by the President might, in like manner, be varied and annulled. The Directors were bound to give immediate effect to the directives so issued. (Para 23)

On December 21, 1965 the Government of India addressed a communication to the Chairman and Managing Director of the company on the subject of bonus payable to employees in the public sector undertakings.

The Central Cabinet's decision was made known to the workmen who were given the option either to accept Cabinet decision, as conveyed to the Company or the production bonus scheme as formulated by the Company. The workmen declined to opt for the production bonus scheme, but, on the other hand, insisted that bonus must be paid to them according to the Cabinet's decision. Held that the ex gratia payments, claimed by the workmen, were saved by Section 34 (3) of the Bonus Act. As the Company was bound to implement the Circular of the Central Government, dated December 21, 1965, was bound to

pay the ex gratia payment of bonus to the workmen. (Paras 24, 26, 27, 30, 32)

(B) Industrial Disputes Act (1947), Section 24 — Right to strike — Strike held unjustified — Award of Industrial Tribunal Punjab in Reference No. 44 of 1966, Reversed.

The management was prepared to pay at all times the bonus as per the Bonus Act. They had also announced the introduction of the production bonus scheme. They were actively taking part in the conciliation proceedings. The management also made to the Union certain proposals on October 15, 1966 at the conference which 'proposals' the representatives of the workmen promised to discuss with the workmen and give a reply to the management. But, on October, 16, 1966, at a meeting of the workmen, they were incited to go on strike. The receipt of one telegram requesting the Union to put off going on strike by one day was admitted by the President of the Union, but that request was not complied with by the workmen.

Held that all these circumstances clearly showed that the demand of the Union regarding ex gratia bonus could not be considered to be of an 'urgent and serious nature'. They also showed that the launching of the strike was unjustified. Therefore the workmen were not entitled to any wages for the period of the strike. Award of Industrial Tribunal Punjab in Reference No. 44 of 1966, Reversed. (Para 45)

Cases Referred: Chronological Paras (1960) AIR 1960 SC 902 (V 47) = 1960-3 SCR 451, Management of Chandramalai Estate, Ernakulam v. Its Workmen 43

Mr. H. R. Gokhale, Sr. Advocate, (Dr. Anand Prakash, Advocate, Mr. J. B. Dadachanji, Advocate, M/s. J. B. Dadachanji and Co., and Mr. K. P. Bhandare and Miss Bhuvnesh Kumari, Advocates, with him), for Appellant; Mr. A. K. Sen, Sr. Advocate, (M/s. Rameshwar Nath and Mahinder Narain, Advocates of M/s. Rajinder Narain and Co., with him), for Respondents.

The Judgment of the Court was delivered by

VAIDIALINGAM, J.:— This appeal, by special leave, is directed against the award dated November 24, 1967 of the Industrial Tribunal, Punjab, Chandigarh, in Reference No. 44 of 1966.

2. The President of India, by order dated October 31, 1966 referred the fol-

* (Ref. No. 44 of 1966, D/- 8-12-1967 — Ind. Tri. Punjab)

lowing issues for adjudication under Section 10 (1) (d) of the Industrial Disputes Act, 1947 to the Industrial Tribunal, Punjab, Chandigarh:

"1. Whether the workmen are justified in demanding the minimum bonus payable for the years 1964-65, 1965-60 and future years being fixed @ Rs. 110/- and the maximum @ Rs. 360/- per worker? If so, with what details?

2. Whether the action of the management in treating 4 days advance bonus paid for the year 1965-60 as deductible from bonus payable in future years is justified? If so, are any conditions or stipulations necessary and if so with what details?

3. Whether there is any justification for making any amendments in the production bonus-scheme introduced by the management in such a way that it enables payment of bonus to the lower paid workers at higher rates and higher paid workers at lower rates? If so, with what details?

4. Whether the workers are entitled to any wages or compensation for the period of strike viz., 12th October to 31st October, 1963."

It may be stated at the outset that this Court is not concerned with issue No. 3. The question of introduction of production bonus scheme arises only to a limited extent in so far as it has got a bearing on a contention raised by the appellant that the production bonus scheme has been introduced in substitution of ex gratia payment of bonus which was being made by the management. Even as regards the strike period mentioned in issue No. 4, parties were agreed before the Tribunal that the period of strike in respect of which wages or compensation were claimed by the workmen was from 17th October to 31st October 1963 and not from 12th October as stated in issue.

3. The circumstances under which the reference came to be made by the President of India may be stated. The appellant Fertiliser Corporation of India is a limited company incorporated under the Companies Act 1956 and it is also a Government company, as defined in Section 617 of that Act. The Nangal unit of the appellant went into production for the first time during the financial year 1962-63. On October 29, 1963, the appellant issued a Circular regarding the grant of ad hoc bonus of the year 1962-

63. The General Manager states, in the Circular that the management has sanctioned payment of ad hoc bonus to employees of Nangal unit for good performance during the year 1962-63 and that bonus will be payable to all employees who are on the rolls of the Corporation on October 30, 1963 and had completed 1 year's service on March 31, 1963 and whose basic salary on that date did not exceed Rs. 500/- per mensem. The Circular proceeds to state that the amount of bonus payable will be 1 month's basic salary plus dearness allowance, subject to the condition that no employee will get less than Rs. 100/- or more than Rs. 300/-.

4. On December 17, 1964, the appellant issued a circular regarding the grant of bonus and ex gratia payment for the year 1963-64. This circular states that the management has decided to sanction bonus and ex gratia payment to the employees of the Nangal unit on the basis mentioned therein. The principles laid down in this circular regarding payment of bonus and ex gratia payment are: (1) Bonus is being paid to all eligible employees strictly in conformity with the Bonus Commission's recommendation, as accepted by the Central Government, and the said bonus is the minimum bonus payable as per the Bonus Commission's recommendations, equivalent to 4% of the total basic wage and dearness allowance (excluding all other allowances etc.) paid during the year 1963-64. The employees eligible for these payments are those who draw a total basic pay and dearness allowance up to Rs. 1,600/- per mensem and the quantum payable to employees drawing over Rs. 750/- of basic pay and dearness allowance will be limited to what they would get if their pay and dearness allowance were only Rs. 750/- per month. (2) An additional ex gratia payment to be made to all workers drawing basic pay up to Rs. 500/- per month, to the extent that such payment, together with the bonus indicated earlier is equivalent to at least one month's full salary (basic pay plus dearness allowance); and the total payment, i.e., bonus and ex gratia in the case of workers drawing basic pay up to Rs. 500/- per month would be subject to a minimum of Rs. 100/- and maximum of Rs. 300/-. (3) The minimum qualifying service for ex gratia payment will be 3 months and minimum qualifying service for payment of bonus as per

Bonus Commissions recommendation is 30 days.

5. On December 30, 1964 the appellant issued another circular stating that the minimum limit of Rs. 100/- in respect of bonus and ex gratia payment for the year 1963-64, as per its circular dated December 17, 1964 is raised to Rs. 110/- and that the enhanced amount will be paid along with the salary for the month of December 1964.

6. Regarding the grant of bonus for the year 1964-65, another circular was issued by the appellant on September 27, 1965. In this circular it is stated that bonus for the year 1964-65 has been decided to be paid strictly in accordance with legal obligations arising out of the payment of bonus under the Payment of Bonus Ordinance 1965, (Ordinance No. 3 of 1965) (hereinafter referred to as the Ordinance). According to that Ordinance, bonus that is payable is the minimum bonus which will be equivalent to 4% of the total basic pay and dearness allowance (excluding all other allowances) paid during the year 1964-65, or Rs. 40/- whichever is higher. The employees eligible for the bonus will be those who draw a total basic pay and dearness allowance up to Rs. 1,600/- per month, but the quantum of bonus payable to employees drawing total pay and dearness allowance over Rs. 750/- per month will be limited to what it would be if their pay and dearness allowance are only Rs. 750/- per mensem. It may be stated at this stage that the Ordinance was promulgated on May 29, 1965 and the Payment of Bonus Act 1965 (Act XXI of 1965) (hereinafter called the Bonus Act) came into force on September 25, 1965.

7. On December 9, 1965 the Minister of Labour and Employment made a statement in the Lok Sabha regarding a decision having been taken by the Central Cabinet on December 2, 1965. In this statement the Minister has referred to the fact that with the specific approval of the Cabinet ex gratia payments had been allowed in the past by way of bonus to employees drawing upto Rupees 500/- per mensem in some undertakings in the public sector. After referring to the recommendations of the Bonus Commission, the Minister announced the decision of the Cabinet dated December 2, 1965. As the said decision of the Cabinet has been circulated to the appellant, the matters referred to in the said decision will be adverted to by us when we refer

to the letter of the Government addressed to the appellant.

8. On December 21, 1965 the Government of India addressed a communication to the Chairman and Managing Director of the appellant company on the subject of bonus payable to employees in the public sector undertakings. As the claim of the labour in the case, for bonus being paid for 1964-65 and 1965-66 is substantially based upon the decision of the Central Cabinet dated December 2, 1965 and as according to the appellant this communication cannot be considered to be a direction or an order, it is desirable to quote, in extenso, the said communication:

“ No. CH/COORD/64/65
GOVERNMENT OF INDIA
Ministry of Petroleum & Chemicals
(Department of Chemicals)
New Delhi, the 21st December, 1965

To,
Shri Satish Chandra,
Chairman & Managing Director,
Fertilizer Corporation of India Ltd.,
F-43, New Delhi South Extension, Pt. I,
New Delhi.

Subject: Bonus-payable to employees in the Public Sector undertakings—
Sir,

I am directed to refer to the Payment of Bonus Act, 1965 (No. 21 of 1965) which provides for the payment of bonus to persons employed in certain establishments and for matter connected therewith. “Establishment in public sector” is defined in Section 2 (16) of the Act. Further, sub-section (1) of Section 20 lays down that if in any accounting year an establishment in public sector sells any goods produced or manufactured by it or renders any services, in competition with an establishment in private sector, and the income from such sale or services or both is not less than twenty per cent of the gross income of the establishment in public sector for that year, then the provisions of this Act shall apply in relation to such employment in public sector as they apply in relation to a like establishment in private sector. It follows that the provisions of the Act do not apply to such of the establishments in private sector. Notwithstanding the provisions of the Act, it has been decided by Government as a matter of policy that non-competitive public sector undertaking should also make ex gratia payments to their employees of a minimum of 4 (four) per cent of annual gross

earnings of the employees on the same lines as bonus will be payable by public sector undertakings falling within the provisions of the aforesaid act. The benefit of six-year bonus holiday (vide Section 10 of the Act) should be available to non-competitive public sector undertakings.

2. Government have further decided that the following should be the guiding principles for determining the quantum of ex gratia payments to employees of non-competing public sector undertakings:

(i) all non-competing public sector undertakings should pay ex gratia to their employees amounts which they would be liable to pay as bonus if they were to fall within the purview of the Payment of Bonus Act;

(ii) where such an undertaking has made ex gratia payment in the past, the amount of such payment should be treated as absorbed in the amount determined as in (i) above. In other words, any claim of employees to payment determined on the lines of the Bonus Law as an addition to payment on the scale of ex gratia payments in the past, should not be accepted. If the past ex gratia payment had been higher than the amount as worked out as in (i) above, the level of past ex gratia payment should be maintained;

(iii) the principle in (ii) above, shall also be followed in the case of competing public sector undertakings; and

(iv) the applicability of (ii) and (iii) above should be conditional upon the maintenance of the level of performance of the undertaking in individual cases. It is requested that the decisions of Government referred to, may be noted for guidance and necessary action.

Yours faithfully .

Sd/- Nakul Sen

Secretary to Government of India.*

9. Again, on September 9, 1966 the appellant issued a circular regarding payment of bonus for the year 1965-1966. It is stated therein that the management has decided to pay bonus to the employees of the Nangal units for the year 1965-1966 and that statutory bonus equivalent to 4% of basic pay and dearness allowance would be paid strictly in accordance with the provisions of the Bonus Act, 1965. It is further mentioned that in addition to this bonus it has been decided to pay production bonus at 3%

of wages to employees whose maximum scale of pay does not exceed Rs. 1,400/- per mensem. Then the letter proceeds to state as to how exactly the production bonus is to be calculated and paid. The circular further states that in addition to the statutory bonus and production bonus the employees will also be paid '4 days' wages in the form of advance production bonus to be adjusted as and when total bonus payable to the workers exceeds 30 days' wages in future. There was a note appended to this circular on the subject of bonus payments, for the information of workers. That note proceeds to state that as production for the year 1962-63 exceeded the target the management has decided to pay ad hoc bonus equivalent to a month's salary for employees drawing upto Rs. 580/- per month.

10. For the year 1963-64 the employees were entitled to the minimum bonus of 4%, according to the recommendations of the Bonus Commission and that amount of bonus was paid. Though legally the workmen were not entitled to anything more, nevertheless, as the Nangal unit again exceeded the production target for the year 1963-64, the management decided to give an ex gratia payment for good performance so that the bonus as per the Bonus Commission's Report plus the ex gratia payment worked out to a month's wage. But during the year 1964-65 the production exceeded the target and the management decided to pay, in addition to the bonus payable under the Ordinance a performance reward equivalent to half a month's wages. The management was considering to introduce a production bonus scheme to provide an incentive for increased production. This became necessary in view of the advice given by the Labour Law Officer of the company that ex gratia payments should be avoided. The management further states that production bonus scheme has been approved by the Government of India and under that scheme employees are entitled to sums varying from 3% to 3.5% of their wages.

11. In the year 1965-66 the production had not exceeded the target and the employees of Nangal unit became entitled only to the statutory bonus of 4% of their wages, under the Bonus Act and production bonus was not admissible. Ex gratia payment also was ruled out in view of the advice of the Labour Officer and because of the fact that with the

introduction of production bonus scheme all ex gratia payments stood eliminated. But, inasmuch as the workers in the Nangal unit have maintained peace and good industrial relations, the management decided, as a special case, to award production bonus of 3% under the production bonus scheme. The note summed up the position by stating that for the year 1965-66 the Nangal workers were eligible to (a) statutory bonus at 4% of the annual wages under the Bonus Act; (b) production bonus at 3% of the annual wages and (c) 4 days' wages in the form of advance production bonus to give the workmen a month's wages in all, which was to be adjusted as and when the total bonus payable to the workers exceeds 30 days' wages in future.

12. From the circular letters dated September 27, 1965 and September 9, 1966 it will be seen that the management offered to pay only the statutory bonus under the Ordinance and the Bonus Act and that ex gratia payment of bonus has been discontinued. In particular, in the note annexed to the circular of September 9, 1966 the management has taken the specific stand that a production bonus scheme has been introduced and that the said scheme has been approved by the Government of India. They also maintained that with the introduction of the production bonus scheme all ex gratia payments are eliminated.

13. As the appellant did not pay bonus for the years 1964-65 and 1965-66 at the rate at which it was paid for the year 1963-64, the Union submitted a charter of demands to the appellant on August 19, 1966. The Union demanded that bonus should be paid for the years 1964-65 and 1965-66 at the same rate as it had been paid in previous years and that the appellant was bound to act according to the decision of the Central Cabinet, dated December 2, 1965 and communicated to it by the circular letter of the Government of India dated December 21, 1965. That is according to the Union the minimum bonus that a worker was entitled to get was Rs. 110/-. There were certain other demands which are not necessary to consider in this appeal. By this letter the Union also indicated that if the demands were not met within 15 days, it would be forced to adopt agitational approaches to seek compliance with its demands. The management did not comply with this demand regarding payment of bonus and

attempts at mediation failed and the workmen went on strike from October 17, 1966 and the reference to adjudication was made on November 2, 1966.

14. Before the Tribunal the workmen pressed their claim for bonus on the basis contained in their charter of demands. They also raised the plea that the introduction of production bonus scheme had no effect regarding the ex gratia payment of bonus made by the appellant. As the management had not complied with the reasonable demands of the labour and as it was acting in violation of the Cabinet decision, the workmen were justified in going on strike from October 17, 1966 and they were entitled to full wages for the strike period.

15. The appellant resisted the claims of the Union. They raised certain objections regarding the jurisdiction of the Industrial Tribunal to entertain the suit, but that again is not the subject of the present appeal. The management pleaded that the claim for bonus for the years 1964-65 and 1965-66 had to be considered and adjudication made only according to the provisions of the Bonus Act and that the workmen were not entitled to claim anything beyond what was provided in the said Act. No legal claim could be based on ex gratia payments of bonus in the previous years. They accepted the position that under Article 110 of the Articles of Association of the company the President of India could issue directions which become binding on the company, but pleaded that no such directive had been issued by the President. Even assuming that such direction had been issued by the President to the company, the workmen, who were third parties, could not seek to enforce any rights based upon such directives. The appellant Corporation is a public limited company and as such an autonomous statutory body. They further pleaded that the rate of bonus mentioned in the Cabinet decision would become payable only if the level of performance or production was properly maintained and in the case of the Nangal unit the level had not been kept up.

16. The management further averred that in consultation and with the approval of the Central Government the appellant introduced the production bonus scheme with effect from 1965-66 and the said scheme replaced the previous system of ex gratia payments, made on an ad

hoc basis for the initial two years of the Nangal Unit's operation. The production bonus is payable in addition to the statutory bonus which the workmen are entitled to under the Bonus Act. As the Central Government had approved the scheme of payment of statutory bonus and production bonus, in lieu of the past system of making ex gratia and ad hoc payments, the management pleaded that the Cabinet decision of December 2, 1965 stood modified to that extent.

17. Regarding the treating of the 4 days' advance bonus paid for the year 1965-66 as deductible from bonus payable in future years the management pleaded that in order to keep industrial peace and as the new production bonus scheme substituting the old ex gratia payment had come into force the appellant decided to pay advance bonus of 4 days' wages. This advance bonus was specifically stated as being deductible when the total bonus payable to workers in future years exceeded 30 days. Therefore the management averred that they were entitled to adjust this advance payment in future years.

18. The management further pleaded that there was absolutely no justification for the workmen starting agitation from August 27, 1966 nor for going on strike from October 17, 1966. The conciliation proceedings started under the Act had not terminated and the appellant also was participating in the conciliation proceedings and was anxious to meet the demands of the workmen if it was otherwise possible. The production bonus scheme for the year 1965-66 had been announced on September 9, 1966. The strike was both illegal and unjustified and hence the workmen were not entitled to any wages during the strike period.

19. The Industrial Tribunal in its award has held that the appellant was bound to comply with the Cabinet decision dated December 2, 1965 and communicated to it by the Government by its Circular letter dated December 21, 1965. The decision of the Central Cabinet had been publicly announced by the Minister concerned in the Lok Sabha on December 9, 1965. The principles laid down for ex gratia payments by non-competitive public sector undertakings had been made applicable to competitive public sector undertakings also. The Tribunal held that as the appellant was a competitive public sector undertaking and the directions regarding ex gratia

payments of bonus as well as the principles for determining the quantum of such payments had all been laid down in the Circular letter of December 21, 1965 and the appellant was bound to implement those directions, the claim of the labour for such payments for the years in question was perfectly justified. The ex gratia payment to be made under the Cabinet decision was to be in accordance with the level of past ex gratia payments. No doubt such payments were to be made provided the level of performance was maintained.

20. On the materials placed before it, the Tribunal held that the said condition was satisfied. The Tribunal rejected the claim of the appellant that production bonus scheme was introduced in consultation and with the approval of the Central Government and it further held that the introduction of that scheme was not in lieu of the ex gratia payments made on an ad hoc basis in the previous years. The Tribunal has further held that as the decision of the Central Cabinet, dated December 2, 1965 stands and has not been modified in any way by the Government, the management was bound to continue the ex gratia payments. It further held that the striking down, by this Court, of sub-section (2) of Section 34 of the Bonus Act had no effect on the claim made by the Union because the claim of the Union was sufficiently safeguarded by sub-section (3) of Section 34. Ultimately the Tribunal accepted the claim of the workmen for payment of minimum bonus for the years 1964-65 and 1965-66 being fixed at Rs. 110/- and regarding the maximum the Tribunal held that that was a matter of calculation, having regard to the wages of an employee; but it restricted its direction in this regard to the two years in question and declined to express any opinion regarding future years. The Tribunal also negatived the claim of the appellant to treat the 4 days' bonus paid in advance for the year 1965-66 as deductible from the bonus payable in future years. Regarding the wages claimed by the workmen for the period October 17 to October 31, 1966, the Tribunal held that the strike was both legal and justified and it directed the management to pay the workmen half their wages for that period.

21. The same stand that has been taken before the Tribunal by the parties has been urged before us by Mr. Gokhale,

the learned Counsel for the appellant-management and Mr. A. K. Sen the learned counsel for the Union.

22. We shall first consider the correctness of the decision of the Industrial Tribunal regarding the claim of the workmen for ex gratia payment of bonus. We are not inclined to accept the contention of Mr. Gokhale that the appellant was not bound to implement the directions contained in the Circular letter of the Government dated December 21, 1965, containing the Cabinet decision of December 2, 1965, nor his further contention that the claim of the workmen for bonus should have been adjudicated upon exclusively as per the provisions of the Bonus Act without reference to the Cabinet decision.

23. The appellant company, registered under the Companies Act, is no doubt an autonomous unit; but there are several articles in the Articles of Association of the appellant Corporation which give power to the President of India and the Central Government to give directions in the working of the appellant. In fact, it may not be necessary to deal elaborately with this matter as the appellant itself, in sub-paragraph (1) of paragraph 8 of its reply dated January 25, 1967 filed before the Industrial Tribunal, has categorically admitted the position that under article 110 of the Articles of Association of the company the President of India can issue directives which become binding on the company; but the stand taken therein is that no such directive was ever issued by the President. The further stand taken by the appellant is that the production bonus scheme was introduced with the consent and approval of the Central Government and that, on its introduction, the ex gratia payments of bonus were eliminated and, to that extent, the decision of the Central Cabinet, dated December 2, 1965 stood modified. Even in respect of the Central Cabinet decision, relied on by the Union, the stand taken by the appellant, in its letter dated September 21, 1966 to the Chief Conciliation Officer, Punjab was that the Nangal unit had not so far received any instructions from the controlling Ministry regarding the Cabinet decision and that the position with regard to the Cabinet decision would be checked up by the management with their Head Office and the Ministry. Therefore, it will be seen that it was not the case of the appel-

lant that it will not be bound by the Cabinet decision if the decision was there as a fact. We will only refer to Articles 67 and 110 of the Articles of Association of the appellant. Under Article 67 the Board of Directors of the company are entitled to exercise all such powers and to do all such acts and things as the company is authorised to exercise and do, but subject to the provisions of the Act and the directives, if any, the President may issue from time to time as contained in Article 110. Article 110 is as follows:

"110. Notwithstanding anything contained in any of these articles, the President may, from time to time, issue such directives as he may consider necessary in regard to the conduct of the business of the Company or Directors thereof and in like manner may vary and annul any such directive. The Directors shall give immediate effect to directives so issued." Reading the two articles together, the position is very clear that the exercise of the powers of the Board of Directors of the company is, apart from other restrictions, subject to the directives, if any, issued by the President from time to time with regard to the conduct of the business of the company or Directors. Any direction given by the President may, in like manner, be varied and annulled. The Directors are bound to give immediate effect to the directives so issued.

24. As we are of opinion that the draft letter of October 14, 1966 (which is discussed later on by us) constitutes an offer made by the appellant to the workmen to opt for payment of bonus either according to the Cabinet decision or according to the production bonus scheme, it becomes unnecessary for us to investigate the nature of the power that is exercised either by the President or the Central Government when giving directions to the appellant company, under the Articles of Association. For the same reason the question as to whether the circular letter of the Central Government, dated December 21, 1965 is a direction or order, as envisaged by the Articles of Association, does not also arise for consideration.

25. The decision of the Central Cabinet dated December 2, 1965 has been announced by the Minister in the Lok Sabha on December 9, 1965 and this decision has been communicated to the appellant by the concerned Ministry by Circular letter dated December 21, 1965. There is no controversy that

if the Cabinet decision is given effect to, the claim of the workmen of ex gratia payment of bonus as in previous years will have to be accepted, unless the appellant is able to establish its plea that the production bonus scheme was introduced with the consent and approval of the Central Government in lieu of ex gratia payment of bonus. As to whether the appellant has succeeded in establishing this plea is an aspect which will be adverted to by us at a later stage.

26. In this case it is not necessary to consider the wider question as to how far, without anything else, the workmen would be able to lay any claim on the basis of any decision communicated by the Government to the appellant alone. As pointed out by Mr. Sen, it is clear that the Central Cabinet's decision was made known to the workmen who were given the option either to accept Cabinet decision, as conveyed to the appellant by the Circular letter of December 21, 1965 or the production bonus scheme as formulated by the appellant corporation.

27. Mr. Sen, the learned counsel for the Union, has invited our attention to the draft of a letter, dated October 14, 1966, which was intended to be sent by the workmen to the appellant. That letter, which is addressed to the appellant Corporation states:

"You have given us the option of accepting either the Cabinet decision conveyed to you vide Department of Chemical's letter No. CH/COORD/64/65 dated 21st December 1965, the terms of which are annexed to this letter, or the Production Bonus Scheme as formulated by the FCI Board....."

That the Circular letter of December 21, 1965 of the Government was made known to the workmen is clear from the evidence of the appellant's witness R. W. 7 Shri Wadhwa. He has categorically stated that he joined the discussions between the representatives of the workmen and the Managing Director of the appellant corporation which took place at Delhi on October 15, 1966. He further states that he came to know at that time that on October 14, 1966, during the discussions between the labour and the management at which he was not present, the workmen's representative had desired that the Cabinet's directions may be made applicable to them with regard to bonus. This witness further states that the Managing Director made an offer during

the discussions and that offer is contained in the draft letter dated October 14, 1966, to which we have already referred. The witness further states that the workmen declined to accept the offer of the management to opt for the production bonus scheme. His evidence clearly shows that the management has communicated to the workmen the Cabinet decision, as conveyed by the Circular letter of the Government dated December 21, 1965. This evidence further makes it clear that the workmen declined to opt for the production bonus scheme, but, on the other hand, insisted that bonus must be paid to them according to the Cabinet's decision.

28. Mr. Gokhale attempted to explain away the effect of the draft letter of October 14, 1966 by urging that the Cabinet decision has been communicated only after the Union had submitted its charter of demands as early as August 19, 1966. So long as the Cabinet decision has been communicated and option was given to the workmen, it does not in our opinion matter at what stage the communication was made to the labour. Under the circumstances, it is idle for the management to contend either that the appellant is not bound to comply with the Cabinet decision or that the workmen are not entitled to make any claim on the basis of that decision.

29. That leaves us with the alternative contention, raised by the management, that production bonus scheme was introduced with the consent and approval of the Central Government and that on its introduction the ex gratia payment of bonus stood eliminated. No doubt this is the stand that has been taken in the note attached by the appellant in its Circular letter dated September 9, 1966. We have already adverted to that note in the earlier part of our judgment. No materials, whatsoever, have been placed by the appellant in support of this contention. The production bonus scheme, itself does not state that it is in lieu of all other ex gratia payments. There is no order of Government on record to show that the Circular letter of December 21, 1965 has been modified by the Government in any manner whatsoever. The only evidence relied on by the appellant in this connection was the statement of R. W. 7, Shri Wadhwa. He says that after a consideration of all the relevant factors and in consultation and with the

approval of the Central Government, a production bonus scheme was introduced by the appellant with effect from year 1965-66 and that he was himself present at a meeting in the Ministry when a decision was taken that the Corporation might introduce the production bonus scheme and that the workmen should be paid production bonus in addition to the bonus payable under the Bonus Act. He further speaks to the fact that production bonus scheme replaced the ad hoc ex gratia bonus made in the past years. Excepting this bare statement in the oral evidence, no order of the Central Government to this effect, or modifying its previous decision, has been placed before the Tribunal. Under those circumstances, the Tribunal was perfectly justified in holding that the appellant has not established that on the introduction of the production bonus scheme, all payments of ex gratia bonus ceased.

30. The striking down of sub-section (2) of Section 34 of the Bonus Act, by this Court, has no effect, as rightly held by the Tribunal, in recognising the claim of the workmen. When once it is established, as in this case, that the Cabinet decision regarding ex gratia payment of bonus has been communicated to the workmen with an option to accept the said decision or the production bonus scheme and the labour wanted the Cabinet decision to be implemented, it follows that the agreement, under Section 34 (3) of the said Act has come into effect and it is valid. Hence we are in agreement with the views expressed by the Tribunal that the ex gratia payments, claimed by the workmen, are saved by sub-section (3) of Section 34 of the Bonus Act.

31. There was a feeble argument, attempted to be raised by Mr. Gokhale, that the application of the Cabinet decision is conditional upon the maintenance of the level of performance of undertaking in individual cases. The Tribunal has held that the level of performance of workmen, in the years in question, has been maintained. In this connection among other matters, it has referred to a statement made in the April-May, 1966 issue of the "FCI News", a journal published by the appellant. This journal is issued after the year has come to an end and there is a statement to the effect that the Nangal Fertilizer factory has exceeded the revised production targets fixed for Calcium Ammonium Nitrate

(CAN) and Heavy Water and the said performance, despite the serious handicap suffered because of the severe power cuts enforced since November 1965, was commendable. We are satisfied that the finding recorded by the Tribunal, on this point, is justified.

32. Once it is held, as we do, in agreement with the Tribunal, that the appellant was bound to implement the Circular of the Central Government, dated December 21, 1965, it follows that the appellant was bound to pay the ex gratia payment of bonus, as claimed by the workmen for the years in question and that the appellant is further not entitled to deduct the advance wages of 4 days paid for the year 1965-66. The decision of the Tribunal, on this aspect is correct and is affirmed.

33. Before we take up the question regarding the wages for the strike period, it is necessary to give a clarification regarding an observation made by the Tribunal regarding the production bonus scheme. While discussing the claim of the Union regarding ex gratia payment of bonus as per the Cabinet decision, the Tribunal has observed that the production bonus scheme introduced by the appellant is in addition to the ex gratia payment which the workmen are entitled to. We do not express any opinion regarding the correctness or otherwise of this view of the Tribunal, excepting to state that the opinion expressed by the Tribunal was uncalled for and outside the scope of the reference.

34. This leaves us with the question of the claim of labour for wages for the strike period from October 17 to October 31, 1966. The Tribunal has held that the strike was both legal and justified and it has awarded the workmen half the wages for that period. This finding of the Tribunal is attacked on behalf of the appellant by Mr. Gokhale. The learned counsel did not urge that the strike was illegal, but on the other hand he pressed before us that the strike was thoroughly unjustified and the finding of the Tribunal was contrary to the evidence on record and also perverse. The counsel urged that various items of evidence which have a very vital bearing on a consideration of this question had not been adverted to at all by the Tribunal. On the other hand, Mr. Sen, learned counsel for the Union, pointed out that the Union made various attempts for having its claim regarding bonus ami-

day, and then return to Delhi and report the reaction of the workmen regarding the proposals discussed during the negotiations. But, instead of keeping this promise the representatives of workmen addressed a public meeting on the evening of October 16, 1966 and incited the workmen to strike work from October 17, 1966. The strike was actually commenced from October 17. Mr. Wadehra also stated that a telegram from the Secretary of the Labour Ministry inviting all the parties to attend the conciliation meeting at Chandigarh on October 17, 1966 was received but the labour did not care to attend that meeting.

39. We have referred to some of the incidents which have taken place prior to October 17, 1966 only to show the attitude that the labour was adopting in respect of their demands. There is a further circumstance that a telegram, dated October 13, 1966 had been sent by the Labour Commissioner fixing conciliation proceedings for October 17, 1966, at Chandigarh and a telegram was also sent by Shri Vidhyalankar, who was representing the workmen, to the Union President requesting him to stay the strike for a day. So far as the telegram stated to have been sent by Shri Vidhyalankar, the receipt of the same is admitted, but the Union is not prepared to accept the receipt of the telegram, dated October 13, 1966 stated to have been sent by the Labour Commissioner. We will presently show that the plea of the Union in this regard cannot be accepted because there is sufficient evidence on record to show that the telegram had been sent by the Labour Commissioner and must have been received by the President of the Union.

40. We have already referred to the statement of Shri Wadehra about the receipt, by the management, of the said telegram fixing conciliation proceedings for October 17, 1966. The telegram is Exhibit RW3/1 which is dated October 13, 1966 and sent from Chandigarh. The telegram is sent to the appellant and to the Union. The Labour Commissioner requests the attendance of the parties to the conciliation meeting on October 17, at 11 a. m.

41. Exhibit R. W. 14 is a letter dated October 13, 1966 sent by the Labour Commissioner to the appellant and the unions concerned containing a copy of the telegram sent by him on that date

regarding the conciliation proceedings being fixed on October 17, at Chandigarh and requesting the parties to appear before him. That the said telegram and letter have been sent is proved by the evidence of R. W. 1 who is an Assistant in the Labour Commissioner's Office at Chandigarh and who has produced the necessary file pertaining to the same. That the telegram sent by the Labour Commissioner has been delivered is also proved by R. W. 3 who has produced the delivery sheets in respect of the telegram. Relying upon these circumstances quite naturally, Mr. Gokhale strenuously urged that the receipt of the telegram issued by the Labour Commissioner is purposely denied by the Union to profess ignorance about the conciliation proceedings being taken up on October 17, 1966, because the Union was in no mood to participate in those proceedings.

42. Mr. Sen, no doubt relied upon the evidence of the workmen's witness No. 3, Shri Ramthirtha, President of the Union, that no telegram was received from the Labour Commissioner regarding conciliation proceedings to take place on October 17, 1966, but this witness himself accepts that the telegram sent by Mr. Vidhyalankar was received by him. We are inclined to accept the contention of Mr. Gokhale that the denial by the Union of the receipt of the telegram sent by the Labour Commissioner cannot be accepted.

43. Mr. Gokhale, learned counsel, referred us to the decision of this Court in *The Management of Chandramalai Estate, Ernakulam v. Its Workmen*, 1960-3 SCR 451 = (AIR 1960 SC 902) and particularly to the following observations at p. 455 (of SCR) = (at p. 904 of AIR).

"While on the one hand it has to be remembered that strike is a legitimate and sometimes unavoidable weapon in the hands of labour it is equally important to remember that indiscriminate and hasty use of this weapon should not be encouraged. It will not be right for labour to think that for any kind of demand a strike can be commenced with impunity without exhausting reasonable avenues for peaceful achievement of their objects. There may be cases where the demand is of such an urgent and serious nature that it would not be reasonable to expect labour to wait till after asking the Government to make a reference. In such cases, strike even before such a re-

quest has been made may well be justified."

Mr. Gokhale urged that there was absolutely no urgency in the case before us because the management was prepared to pay the bonus as admitted by them and the controversy was really regarding the additional ex gratia payment. Further, counsel pointed out that the Conciliation Officer had not made any report about conciliation having failed and in fact the telegram sent by the Labour Commissioner as late as October 13, 1960 clearly showed that he was still continuing the proceedings. Counsel also pointed out that after having separated from the Delhi meeting on October 15, 1960, promising to consider the proposals put before it by the management and communicate the same to the management, the leaders of the workmen incited them to go on strike at the meeting held the very next day and actually the strike itself commenced from October 17, 1960. No doubt Mr. Sen, learned counsel, pointed out that there was nothing for the management to consider in their meeting the demands of the workmen, because the Cabinet decision was well known. He also urged that the workmen obviously felt that the management was not adopting a reasonable attitude and hence they resorted to a strike which was justified under the circumstances.

44. We may also indicate that there is evidence, let in by the management, to show that during the strike period and even prior to that, several of the workmen resorted to violence and other acts of indecency. Evidence has also been let in to show that the workmen continued the strike even after a notification, dated October 31, 1960 was issued by the President of India prohibiting the strike and requiring the workers to report for duty. We do not propose to dwell on these matters, because we have only to consider the justification or otherwise of the strike from October 17, to October 31, 1960.

45. The management was prepared to pay at all times the bonus as per the Bonus Act. They had also announced on September 9, 1960 the introduction of the production bonus scheme. They were actively taking part in the conciliation proceedings. The appellant also made to the Union certain proposals on October 15, 1960 at the conference held at Delhi which proposals the representatives of the workmen promised to discuss

with the workmen and give a reply to the appellant. But, on October 16, 1960, at a meeting of the workmen, they were incited to go on strike. The receipt of the telegram of October 13, 1960 of the Labour Commissioner, fixing October 17, 1960 for further discussions and inviting the Union and the management to attend the meeting, is falsely denied by the Union. The receipt of Sri Vidhyalankar's telegram requesting the Union to put off going on strike by one day is admitted by the President of the Union, but that request was not complied with by the workmen. Sri Vidhyalankar, it must be remembered, was representing the workmen in certain conciliation meetings. All these circumstances clearly show that the demand of the Union regarding ex gratia bonus cannot be considered to be of an 'urgent and serious nature'. They also show that the launching of the strike was unjustified. It therefore follows that the workmen are not entitled to any wages for the period of the strike viz., from October 17 to October 31, 1960. To this extent the award of the Industrial Tribunal will have to be set aside.

46. In the result, we set aside the award of the Industrial Tribunal in so far as it directs the appellant to pay the workmen half the wages for the strike period from October 17 to October 31, 1960, and, to that extent, the appeal is allowed. In other respects the appeal will stand dismissed. As the appellant has failed on the substantial question, it will pay the costs of the respondent-workmen.

Appeal partly allowed.

AIR 1970 SUPREME COURT 578
(V 57 C 189)

(From: Industrial Tribunal Andhra Pradesh)*

J. M. SHELAT, V. BHABGAVA AND
C. A. VAIDIALINGAM, JJ.

The Workmen of Shri Bajrang Jute Mills Ltd., Appellants v. The Employers of Shri Bajrang Jute Mills Ltd., Respondents.

Civil Appeal No. 923 of 1960, D/- 31-10-1968.

* (I. D. No. 12 of 1964, D/- 29-5-1965—Industrial Tribunal—Andh. Pra.)

CN/CN/F527/68/D11Z/D

Industrial Disputes Act (1947), S. 2 (rr), Third Sch. Item 1 — Wages — Fair wages — Fixation of — Considerations — Central Wage Board for Jute industry — Held Board had not followed the essential pre-requisites of deciding wage structure.

So far as fair wage is concerned, while the lower limit must obviously be the minimum wage, the upper limit is equally said to be what may broadly be called the 'capacity of the industry to pay'. The capacity of the industry to pay should be gauged on an industry-cum-region basis, after taking a fair cross-section of that industry and in a given case it may be even permissible to divide the industry into appropriate classes and then deal with the capacity of the industry to pay class-wise. AIR 1958 SC 578 and AIR 1963 SC 1327 and AIR 1964 SC 489, Rel. on. (Para 9)

There is an obligation on the Wage Board to follow correctly and apply the principles laid down by the Supreme Court in the matter of fixation of wages and dearness allowance. As the Wage Board was fixing a fair wage for the entire jute industry it may not have been strictly necessary to consider the financial capacity of each individual unit. But the requirement of considering the capacity of each individual unit to pay may not become necessary if the industry is divided into different classes. Even if the industry is divided into different classes it will still be necessary to consider the capacity of the respective classes to bear the burden imposed on them. For this purpose a cross-section of these respective classes may have to be taken for careful consideration for deciding what burden the class considered as a whole can bear.

Where no attempt had been made by the Wage Board to divide the industry into classes, no cross-section of such classes had been taken for investigation to decide what burden the units in each class could bear, the approach of the Wage Board to determine uniform wage scales for the entire industry suffered from an inherent weakness. Conditions, such as easy access to raw materials, transport, nearness of markets for disposal of the manufactured product, availability of labour, the type of market whether within or outside the country for which the manufactured articles were intended and diverse other factors must

vary from region to region. Likewise, economic conditions affecting the consumer prices must differ from region to region, depending largely upon whether a particular region was self-sufficient or not in the elemental needs of its citizens and these in turn were bound to affect living standards. It would therefore be too artificial and unrealistic an approach to be oblivious of these differences and to attempt to group together all establishments and factories and device common wage-scales applicable to all of them disregarding the peculiar features of the industry in a particular region. Instead of attaining harmony there would as a result arise inevitably a feeling of discrimination. It would be enough to take a representative cross-section of the industry for assessment; the cross-section to be a truly representative one and capable of giving a true picture of the conditions of both the industry and labour must be one from each region where establishments of the industry in question are situate. Where what the Wage Board, however, did was that instead of proceeding region-wise and selecting a representative cross-section from each region, it selected 20 mills from West Bengal and clubbed them with 9 reporting mills from the rest of the regions, viz., Bihar, U. P., Madhya Pradesh and Andhra Pradesh where a few mills were scattered and considered these 29 mills as representing a cross-section of the industry, these mills so clubbed together could not truly reflect the economic and other conditions prevailing in the mills in different regions with their peculiar problems and differing conditions. That is not a proper approach and is bound to result in injustice especially in view of the peculiar feature of the jute industry that it was predominantly concentrated in West Bengal and was export-oriented. Besides, the jute industry in the other regions suffered from a distinct disadvantage as the raw materials had to be transported from a distance at considerable cost. Another difficulty in accepting the Wage Board's recommendations would arise where the Board equated the cotton textile industry in West Bengal with the jute industry there and finding the wage-scales in the jute industry lower than those in the cotton textile industry, raised the scales in the jute industry so as to bring them to the level of the cotton textile industry and having so done the next step which it took was to raise also

the wage-scales in mills outside West Bengal to bring them in line with the scales proposed by it for the mills in West Bengal. This meant that the Board gave a go-by to the well established principle of industry-cum-region consistently applied by Industrial Tribunals whenever wage-scales had to be determined. The Board ought to have selected comparable units from each of the regions where the jute mills were situate and after their examination arrive at common wage-scales for each of those regions instead of grouping together 20 mills from West Bengal and 9 mills from the other regions and treating them as constituting a cross-section representing the industry. (Paras 8, 36 to 42, 44)

Cases Referred: Chronological Paras

- (1964) AIR 1964 SC 489 (V 51) =
 (1964) 1 SCR 362, Greaves Cotton
 and Co. v. Their Workmen 9
 (1963) AIR 1963 SC 1327 (V 50) =
 (1963) Supp 2 SCR 16, French
 Motor Car Co. Ltd. v. The
 Workmen 9
 (1959) AIR 1958 SC 578 (V 45) =
 1959 SCR 12, Express Newspaper
 (Private) Ltd. v. Union of India 9
 30, 33

Mr. M. K. Ramamurti, Mrs. Shyamala Pappu and Vineat Kumar, Advocates, for Appellants; M/s. K. Srinivasamurthy, Naunit Lal and B. P. Singh, Advocates, for Respondents.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: The workmen of Shri Bajrang Jute Mills Ltd., in this appeal by special leave, attack the correctness of the award dated May 29, 1965 of the Industrial Tribunal, Andhra Pradesh, Hyderabad, I. D. No. 12 of 1964, by which it held that the demand of the workmen for implementation of the recommendations of the Central Wage Board for Jute Industry (hereinafter referred to as the Wage Board), was not justified.

2. In view of the fact that the respondent-management declined to accede to the demand of the appellants to pay wages in accordance with the recommendations of the Wage Board, the State of Andhra Pradesh, by its order dated March 21, 1964, referred for adjudication to the Industrial Tribunal, Hyderabad, the following question:

"Whether the demand of the workmen in Sri Bajrang Jute Mills, Limited, Guntur, for implementation of the recommendations of the Central Wage Board for Jute Industry is justified, and if so, to what extent?"

3. The Wage Board was constituted by the Central Government for determining, among other matters, a wage structure, based on the principles of fair wages payable in the jute industry. The Wage Board consisted of a Chairman, two independent Members, two Members representing the employers and two Members representing the workers. It may be noted that the Members representing the industry and labour were not chosen by the representative bodies of the industry or the labour but were appointed by Government. In fact, neither the industry nor the labour had any voice in the choice by the Government of any of the members of the Wage Board. The Wage Board submitted its report to the Government, making recommendations about the wage structure and laying down principles for awarding bonus for the year 1962-63 and the subsequent years.

3-A. It appears from the Wage Board's report that, at the very outset, the Wage Board selected 20 mills from West Bengal and 9 reporting mills from outside West Bengal which it considered to form a representative cross-section of the industry for a detailed study. The Wage Board took into account the financial position of the said mills and also collected other data and information not only from the mills concerned but also from other quarters. The Wage Board took into account the growth of paid-up capital, gross block depreciation, profits made and dividends paid by the mills and other allied matters and came to the conclusion that the industry's position was satisfactory and its future was bright. The Wage Board was not required to fix a wage structure on the peculiar financial position of any particular unit, although it was bound to take a fair cross-section of the industry represented by units reflecting the general conditions prevailing in the industry as a whole. The Wage Board also considered the principles for determination of bonus and recommended payment of bonus for the year 1963 on the basis of the basic wages drawn by the worker for the year 1962. It also recommended that for future years the bonus was to be paid according to

the wages drawn in the preceding year. It further recommended certain rules for determination of the quantum of bonus. According to the appellants, the respondent was bound to implement the recommendations of the Wage Board in all respects and its refusal to do so was illegal and unjustified.

4. The respondent pleaded that the recommendations of the Wage Board could not be implemented as the Mill had no financial capacity to bear the burden of the wage scales recommended by the Wage Board. The respondent made an attempt to implement the Wage Board's recommendations to some extent at least, provided the labour agreed for revision of work loads, but the labour was not willing for such revision. It was further stated that the respondent company, though started in 1907, had been running at a loss for a number of years and its loom-strength was only 120. The mill was located at Guntur, which is not a jute-growing area, and in consequence almost all raw materials had to be brought from Vijayanagaram, in Visakhapatnam District, and from Calcutta. As the raw materials and other products had to be brought from outside, it involved the mill in considerable expense due to freight charges etc. The products manufactured in the mill were only cement bags and twine and cement companies were its only customers. The company had furnished replies to the questionnaire issued by the Wage Board and had made it clear that the wages paid by it were reasonable and it could not bear any additional burden in that regard. Even the interim relief, recommended by the Wage Board, was implemented with considerable difficulty though it involved the company in an additional revenue expenditure of Rs. 1,53,000/- a year.

5. The Wage Board's recommendations fixed the wage scales, dearness allowance etc., for all the employees working in all the jute mills situated in the country, irrespective of the financial position of individual mills. If the recommendations of the Wage Board were to be implemented the company would be put to further expenditure of Rupees 2,75,385.60 in the first year, Rs. 3.25 lakhs in the second year and Rs. 3.75 lakhs in the third year in addition to the existing wage bill which the company had to meet. The company has been making only negligible profits and it could not pay any dividend on its equity

shares for nearly 7 years. Its reserves also have been dwindling. The financial position of the company, therefore, is such that it is impossible for it to bear the burden of the additional wage structure, dearness allowance etc., as recommended by the Wage Board. The company further pleaded that the Wage Board committed a serious mistake when it compared the financial position of the respondent along with two other large mills in the Andhra area viz., Nellimarla and Chittavalasa Jute Mills. Further the wage scales fixed by the Wage Board are on the basis of the position occupied by big Jute mills in West Bengal, having upto 2,561 looms and 13,580 spindles. The Wage Board did not attempt to make any distinction between small and uneconomic mills and large mills, nor was any classification made in that manner.

6. Regarding payment of bonus, the company pleaded that this was covered by a settlement and the workmen were not entitled to the same in view of the financial position of the company and as there was no available surplus. The wage structure, dearness allowance etc., fixed by the Wage Board were not in accordance with the principles laid down by this Court in several decisions. According to the decisions of this Court, no fair wage can be fixed unless the unit in question has the financial capacity to meet the additional burden; and, in fixing the wage scale and dearness allowance, the principle of industry-cum-region has to be applied. Small and struggling units should not be compared with large, flourishing concerns. The extent of business carried on by them, the labour force, the capital invested, quantum of reserves, dividends declared and profits made, have all to be taken into account to see whether the units could be compared for wage fixation. All these circumstances have not been given due weight and consideration by the Wage Board. The respondent mill has only 120 looms and it has been compared with not only the very big mills in West Bengal but also with the Nellimarla and Chittavalasa Jute Mills which have 500 and 316 looms respectively. No classification was made by the Wage Board of the various jute mills as large, medium and small units; and in prescribing uniform scales for all types of units no distinction has been made between economic and uneconomic units. Small and struggling units have

been treated in the same way as large and prosperous units. Finally, the respondents pleaded that in view of the circumstances indicated above, the Wage Board's recommendations could not be implemented by it and the labour's claims, on the basis of the Wage Board's recommendations, were not justified.

7. The Industrial Tribunal, in its award under attack, accepted the pleas taken by the management. While recognising the fact that the Wage Board's recommendations were made, after collecting considerable data, the Tribunal was of the view that the Wage Board committed an error in comparing the respondent mill with other big mills, not only in Andhra Pradesh but also outside that State. The Tribunal was also of the view that the principles laid down by this Court that the fixation of wage scales should be on an industry-cum-region basis and that small units should not be compared with large and flourishing concerns, were not given due regard by the Wage Board. On the materials placed before it, the Tribunal accepted the claim of the respondent that it was a small concern considered from any point of view, viz., of looms, paid up capital, reserves, or the profits. In respect of the capacity to pay, the Tribunal was of the view that the Wage Board had not approached the question in the light of the principles laid down by this Court. The Tribunal came to the conclusion that the respondent, which is a fairly small unit, has not the financial capacity to adopt the wage-structure fixed by the Wage Board. The Tribunal accepted the claim of the respondent regarding the additional financial burden it would have to bear, even according to the phased programme fixed by the Wage Board and has held that the financial position of the company is such that it cannot bear this burden. The Tribunal also came to the conclusion that as the Wage Board has devising a fair-wage, the capacity of the particular industry to bear the additional burden — which is one of the essential circumstances to be taken into consideration — has not been taken into account. On the other hand, all jute mills, wherever situate, big or small, prosperous or struggling, economic or uneconomic, have all been treated alike and a uniform wage structure applicable to all mills has been fixed. There has been no attempt at classification of small and uneconomic mills for the purpose of finding

out their financial capacity. The Tribunal finally came to the conclusion that the demand of the workmen for implementation of the recommendations of the Wage Board was not justified.

8. The same stands, taken before the Tribunal by the management and the workmen as mentioned earlier, have been reiterated before us by Mr. M. K. Ramamurthy, learned counsel for the Union, attacking the award and Mr. K. Srinivasamurthy, learned counsel for the management, in support of the award. Before we refer to the circumstances under which the Wage Board was constituted, as well as the approach made by it in the fixation of wage-scales and other matters, it is necessary to refer to the principles laid down by this Court in that regard and to examine whether the Wage Board has properly applied those principles. Mr. Ramamurthy, learned counsel for the appellant, has accepted the position that there is an obligation on the Wage Board to follow correctly and apply the principles laid down by this Court in the matter of fixation of wages and dearness allowance. But his contention is that the Wage Board has, in its recommendations, followed those principles.

9. In *Express Newspapers (Private) Ltd. v. Union of India*, 1939 SCR 12 = (AIR 1938 SC 578) this Court has elaborately considered the concept of (i) living wage; (ii) fair wage; and (iii) minimum wage, as well as the machinery for fixation of wages, adopted in various countries. So it is not necessary to cover the ground over again. So far as fair wage is concerned, this Court has stated that while the lower limit must obviously be the minimum wage, the upper limit is equally said to be what may broadly be called the 'capacity of the industry to pay'. It has further been stated that that capacity of the industry to pay should be gauged on an industry-cum-region basis, after taking a fair cross-section of that industry and that in a given case it may be even permissible to divide the industry into appropriate classes and then deal with the capacity of the industry to pay class-wise. This Court further laid down the principles in that regard as follows, at p. 92 (of SCR) = (at p. 605 of AIR):

"The principles which emerge from the above discussion are:

(1) that in the fixation of rates of wages which include within its compass the fixation of scales of wages also, the capacity of the industry to pay is one of the essential circumstances to be taken into consideration except in cases of bare subsistence or minimum wage where the employer is bound to pay the same irrespective of such capacity;

(2) that the capacity of the industry to pay is to be considered on an industry-cum-region basis after taking a fair cross-section of the industry; and

(3) that the proper measure for gauging the capacity of the industry to pay should take into account the elasticity of demand for the product, the possibility of tightening up the organisation so that the industry could pay higher wages without difficulty and the possibility of increase in the efficiency of the lowest paid workers resulting in increase in production considered in conjunction with the elasticity of demand for the product—no doubt against the ultimate background that the burden of the increased rate should not be such as to drive the employer out of business.”

The discussion on the question of capacity of an industry to pay is wound up at p. 191 (of SCR) = (at p. 642 of AIR) with the following observations:

“Industrial adjudication is familiar with the method which is usually adopted to determine the capacity of the employer to pay the burden sought to be imposed on him. If the industry is divided into different classes, it may not be necessary to consider the capacity of each individual unit to pay but it would certainly be necessary to consider the capacity of the respective classes to bear the burden imposed on them. A cross-section of these respective classes may have to be taken for careful examination and all relevant factors may have to be borne in mind in deciding what burden the class considered as a whole can bear. If possible, an attempt can also be made, and is often made, to project the burden of the wage structure into two or three succeeding years and determine how it affects the financial position of the employer.”

In *French Motor Car Co., Ltd. v. Workmen*, (1963) Supp 2 SCR 16 = (AIR 1963 SC 1327) this Court observed at p. 20 (of SCR) = (at p. 1329 of AIR):

“It is now well settled that the principle of industry-cum-region has to be applied by an industrial court, when it pro-

ceeds to consider questions like wage structure, dearness allowance and similar conditions of service. In applying that principle industrial courts have to compare wage scales prevailing in similar concerns in the region with which it is dealing, and generally speaking similar concerns would be those in the same line of business as the concern with respect to which the dispute is under consideration. Further, even in the same line of business, it would not be proper to compare (for example) a small struggling concern with a large flourishing concern.”

The principle that the basis of fixation of wages and dearness allowance is industry-cum-region was reiterated in *Greaves Cotton and Co. v. Their Workmen*, (1964) 1 SCR 362 = (AIR 1964 SC 489).

10. According to Mr. Ramamurthy, the learned counsel for the appellant, the principles laid down by the decisions, referred to above have been borne in mind by the Wage Board when it fixed the wage structure and dearness allowance. Learned counsel also urged that when a wage structure was fixed for the industry as such, it is not necessary that the capacity of individual units should also be considered and that on the other hand it would be enough if a fair cross-section of the industry was taken into account for this purpose as was done by the Wage Board in the present case.

11. On the other hand, according to Mr. Srinivasamurthy, the learned counsel for the management, inasmuch as a fair wage was being fixed, the wage Board was bound to apply the principle of industry-cum-region in fixing the wage structure and dearness allowance and the Wage Board has committed an error in not classifying the various units as large, medium and small units and prescribing different scales for different types of units.

12. We shall now proceed to consider the circumstances under which the Wage Board was constituted, its composition and the approach made by it in fixing the wage structure and dearness allowance.

13. In Chapter XXVII, paragraph 25, of the Second Five Year Plan of the Government of India, it is stated that statistics of industrial disputes show that wages and allied matters are the major source of friction between employers and

workers and that an acceptable machinery for settling wage disputes will be one which gives the parties themselves a more responsible role in reaching decisions. It is further stated that an authority like a tripartite wage board, consisting of equal representatives of employers and workers and an independent chairman would probably ensure more acceptable decisions and that such wage boards should be constituted for individual industries in different areas. In pursuance of this recommendation, the Government of India, by its Resolution No. WB-5(1)/60 dated August 25, 1960, set up a Central Wage Board for Jute Industry. The Board consisted of a Chairman, two independent Members and two Members representing employers and two Members representing employees. The terms of reference of the Board were:

"(a) to determine the categories of employees (manual, clerical, supervisory, etc.) who should be brought within the scope of the proposed wage fixation;

(b) to work out a wage structure based on the principles of fair wages as set forth in the report of the Committee on Fair Wages."

In evolving a wage structure, the Board was also required to take into account the needs of the industry in a developing economy, the special features of the jute industry as an export industry, the requirements of social justice and the need for adjusting wage differentials in such a manner as to provide incentives to workers for advancing their skill. The Wage Board was also required, within two months from the date of its starting work, to submit its recommendations regarding the demands of labour in respect of interim relief, pending its final report.

14. The Wage Board recommended to the Central Government the grant of interim relief of Rs. 2.85 from October 1 to December 31, 1960 and Rs. 3.42 from January 1, 1961 in respect of all jute mills in India, excepting the Katihar Jute Mill in respect of which the interim relief at the rate of Rs. 3.42 was granted from September 1, 1961. The Central Government accepted this recommendation, by its Resolution No. WB-5(3)/61 dated January 25, 1961 and requested the jute mills to implement the same as soon as possible. There is no controversy that the respondent mill complied with this request though

it involved the company in an additional expenditure of Rs. 1,53,000/-. This claim of the company has been accepted by the Industrial Tribunal. The Wage Board submitted to the Central Government on September 4, 1963 its final recommendations dated August 31, 1963 and recommended that the new wage structure should be given effect to from July 1, 1963. The Central Government by its Resolution No. WB-5(16)/63 dated September 27, 1963 accepted the report and made a request to the employers, the workers and the State Government to implement the same expeditiously. The standardised basic wages of various categories of workers of jute mills for a month of 26 days or 208 hours are specified in Appendix XI of the Report; and there is no controversy that the basic wages of all categories of workers in the employ of the respondent jute mill is the same as the standardised basic wage contained in Appendix XI. But, there is a further recommendation that so far as the appellant jute mill and another jute mill, viz., Sri Krishna Jute Mill, were concerned, the wage increase was to be on a phased basis.

15. We may refer now to the various aspects dealt with by the Wage Board in its report. Chapter III deals generally with the Industry. In para 3.5 it is stated that there is an overwhelming concentration of jute industry in West Bengal and only a sprinkling of it is to be found elsewhere in India. It is also noted that the loomage at the time of the report in the whole of India stood at 72,916 looms. The reasons for the heavy concentration in West Bengal of jute mills are stated to be factors like abundant supply of raw material, proximity of coal fields in Raniganj, navigability of the Hooghly and the availability of the required type of labour in the neighbourhood. So far as jute mills at other places in India are concerned, in para 3.6 of the Report it is stated that small jute mills have come up in other States, including Andhra Pradesh, but the total loomage of all such mills outside West Bengal is only 3,242 looms, and the mills are distributed in various places.

16. Appendix VII of the Report contains a statement showing the mills operating, number of looms and spindles in the whole of India. So far as West Bengal is concerned, the total number of looms is given as 65,383, in Andhra

Pradesh as 1,072; in Bihar 1,059; Uttar Pradesh 891 and Madhya Pradesh 220. It will be noted from Appendix VII that in Andhra Pradesh there are two fairly big units, the Nellimarla and Chitavalsa having 316 and 500 looms respectively, whereas the respondent mill has only 120 looms. We are particularly referring to this aspect because it is the grievance of the respondent that the Wage Board has compared it with the Nellimarla and Chitavalsa and other big units in West Bengal. A perusal of Appendix VII shows that there are several jute mills having more than 1,000 looms and some having more than 2,000 looms, in West Bengal.

17. Chapter IV deals with the scope of enquiry. In para 4.1 it is stated that the Board's recommendations will apply to all the jute mills then existing and also to those that might be started thereafter, and a list of all mills then in existence is given in Appendix VII.

18. Chapter V deals with minimum wages in the jute industry. In para 5.4, the Wage Board takes note of the fact that the minimum wages in Nellimarla and Chitavalsa jute mills in Andhra Pradesh are found to be the highest in the jute industry. In para 5.26, the minimum wages in West Bengal Jute Mills from 1948 and as obtaining from January 1, 1961 have been referred to. Such minimum wages from January 1, 1961 including Rs. 3.42 granted as interim relief by the Wage Board and the dearness allowance, are stated to be Rs. 75.59, comprised of basic wages of Rs. 34.67 + Rs. 3.42 (interim relief) + Rs. 32.50 (dearness allowance.) Regarding the jute mills in Andhra Pradesh, it is stated in para 5.35 that Nellimarla and Chitavalsa Jute Mills were paying from January 1, 1961, the total emoluments of Rs. 81.21 per month to the lowest category of workers for 208 working hours, inclusive of Rs. 3.42 interim relief granted by the Wage Board.

19. In para 5.38, it is stated that the respondent mill, from January 1, 1961, is paying total emoluments of Rs. 52.17 per month, comprised of Rs. 19.50 (basic) + Rs. 3.42 (interim relief) + Rs. 29.25 (dearness allowance). The Jute mills in Bihar State, as will be seen from para 5.43 were paying total monthly emoluments ranging from Rs. 69.98 to Rs. 70.59.

20. Chapter VI deals with the industry's capacity to pay. In para 6.1 it is stated that two matters which received

the highest consideration in the course of the deliberations of the Wage Board were the needs of the workers and the capacity of the industry to pay those needs. It is further stated that the consequence of a fair wage upon the employer or the capacity of the industry to maintain production efficiently, have received the special attention of the Wage Board. In para 6.8, reference is made to the Fair-Wages Committee's Report that in determining the capacity of the industry to pay, it is wrong to take the capacity of a particular unit or the capacity of the entire industry in the country and that the practical method is to take a fair cross-section of the Jute industry. In this connection the Wage Board refers to the claims advanced by the workers and the industry. The workers appear to have suggested the names of mills which were well established and whose financial position was never in doubt, whereas the industry urged that the capacity of the weaker and marginal units should not be ignored as the wages that are to be fixed by the Wage Board should be such as could be paid without difficulty by all units of the industry.

21. In para 6.9 it is stated that the Wage Board was of the view that the only proper and practical method was to take a cross-section of the industry which could be considered as fair in its view. Accordingly, twenty jute mills in West Bengal were selected by it as representing a fair cross-section of the industry in that region. The Wage Board also decided to make a census survey of 9 reporting mills outside the West Bengal region. Accordingly it selected all the three in Andhra Pradesh, two in Bihar, three in Uttar Pradesh and one in Madhya Pradesh. A list of the jute mills in West Bengal and outside West Bengal region considered as forming a representative cross-section of the jute mills is given in Annexure A to the Report. So far as Andhra Pradesh is concerned, all the three mills situate in the State have been taken into account, being Nellimarla, Chitavalsa and the respondent. The Wage Board then considers the capital formation, bonus issue, total paid up capital, reserves and surplus, percentage of dividend declared profits made; but, under each of these heads, the Wage Board grouped together all the mills in West Bengal, Andhra Pradesh, Bihar, Uttar Pradesh and Madhya Pradesh.

22. In para 6.44, the Wage Board expresses the view that it would be possible for the industry to bear the extra burden arising from the new wage structure recommended by it without much difficulty and without affecting the economy of the industry adversely.

23. In Chapter VII the Wage Board considers the principles by which the Tribunals and other wage-fixing authorities were guided in fixation of wages in West Bengal and outside that State. In para 7.19 the Wage Board proceeds to state that it has to devise a fair wage structure. It refers to the report of the Committee on Fair Wages that with regard to a fair wage, the lower limit must obviously be the minimum wage and the upper limit is equally set by what may broadly be called the capacity of the industry to pay. In para 7.25 the Wage Board refers to the claim of the workers that the minimum wages at Calcutta, at prices prevailing in 1960 should be Rupees 125/- and that the minimum wage at Kanpur, in Uttar Pradesh, should be Rs. 140/- per month; while, on the other hand, the Indian Jute Mills Association appears to have pressed that the then existing wages in the jute industry for all categories of workers were fair.

24. In Para 7.34 the Wage Board refers to the fact that the wages in the jute industry had not kept pace with wages in cotton textile and engineering industries in West Bengal, as would be seen from the fact that in 1959, while in the jute industry the minimum wages had gone up by 40% over the 1946 wages it had gone up in cotton textile and engineering industries by 69.71% and 77.50% respectively. It further notes the fact that the minimum wages in cotton textile mills in West Bengal on April 1, 1963 were Rs. 83.50 and in the engineering industry Rs. 82/- per month. On the other hand, the wages in the jute industry on April 1, 1963 were Rs. 70.59. On this reasoning the Wage Board comes to the conclusion in para 7.35 that there was a prima facie case for increase in the wages of the jute workers. The Wage Board expresses the opinion that the concept of the paying capacity of the jute industry is not the same as it is generally understood in the case of other industries, in view of the fact that the jute industry is principally an export-oriented industry, depending upon the fluctuating foreign markets.

25. In para 7.40 the Wage Board states that in fixing the wage structure for the jute industry it has taken into consideration the prevailing wage structure in the cotton textile industry and the engineering industry in West Bengal. It has noted that in West Bengal, as on April 1, 1963, the minimum wage in the cotton textile industry was Rs. 84.10 per month and in engineering industry Rs. 82/- per month. As in the opinion of the Wage Board there is a great similarity in the nature and condition of work between cotton textile industry and jute industry, in para 7.43 it decides to devise a wage structure in the jute industry keeping in view the pattern of wages existing in the cotton textile industry in West Bengal.

26. Regarding dearness allowance, the Wage Board in para 7.44 decides to introduce a system of variable dearness allowance linked with the consumer price index.

27. In para 7.45 the Wage Board refers to the special representations made by the jute mills outside West Bengal that in comparison with the mills in West Bengal they have to pay higher freight charges on coal, batching oil and that mill stores and electricity charges are higher for them, that their productivity is low and that most of them have no export trade. The Wage Board states that it has considered these problems and though there are these locational difficulties for individual jute mills, it has decided that the wage level in the jute industry should as far as possible be uniform throughout the country. The Wage Board further states that the wages in some of these jute mills were very low and in order to obviate their financial difficulties in consequence of the raising of wage level, it has decided that the wage level in these mills should be raised in a phased manner.

28. Having decided that the wage level in the Jute Industry should be uniform throughout the country, the Wage Board, in para 7.52 decides that the total minimum wage in West Bengal should be fixed at Rs. 81/- per month, consisting of (i) basic wage; (ii) Wage Board increment; and (iii) variable dearness allowance. The Wage Board further, in para 7.56, states that in addition to basic wages, all categories of workers should be paid an increase of Rs. 8.33 per month inclusive of interim relief of Rs. 3.42 already granted by it and accepted by the

Central Government. This increment of Rs. 8.33 per month is desired to be shown as a separate item under the heading 'Wage Board increment' in the case of all categories of workers and that increment should be treated as part of the basic wages for all purposes like bonus, provident fund etc.

29. In para 7.57 the Wage Board states that the dearness allowance of Rs. 32.50 that was being paid then should be considered as the dearness allowance fixed at the working class consumer price index number of 425, for Calcutta with base year 1939 as 100. It is further stated that the dearness allowance should be a variable one and the rate of increase or decrease should be at 0.20 np. per point rise or fall in the average working class consumer price index number for Calcutta. The dearness allowance is also directed to be revised every six months in the months of February and August of each year.

30. On the basis of these calculations, in para 7.58 the Wage Board fixes the total monthly minimum wage payable at

During the first 24 months from the date on which the recommendations of the Board will be effective

During the next 12 months

During the next 12 months

Thereafter

32. In paragraph 7.66 the Wage Board directs that all categories of workers in jute mills situated outside West Bengal should also be paid the Wage Board increment of Rs. 8.33 per month, inclusive of interim relief of Rs. 3.42 already granted.

33. In para 7.67 (c) it is stated that the rates of dearness allowance of all categories of workers in the respondent mill and in Sri Krishna Mills is fixed at Rs. 32.50 at the average working class consumer price index number of 560 for Eluru for the last six months in 1962 with base year 1935-36 as 100. It is further stated that the dearness allowance should be a variable dearness allowance and the rate

Rs. 81/- comprised of (a) Rs. 40.17 basic wage; (b) Rs. 8.33 Wage Board increment; and (c) Rs. 32.50 being variable dearness allowance. In para 7.59, the Wage Board states that the standardised basic wages of various categories of workers of a jute mill for a month of 26 days or 208 hours are enumerated in Appendix XI to the Report.

31. When considering the wage structure for jute mills outside West Bengal, in para 7.65 (a) the Wage Board states that the basic wages of all categories of workers in the jute mills mentioned by it, outside West Bengal, which includes the respondent mill, should be the same as those in jute mills in West Bengal mentioned in Appendix XI. Therefore, it is clear that the minimum basic wage fixed for the mills in West Bengal has been applied to all the mills outside West Bengal, including the respondent. But, so far as the respondent mill is concerned, the Wage Board, in the same paragraph, gives a direction that the standardised basic wages mentioned in Appendix XI of the Report is to be adopted in a phased manner as follows:

Basic wages of all categories of workers should be 20 per cent less than the standardised wages shown in Appendix XI

Basic wages of all categories of workers should be 10 per cent less than the standardised wages shown in Appendix XI

Basic wages of all categories of workers should be 5 per cent less than standardised wages shown in Appendix XI

Basic wages of all categories of workers should be the same as standardised wages shown in Appendix XI.

of increase or decrease should be 0.20 nP. per point of rise or fall in the average working class consumer price index number for Eluru and that it should be revised every six months in the months of February and August.

34. Chapter VIII deals with bonus in jute industry and in para 8.18 the Wage Board makes a recommendation that in the jute industry the payment of bonus should be governed by the rules mentioned therein.

35. Lastly, in para 10.8 of Chapter X, the Wage Board states that the new wage structure recommended by it should come into force from July 1, 1963; and it is provided in para 10.9 that the payment of wages at the new rates should start

in any case not later than the week ending November 2, 1963.

36. We have fairly exhaustively dealt with the various matters considered by the Wage Board in its Report. It is no doubt true that the Wage Board has gone elaborately in the matter of fixing of the wage structure in the jute industry. We have earlier referred to the various principles laid down by this Court which should govern the fixing of wages and dearness allowance. The Board itself states that it was fixing a fair wage for the industry. We have adverted to the fact that in the *Express Newspapers Case*, 1959 SCR 12 = (AIR 1958 SC 578) this Court has held that in the case of fixation of fair wage, the upper limit may broadly be stated to be the capacity of the industry to pay. It has been further laid down that the capacity of the industry to pay should be gauged on an industry-cum-region basis, after taking a fair cross-section of that industry and that, in a given case, it may be even permissible to divide the industry into appropriate classes and then deal with the capacity of the industry to pay classwise. As the Wage Board was fixing a fair wage for the entire jute industry it may not have been strictly necessary to consider the financial capacity of each individual unit. But, as pointed out in the *Express Newspapers Case*, 1959 SCR 12 = (AIR 1958 SC 578) the requirement of considering the capacity of each individual unit to pay may not become necessary if the industry is divided into different classes. Even if the industry is divided into different classes, it will still be necessary to consider the capacity of the respective classes to bear the burden imposed on them. For this purpose a cross-section of these respective classes may have to be taken for careful consideration for deciding what burden the class considered as a whole can bear.

37. The question is whether the Wage Board has adopted these principles when it fixed the wage structure for the entire jute industry. From the various matters dealt with by the Wage Board and the manner of approach made by it as referred to above, we are satisfied that no attempt has been made by the Wage Board to divide the industry into classes. It is also clear that no cross-section of such classes has been taken for investigation to decide what burden the units in each class can bear.

38. The approach of the Wage Board to determine uniform wage scales for the entire industry must suffer from an inherent weakness. Conditions, such as easy access to raw materials, transport, nearness of markets for disposal of the manufactured product, availability of labour, the type of market whether within or outside the country for which the manufactured articles are intended and diverse other factors must vary from region to region. Likewise, economic conditions affecting the consumer prices must and do differ as is well known, from region to region, depending largely upon whether a particular region is self-sufficient or not in the elemental needs of its citizens and these in turn are bound to affect living standards. It would therefore be too artificial and unrealistic an approach to be oblivious of these differences and to attempt to group together all establishments and factories and device common wage-scales applicable to all of them disregarding the peculiar features of the industry in a particular region. Favourable conditions prevailing in one region would place industrial concerns there in a position better than those in other regions where such conditions do not occur. Similarly, in regions where consumer prices are lower, labour would be better off than in the rest of the regions where the living index is higher; yet, the wage scales would be the same in all the regions. Uniformity of wage-scales, irrespective of differences in conditions would place both the employees and the employers in regions where such favourable conditions prevail in an unfairly advantageous position over the employees and employers in the other regions. Instead of attaining harmony there would as a result arise inevitably a feeling of discrimination. Though, as stated by this Court in *Express Newspapers Case*, 1959 SCR 12 = (AIR 1958 SC 578), it may not be possible or even necessary for a Wage Board to scrutinise all the establishments separately and it would be enough to take a representative cross-section of the industry for assessment, the cross-section to be a truly representative one and capable of giving a true picture of the conditions of both the industry and labour must be one from each region where establishments of the industry in question are situate.

39. What the Wage Board, however, did was that instead of proceeding region-

wise and selecting a representative cross-section from each region, it selected 20 mills from West Bengal and clubbed them with 9 reporting mills from the rest of the regions, viz., Bihar, U. P., Madhya Pradesh and Andhra Pradesh where a few mills are scattered. The Board considered these 29 mills as representing a cross-section of the industry. It is obvious that these mills so clubbed together could not truly reflect the economic and other conditions prevailing in the mills in different regions with their peculiar problems and differing conditions. That in our view was not a proper approach and was bound to result in injustice especially in view of the peculiar feature of the jute industry that it is predominantly concentrated in West Bengal and is export-oriented. Besides, the jute industry in the other regions suffers from a distinct disadvantage as the raw materials have to be transported from a distance at considerable cost. Taking the 20 mills from West Bengal and the 9 mills from outside as forming a representative cross-section was manifestly incorrect as the West Bengal Mills cannot truly be said to be comparable units for the rest of the mills.

40. Another difficulty in accepting the Wage Board's recommendations arises from the fact that the Board equated the cotton textile industry in West Bengal with the jute industry there and finding the wage-scales in the jute industry lower than those in the cotton textile industry the Board raised the scales in the jute industry so as to bring them to the level of the cotton textile industry. Having so done, the next step which the Wage Board took was to raise also the wage-scales in mills outside West Bengal to bring them in line with the scales proposed by it for the mills in West Bengal. This process gave rise to two infirmities: (i) that the Board treated cotton textile concerns in West Bengal as comparable to those in jute industry; and (ii) it treated the jute mills in West Bengal as comparable to those outside, although conditions in the different regions where they were situate were obviously different. This meant that the Board gave a go-by to the well established principle of industry-cum-region consistently applied by Industrial Tribunals whenever wage-scales had to be determined.

41. Such a disharmony in the approach to the problem of determination

of wage scales by a Wage Board on the one hand and an Industrial Tribunal on the other must inevitably occur because whereas the attempt of a Board would be to uniformise wage scales for the entire industry, though it is spread over different parts of the country where conditions can rarely be expected to be similar or the same, the concern of a Tribunal would principally be to determine equitably the wage scales of a single unit with which it is for the time being concerned. The difficulty would be all the more felt by such a Tribunal where it is faced with the dilemma whether or not it should follow the Board's recommendations arrived at on principles different from (as in the present case) those consistently followed in industrial adjudication. One should have thought that this difficulty would have been realised before the recommendations of the Wage Board were accepted by Government.

42. The difficulty referred to above arising from the difference in the functions of the two bodies could well have been obviated if the Wage Board instead of laying down uniform scales for the entire industry, irrespective of where its several units were situate and of the different conditions prevailing in various areas, had considered the units in each area separately and determined the wage-scales for each such area by taking from that area a representative cross-section of the industry where possible or where that was not possible by taking comparable units from other industries within that area, thus following the principle of industry-cum-region. It is true that in doing so uniformity of wage-scales for the entire industry would not have been attained. But in a vast country like ours, where conditions differ often radically from region to region and even the index of living differs within a fairly wide range, such a target cannot always be just or equitable. If the wage-scales had been determined by the Board in the manner aforesaid, even though the Board is not a statutory body and consequently its decisions are of a recommendatory character, it would be possible for industrial tribunals to give due weight to its recommendations as such recommendations would have been in conformity with the principle of industry-cum-region, a principle binding on the tribunals. It would be difficult in that event for any unit in the industry in that region to propound a grievance that its capacity to pay

was not taken into account as the scales so framed would have been determined after taking into consideration scales prevailing in comparable units, whether in that industry or other industries in that region depending on whether in a particular area the accent was on the industry part or the region part of the principle of industry-cum-region. The Board, therefore, ought to have selected comparable units from each of the regions where the jute mills are situate and after their examination arrive at common wage-scales for each of those regions instead of grouping together 20 mills from West Bengal and 9 mills from the other region and treating them as constituting a cross-section representing the industry. The position in which a Tribunal called upon to fix wage-scales would be placed would not be an enviable one for it would find itself in an embarrassing situation where it had either to accept the wage-scales fixed by the Board though they were fixed in contravention of the principle of industry-cum-region, or discard them and proceed to fix them on its own on the principle of industry-cum-region, a principle which, as the industrial law stands today, it is bound to follow.

43. We have already pointed out that the Wage Board has taken the view that the wage level in the entire jute industry should be uniform throughout the country. It has also stated that the wage structure for the jute industry in West Bengal has to be devised having regard to the pattern of wage-structure existing in the cotton textile industry in that area. It is on this basis, and after a comparison of the wage structure prevailing in the cotton textile industry in that area, that the Wage Board has come to the conclusion that the minimum monthly emoluments of a worker in West Bengal must be fixed at Rs. 81/- taking in the basic wages, the Wage Board increment and the variable dearness allowance. The standardised basic wages enumerated in Appendix XI has been made applicable to all the jute mills outside West Bengal also, including the respondent mill. We have already referred to the recommendation of the Wage Board in para 7.65 (c) that the respondent jute mill should adopt the standardised basic wages fixed in Appendix XI, in a phased manner. Over and above that basic wage, the Wage Board has given an increase of Rs. 8.33 per month, as Wage Board increment and a variable dearness allow-

ance of Rs. 32.50 per month. Though it had been pressed by the jute mills outside West Bengal, that they had to pay higher freight charges on coal, batching oil etc., and that mill stores and electricity charges were higher for them, the Wage Board insisted that the wage level in the jute industry should be uniform throughout the country. The result of the Wage Board's recommendations, if they are to be given effect to by the respondent mill, will be that as against the minimum monthly wage of Rs. 52.17 that was being paid by the respondent there is a very sharp rise in its wage bill. The claim of the respondent that the recurring expenditure for implementation of the recommendation of the Wage Board is over Rs. 3,75,000/-, and that it has not the financial capacity to bear this burden, has been accepted by the Industrial Tribunal and that finding has not been challenged before us by the appellant. The respondent mill, which has only 120 looms, has been compared with the two big mills in Andhra Pradesh, viz., Nellimarla and Chitavals, having 326 and 500 looms respectively, as also with very large mills in West Bengal, some of whose loom capacity is more than 2000. That clearly shows that all mills, small as well as large, economic as well as uneconomic, have been clubbed together and treated alike by the Wage Board. In considering the capacity, the Wage Board has taken 20 jute mills in West Bengal as representing a fair cross-section of the industry in that region and it has taken 9 reporting mills outside West Bengal for this purpose. Three mills selected in Andhra Pradesh were the Nellimarla, Chitavals and the respondent mills. We have already shown the large disparity that exists between the mills in West Bengal as also between the Nellimarla and Chitavals and the respondent mill. We have also referred to the decisions of this Court that to compare wage scale comparable establishments in the region should be taken into account and that a small struggling concern should not be compared with a large, flourishing one. But this is exactly what has happened, when the Wage Board treated alike the respondent mill not only with Nellimarla and Chitavals jute mills but also with some of the very big and prosperous mills in West Bengal.

44. The various aspects, dealt with above, establish that the essential prerequisite of deciding the wage structure,

viz., to consider the capacity of the industry to pay on the principles laid down by this Court, is absent in the recommendations of the Wage Board and that introduces a fatal infirmity in its decision.

45. The question of bonus does not arise for our consideration as the respondent has stated that the management has entered into a settlement with its workmen and that they will be entitled for bonus only if the net profits exceed Rs. 75,000/-. It has further been stated that there is no available surplus to warrant the payment of bonus. These statements have not been controverted on behalf of the appellant.

46. To conclude, the award of the Industrial Tribunal that the demand of the workmen for implementation of the recommendations of the Wage Board is not justified, is correct. The appeal fails and is dismissed. In the circumstances of the case, there will be no order as to costs. Appeal dismissed.

AIR 1970 SUPREME COURT 891
(V 57 C 190)

(From: Madras)*

S. M. SIKRI AND K. S. HEGDE, JJ.

(1) In Civil Appeals Nos. 2251 and 2252 of 1968, M/s. Tarapore and Co., Madras, Appellant v. M/s. V/O Tractoroexport Moscow and another, Respondents.

(2) In Civil Appeals Nos. 2305 and 2306 of 1968, M/s. V/O Tractoroexport, Moscow, Appellant v. M/s. Tarapore & Co., Madras and another, Respondents.

Civil Appeals Nos. 2251, 2252, 2305 and 2306 of 1968, D/- 26-11-1968.

(A) Banking Regulation Act (1949), Section 6 — International trade — Irrevocable letters of credit — Nature of — Mechanism of such letter is of great importance in international trade — Courts should refrain from interfering — (Specific Relief Act (1963), Section 38) — (Constitution of India, Sch. VII, List 1, Item 41) — Applications Nos. 1760 & 2455 of 1967 (in C. S. No. 118 of 1967), D/- 12-4-1968 (Mad), Reversed.

An irrevocable letter of credit has a definite implication. It is a mechanism of great importance in international trade. Any interference with that mechanism is

*((1) 82 Mad LW 361, (2) Applns. Nos. 1760 and 2455 of 1967, in C. S. No. 118 of 1967, D/- 12-4-1968 — Mad.)

bound to have serious repercussions on the international trade. Except under very exceptional circumstances, the courts should not interfere with that mechanism.

(Para 7)

Where in pursuance of a contract with a Russian Firm for supply of machinery, an Indian Firm opened a confirmed, irrevocable and divisible letter of credit with a Bank in favour of the Russian Firm, in a suit by the Indian Firm alleging that machinery supplied was not upto the contract, the Court will not be justified in granting temporary injunction restraining the Bank as well as the Russian Firm from taking any further steps in pursuance of that letter of credit. Applns. Nos. 1760 & 2455 of 1967 (in C. S. No. 118 of 1967), D/- 12-4-1968 (Mad), Reversed; (1969) 82 Mad LW 361, Affirmed.

(Para 8)

Opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are upto contract or not. A vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. If the buyer has an enforceable claim that adjustment must be made by way of refund by the seller and not by the way of retention by the buyer. The letter of credit is independent of and unqualified by the contract of sale or underlying transaction. The autonomy of an irrevocable letter of credit is entitled to protection. As a rule Courts refrain from interfering with that autonomy. (1958) 2 QB 127 & (1922) 1 KB 318 & Federal Reporter 2nd Series, 298 p. 836, Rel. on.

(Paras 10, 11)

(B) Constitution of India, Article 133 — Interim orders of Court — Interference with, by Supreme Court.

Ordinarily Supreme Court does not interfere with interim orders. But where legal principles of great importance affecting international trade are involved and the orders of Court, if allowed to stand are bound to have their repercussion on our international trade, the Supreme Court will interfere with the interim orders of Court below. (Para 8)

Cases Referred: Chronological Paras (1958) 1958-2 QB 127 = 1958-1 All ER 262, Hamzeh Walas and Sons v. British Imex Industries Ltd.

(1953) AIR 1953 SC 198 (V 40)=
 1953 SCR 1159, Asrumati Devi
 v. Kumar Rependra Deb 5
 (1922) 1922-1 KB 318= 91 LJKB
 274, Urquhart Lindsay and Co. Ltd.
 v. Eastern Bank Ltd. 10
 Federal Reporter 2nd Series 293
 p. 830, Dulico Steel Products Ins.,
 of Washington v. Bankers Trust
 Co. 11

Mr. M. C. Setalvad, Senior Advocate,
 (M/s. V. P. Raman and D. N. Mishra,
 Advocates, and Mr. J. B. Dadachanji,
 Advocate of M/s. J. B. Dadachanji and
 Co., with him), for Appellant (In Civil
 Appeals Nos. 2251 and 2252 of 1968),
 and Respondent No. 1 (In Civil Appeals
 Nos. 2305 and 2306 of 1968); Mr. S. Mohan
 Kumaramangalam, Senior Advocate, Mr.
 M. K. Ramamurthi, Mrs. Shyamla Pappu
 and Mr. Vineet Kumar, Advocates, with
 him), for Respondent No. 1 (In Civil Ap-
 peals Nos. 2251 and 2252 of 1968), and
 Appellant (In Civil Appeals Nos. 2305
 and 2306 of 1968); M/s. Rameshwar Nath
 and Mahinder Narain, Advocates of M/s.
 Rajinder Narain and Co., for Respon-
 dent No. 2 (In all the Appeals).

The Judgment of the Court was deliv-
 ered by

HEGDE, J.— These are connected ap-
 peals. They arise from Civil Suit No. 118
 of 1967 on the original side of the High
 Court of Judicature at Madras. Herein
 the essential facts are few and simple
 though the question of law that arises for
 decision is of considerable importance.

2. The suit has been brought by M/s.
 Tarapore & Co., Madras (hereinafter re-
 ferred to as the "Indian Firm"). That
 firm had taken up on contract the work
 of excavation of a canal as a part of the
 Farakka Barrage Project. In that con-
 nection they entered into a contract with
 M/s. V/O Tractors Export, Moscow
 (which will hereinafter be referred to as
 the "Russian Firm") for the supply of
 construction machinery such as Scrapers
 and Bulldozers. In pursuance of that
 contract, the Indian Firm opened a con-
 firmed, irrevocable and divisible letter
 of credit with the Bank of India, Limited
 for the entire value of the equipment
 i.e. Rs. 68,09,372/- in favour of the
 Russian Firm negotiable through the
 Bank for Foreign Trade of the U. S. S. R.,
 Moscow. Under the said letter of credit
 the Bank of India was required to pay
 to the Russian Firm on production of the
 documents particularised in the letter of
 credit along with the drafts. One of the

conditions of the letter of credit was that
 25 per cent of the amount should be paid
 on the presentation of the specified docu-
 ments and the balance of 75 per cent to
 be paid one year from the date of the
 first payment. The agreement entered
 into between the Bank of India and the
 Russian Firm under the letter of credit
 was "subject to the Uniform Customs
 and Practice for Documentary Credits
 (1962 Revision), International Chamber
 of Commerce Brochure No. 222." Article 3
 of the brochure says that:

"An irrevocable credit is a definite
 undertaking on the part of an issuing
 bank and constitutes the engagement of
 that bank to the beneficiary or, as the
 case may be, to the beneficiary and bona
 fide holders of drafts drawn and/or
 documents presented thereunder, that the
 provisions for payment, acceptance or
 negotiation contained in the credit will
 be duly fulfilled, provided that all the
 terms and conditions of the credit are
 complied with.

An irrevocable credit may be advised
 to a beneficiary through another bank
 without engagement on the part that
 other bank (the advising bank), but when
 an issuing bank authorises another bank
 to confirm its irrevocable credit and the
 latter does so, such confirmation consti-
 tutes a definite undertaking on the part
 of the confirming bank either that the
 provisions for payment or acceptance will
 be duly fulfilled or, in the case of a credit
 available by negotiation of drafts,
 that the confirming bank will negotiate
 drafts without recourse to drawer.

Such undertakings can neither be mod-
 ified nor cancelled without the agree-
 ment of all concerned."

Article 8 of the Brochure says:—

"In documentary credit operations all
 parties concerned deal in documents and
 not in goods.

Payment, acceptance or negotiation
 against documents which appear on their
 face to be in accordance with the terms
 and conditions of a credit by a bank
 authorised to do so, binds the party
 giving the authorisation to take up the
 documents and reimburse the bank which
 has effected the payment, acceptance or
 negotiation.....

The only other Article in that brochure
 which is relevant for our present purpose
 is Article 9 which reads:

"Banks assume no liability or responsi-
 bility for the form, sufficiency, accuracy,
 genuineness, falsification or legal effect

of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented thereby, or for the good faith or acts and/or omissions, solvency, performance or standing of the consignor, the carriers or the insurers of the goods or any other person whomsoever."

On the strength of the aforementioned contract, the Russian Firm supplied all the machinery it undertook to supply by about the end of December 1960, which were duly taken possession of by the Indian Firm and put to work at Farakka Barrage Project. They are still in the possession of the Indian Firm. After the machinery was used for sometime, the Indian Firm complained to the Russian Firm that the performance of the machinery supplied by it was not as efficient as represented at the time of entering into the contract and consequently it had incurred and continues to incur considerable loss. In that connection there was some correspondence between the Indian Firm and the Russian Firm. Thereafter the Indian Firm instituted a suit on the original side of the High Court of Madras seeking an injunction restraining the Russian Firm from realizing the amount payable under the letter of credit. During the pendency of that suit the parties arrived at an agreement on August 14, 1966 at Delhi (which shall be hereinafter referred to as the Delhi agreement). The portion of that agreement which is relevant for our present purpose reads as follows:

Tarapore and Co., Madras, agree to withdraw immediately the Court case filed by them against "Tractoroexport," Moscow, in the Madras High Court.

2. Immediately on Tarapore withdrawing the case, V/O "Tractoroexport" agree to instruct the Bank for Foreign Trade of the USSR in Moscow, not to demand any further payment against L. C. established by Tarapore and Co., Madras, for a period of six months from the due dates in the first instance. During this period both the parties shall do their best to reach an amicable settlement.

3. In case the settlement between the two parties is not completed within this period of six months V/O Tractoroexport shall further extend the period of pay-

ment by further period of six months for the settlement to be completed.

4. Tarapore and Co., shall authorise their Bank to keep the unpaid portions L. C. valid for the extended period as stated above."

At this stage it may be mentioned that the Russian Firm had received from the Bank of India 25 per cent of the money payable under the letter of credit very soon after it supplied to the Indian Firm the machinery mentioned earlier. In pursuance of the aforementioned agreement the Indian Firm withdrew the suit. Thereafter there were attempts to settle the dispute. In the meantime the Indian Rupee was devalued. The contract between the Indian Firm and the Russian Firm contains the following term:

"Payment for the delivered goods shall be made by the Buyers in Indian Rupee in accordance with the Trade Agreement between the USSR and India dated 10th June, 1963. All the prices, are stated in Indian rupee. One Indian Rupee is equal to 0.186621 grammes of pure gold. If the above gold content of Indian Rupee is changed the prices and the amount of this contract in Indian Rupee shall be revalued accordingly on the date of changing the gold parity of the Indian Rupee."

This clause will be hereinafter referred to as the 'Gold Clause'. In view of that clause, the price fixed for machinery supplied stood revised. Consequently under the contract the Indian Firm had to pay to the Russian Firm an additional sum of about rupees twenty-six lacs. Accordingly the bankers of the Russian Firm called upon the Indian Firm to open an additional letter of credit for payment of the extra price payable under the contract. They also intimated the Indian Firm that the extension of time for the payment of the price of the machinery supplied, agreed to at Delhi will be given effect to only after the Indian Firm arrange for the additional letter of credit asked for. The Indian Firm objected to this demand as per its letter of 20th September, 1966. The relevant portion of that letter reads:

"We are rather surprised to see this, because, by our arrangement dated the 14th August, 1966, at New Delhi you had agreed to give further time for the payments on the withdrawal of the Madras High Court case. That was the only condition that was talked about and incorporated in our written agreement. If

you will be good enough to refer to the agreement dated the 14th Aug., 1966, you will find that we were obliged to withdraw the Madras suit pending talks of settlement and immediately on our withdrawing this suit, you agreed to instruct your Bankers not to demand any further payment under the letter of credit. There is absolutely no reference in that agreement to our having to open any additional letter of credit in view of the devaluation of the Indian rupee..... We would therefore request you to immediately instruct your Bankers in Moscow to advise our Bankers regarding the extension of time for payment under the letter of credit without any reference to any additional letters of credit in view of devaluation..... Moreover, when the entire question is open for amicable settlement between us, it is not possible to determine what exactly will be amount payable and unless that amount is known, it is not possible to open additional letters of credit to give effect to the gold clause.....

3. On November 1, 1960, the Russian Firm sent to the Indian Firm addendum No. 1 modifying the original contract in accordance with the gold clause. The last clause of that addendum recited that "all other terms and conditions are as stated in the above mentioned contract" (original contract). The Indian Firm objected to that addendum as well as to the demand for opening an additional letter of credit. In that connection the Russian Firm wrote a letter to the Indian Firm on November 29, 1966. As considerable arguments were advanced on the basis of that letter we shall quote the relevant portion of that letter:

"..... We confirm that you have signed with us the addendum No. 1 to our Contract No. 61/Tarapore-220/65 dated the 2nd Feb., 1965, at our request for the sole and specific purpose of satisfying our bankers. We confirm further that this addendum will not in any manner prejudice the arrangement we have come to in Delhi on the 14th August, 1966, and is without prejudice to your claims and points of controversy regarding which we shall have further discussions with a view to reach an amicable settlement.

Under this addendum, the company will extend the letter of credit for one year and accept the drafts for the difference in value of 57.5% due to devaluation. The final amount payable will be in accordance with the settlement."

Thereafter the Russian Firm appears to have drawn drafts on the Indian firm for the excess amount payable under the gold clause. For one reason or the other, no settlement as contemplated by the Delhi agreement was reached. The Indian firm complained that the Russian Firm never made any serious attempt to resolve the dispute whereas the Russian Firm alleged that it found no substance in the complaint made by the Indian Firm as regards the machinery supplied. In the suit as brought, as well as in these appeals that controversy is not open for examination. Suffice it to say that the parties did not amicably settle the dispute in question. When the extended time granted under the Delhi agreement was about to come to a close, the Indian Firm instituted the suit from which these appeals have arisen. In that suit the only substantive relief asked for is that the Bank of India as well as the Russian Firm should be restrained from taking any further steps in pursuance of the letter of credit opened by the Indian Firm in favour of the Russian Firm. Therein temporary injunctions were asked for in the very terms in which the permanent injunctions were prayed for. At a subsequent stage a further injunction restraining the Russian Firm from enforcing its right under the gold clause was also prayed for. The Russian Firm opposed those applications but the trial Judge granted the temporary injunctions asked for. The Russian Firm took up the matter in appeal to the Appellate Bench of that High Court which reversed the order of the trial judge by its Order dated October 9, 1968 but it certified that they are fit cases for appeal to this Court. When the applications in the appeals seeking interim orders came up for consideration by this Court the Russian Firm entered its caveat. It not only opposed the interim reliefs prayed for it further challenged the validity of the certificate granted by the High Court on the ground that the orders appealed against are not final orders within the meaning of Article 133 of the Constitution. Evidently as a matter of abundant caution, the Indian Firm had filed two separate applications seeking special leave to appeal against the orders of the Appellate Bench of the Madras High Court. After hearing the parties this Court revoked the certificates granted holding that the orders appealed against are not final orders but at the same time granted special leave to the Indian Firm to appeal against the orders

of the Madras High Court. Civil Appeals Nos. 2051 and 2052 of 1968 are appeals filed by the Indian Firm.

4. Before the Appellate Bench of the High Court of Madras, the Indian Firm had objected to the maintainability of the appeals filed by the Russian Firm on the ground that orders appealed against are not judgments within the meaning of Clause 15 of the Letters Patent of the Madras High Court but that objection had been overruled by the Appellate Bench following the earlier decisions of that High Court. That contention was again raised in the appeals filed by the Indian Firm in this Court. To obviate any difficulty the Russian Firm applied to this Court for special leave to appeal against the interim orders passed by the trial judge. We allowed those applications and consequently Civil Appeals Nos. 2305 and 2306 of 1968 came to be filed.

5. In view of the appeals filed by the Russian Firm in this Court against the interim orders made by the trial judge it is not necessary to decide whether the appeals filed by the Russian Firm before the Appellate Bench of the Madras High Court were maintainable? On that question judicial opinion is sharply divided as could be seen from the decision of this Court in *Asumati Debi v. Kumar Rupendra Deb*, 1953 SCR 1159 = (AIR 1953 SC 198). Hence we shall confine our attention to the question whether the temporary injunctions issued by the trial judge are sustainable?

6. The scope of an irrevocable letter of credit is explained thus in Halsbury's Laws of England (Vol. 34, Paragraph 319 at Page 185):

"It is often made a condition of a mercantile contract that the buyer shall pay for the goods by means of a confirmed credit, and it is then the duty of the buyer to procure his bank, known as the issuing or originating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country known as the correspondent or negotiating bank, to accept drafts drawn upon it for the price of the goods, against tender by the seller of the shipping documents. The contractual relationship between the issuing bank and the buyer is defined by the terms of the agreement between them under which the letter opening the credit is issued; and as between the seller

and the bank, the issue of the credit duly notified to the seller creates a new contractual nexus and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange upon tender of the documents. The contract thus created between the seller and the bank is separate from, although ancillary to, the original contract between the buyer and the seller, by reason of the bank's undertaking to the seller, which is absolute. Thus the bank is not entitled to rely upon terms of the contract between the buyer and the seller which might permit the buyer to reject the goods and to refuse payment therefor; and, conversely, the buyer is not entitled to an injunction restraining the seller from dealing with the letter of credit if the goods are defective."

Chalmers on "Bills of Exchange" explains the legal position in these words:

"The modern commercial credit serves to interpose between a buyer and seller a third person of un-questioned solvency, almost invariably a banker of international repute; the banker on the instructions of the buyer issues the letter of credit and thereby undertakes to act as paymaster upon the seller performing the conditions set out in it. A letter of credit may be in any one of a number of specialised forms and contains the undertaking of the banker to honour all bills of exchange drawn thereunder. It can hardly be over-emphasised that the banker is not bound or entitled to honour such bills of exchange unless they, and such accompanying documents as may be required thereunder, are in exact compliance with the terms of the credit. Such documents must be scrutinised with meticulous care, the maxim *de minimis non curat lex* cannot be invoked where payment is made by the letter of credit. If the seller has complied with the terms of the letter of credit, however, there is an absolute obligation upon the banker to pay irrespective of any disputes there may be between the buyer and the seller as to whether the goods are up to contract or not."

Similar are the views expressed in 'Practice and Law of Banking' by H. B. Sheldon, "the Law of Bankers Commercial Credits" by H. C. Gutteridge, "the Law Relating to Commercial Letters of Credit" by A. G. Davis, "the Law Relating to Bankers' Letters of Credit" by B. C. Mitra and in several other text books read

to us by Mr. Mohan Kumaramangalam, learned Counsel for the Russian firm. The legal position as set out above was not controverted by Mr. M. C. Setalvad, learned Counsel for the Indian Firm. So far as the Bank of India is concerned it admitted its liability to honour the letter of credit and expressed its willingness to abide by its terms. It took the same position before the High Court.

7. The main grievance of the Indian Firm is that if the Russian Firm is allowed to take away the money secured to it by the letter of credit, it cannot effectively enforce its claim arising from the breach of the contract it complains of. It was urged on its behalf that the Russian Firm has no assets in this country and therefore any decree that it may be able to obtain cannot be executed. Therefore, it was contended that the Trial Court was justified in issuing the impugned orders. The allegation that Russian Firm has no assets in this country was not made in the pleadings. That apart in the circumstances of this case that allegation has no relevance. An irrevocable letter of credit has a definite implication. It is a mechanism of great importance in international trade. Any interference with that mechanism is bound to have serious repercussions on the international trade of this country. Except under very exceptional circumstances, the Courts should not interfere with that mechanism.

8. For our present purpose we shall assume without deciding that the allegations made by the Indian Firm are true. We shall further assume that the suit as brought is maintainable though Mr. Kumaramangalam seriously challenged its maintainability. But yet, in our judgment, the learned trial Judge was not justified in law in granting the temporary injunctions appealed against. Ordinarily this Court does not interfere with interim orders. But herein legal principles of great importance affecting international trade are involved. If the orders impugned are allowed to stand they are bound to have their repercussion on our international trade.

9. We have earlier referred to several well-known treaties on the subject. Now we shall proceed to consider the decided cases bearing on the question under consideration.

10. A case somewhat similar to the one before us came up for consideration before the Queens Bench Division in

England in *Hamzeh Walas and Sons v. British Imex Industries Ltd.*, 1958-2 QB 127. Therein the plaintiffs, a Jordanian firm contracted to purchase from the defendants, a British firm, a large quantity of reinforced steel rods, to be delivered in two instalments. Payment was to be effected by opening in favour of the defendants of two confirmed letters of credit with the Midland Bank Ltd., in London, one in respect of each instalment. The letters of credit were duly opened and the first was realized by the defendants on the delivery of the first instalment. The plaintiffs complained that that instalment was defective and sought an injunction to bar the defendants from realizing the second letter of credit. Donovan, J., the trial Judge refused the application. In appeal Jenkins, Sellers and Pearce L., JJ. confirmed the decision of the Trial Judge. In the course of his judgment Jenkins, L. J., who spoke for the Court observed thus:

"We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this Court in the present case to interfere with that established practice.

There is this to be remembered, too. A vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is of no mean advantage when goods manufactured in one country are being sold in another. It is, furthermore, to be observed that vendors are often reselling goods bought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice is—and I think it was followed by the defendants in this case—to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute as between the vendor and the purchaser was to have the effect of "freezing" if I may use that expression

the sum in respect of which the letter of credit was opened”.

In *Urquhart Lindsay and Co. Ltd. v. Eastern Bank Ltd.*, 1922-1 KB 318 the King's Bench held that the refusal of the defendants bank to take and pay for the particular bills on presentation of the proper documents constituted a repudiation of the contract as a whole and that the plaintiffs were entitled to damages arising from such a breach. It may be noted that in that case the price quoted in the invoices was objected to by the buyer and he had notified his objection to the bank. But under the terms of the letter of credit the bank was required to make payments on the basis of the invoices tendered by the seller. The Court held that if the buyers had an enforceable claim that adjustment must be made by way of refund by the seller and not by the way of retention by the buyer.

11. Similar opinions have been expressed by the American Courts. The leading American case on the subject is *Dulien Steel Products Inc., of Washington v. Bankers Trust Co.*, Federal Reporter 2nd Series, 298 p. 836. The facts of that case are as follows:

The plaintiffs, *Dulien Steel Products Inc.*, of Washington, contracted to sell steel scrap to the European Iron and Steel Company. The transaction was put through *M/s. Marco Polo Group Project, Ltd.* who were entitled to commission for arranging the transaction. For the payment of the commission to *Marco Polo*, plaintiffs procured an irrevocable letter of credit from *Seattle First National Bank*. As desired by *Marco Polo* this letter of credit was opened in favour of one *Sica*. The defendant-bankers confirmed that letter of credit. The credit stipulated for payment against (1) a receipt of *Sica* for the amount of the credit and (2) a notification of *Seattle Bank* to the defendants that the plaintiffs had negotiated documents evidencing the shipment of the goods. *Sica* tendered the stipulated receipt and *Seattle Bank* informed the defendants that the *Dulien* had negotiated documentary drafts. Meanwhile after further negotiations between the plaintiffs and the vendees the price of the goods sold was reduced and consequently the commission payable to *Marco Polo* stood reduced but the defendants were not informed of this fact. Only after notifying the defendants about the negotiation of the drafts drawn under the contract of sale, the *Seattle Bank* in-

formed the defendants about the changes underlying the transaction and asked them not to pay *Sica* the full amount of the credit. The defendants were also informed that *Sica* was merely a nominee of *Marco Polo* and has no rights of his own to the sum of the credit. *Sica*, however, claimed payment of the full amount of the credit. The defendants asked further instructions from *Seattle Bank* but despite *Seattle Bank's* instructions decided to comply with *Sica's* request. After informing *Seattle Bank* of their intention, they paid *Sica* the full amount of the credit. Plaintiffs thereupon brought an action in the District Court of New York for the recovery of the moneys paid to *Sica*. The action was dismissed by the trial Court and that decision was affirmed by the Court of Appeals. That decision establishes the well known principle that the letter of credit is independent of and unqualified by the contract of sale or underlying transaction. The autonomy of an irrevocable letter of credit is entitled to protection. As a rule Courts refrain from interfering with that autonomy.

12. A half-hearted attempt was made on behalf of the Indian Firm to persuade us not to apply the principles noticed above as in these appeals we are dealing with a complaint of fraud. The facts pleaded in the plaint do not amount to a plea of fraud despite the assertions of the Indian Firm that the Russian Firm was guilty of fraud.

13. Evidently with a view to steer clear of the well-established legal position *Mr. Setalvad*, learned Counsel for the Indian Firm urged that the letter of credit was no more enforceable as the original contract stood modified as a result of the Delhi agreement and the subsequent correspondence between the parties. It was urged that according to the modified contract the Indian Firm is only liable to pay the price that may be settled between the buyer and the seller. This contention has not been taken either in the plaint or in the arguments before the trial Judge or before the Appellate Bench. It is taken for the first time in this Court. This is not purely a legal contention. The contention in question bears on the intention of the parties who entered into the agreement. No one could have known the intention better than plaintiff who was a party to the contract. If there was such an intention, the plaintiff would have certainly pleaded the same. That apart, we are unable to

accept the contention that either the Delhi agreement or the subsequent correspondence between the parties modified the original contract. The Delhi agreement merely provided that the parties will try and settle the dispute out of Court, if possible. Much was made of the letter written by the Russian Firm to the Indian Firm on 29-11-1966 wherein, as seen earlier, it was stated:

"that the final amount payable will be in accordance with the settlement". This letter has to be read along with the other letters that passed between the parties. If so read, it is clear that the statement that the final payment will be made in accordance with the settlement is subject to the condition that the parties are able to arrive at a settlement. Otherwise the parties continue to be bound by the original contract subject to the extension of the time granted under the Delhi agreement for the payment of the price. As regards the additional payment demanded by the Russian Firm, there is no occasion for issuing any temporary injunction. If the Indian Firm does not comply with that demand the law will take its course. It is for that Firm to choose its course of action.

14. In the result we allow Civil Appeals Nos. 2305 and 2306 of 1968 with the costs of the appellant therein and set aside the temporary injunctions granted by the trial judge. The other appeals are dismissed with no order as to costs. The costs to be paid by the Indian company.

Order accordingly.

AIR 1970 SUPREME COURT 898
(V 57 C 191)

M. HIDAYATULLAH, C. J., S. M. SIKRI, R. S. BACHAWAT, G. K. MITTER AND K. S. HEGDE, JJ.

M/s. Tilokchand Motichand and others, Petitioners v. H. B. Munshi, Commissioner of Sales Tax, Bombay and another, Respondents.

Writ Petn. No. 53 of 1968. D/- 22-11-1968.

Constitution of India, Article 32 — Instances of self-restraint of Supreme Court under Article 32 — Existence of other ordinary remedy — Delay — No rules

CN/DN/G183/GS/RGD/B

of limitation — Exercise of power under Article 32 is discretionary — State cannot put fetters on Court's powers — Payment under mistake of law — Recovery of, under Section 72 Contract Act — Limitation Act prescribes limitation on grounds of public policy which has to be respected in enforcement of fundamental right — Section 12A (4), Bombay Sales Tax Act (1946) declared invalid in 1964 — Payment towards tax made in 1959 and 1960 — Petition for recovery made 6 months after declaration of invalidity of Section 12A (4) — Petition held barred — Limitation Act (1963), Article 24 — Contract Act (1872), Section 72 — Civil P. C. (1908), Section 11 — Previous petition under Article 226 dismissed not on merits — Subsequent petition under Article 32 is not barred.

Article 32 gives the right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of the Constitution. The State cannot place any hindrance in the way of an aggrieved person seeking to approach the Supreme Court. But the guarantee goes no further on the terms of Art. 32. Where the matter has reached the Supreme Court the extent or manner of interference is for the Court to decide. Interference must always depend upon the facts of each case.

(Para 4)

This Court does not convert civil and criminal actions into proceedings for the obtainment of writs. It is in rare cases, where the ordinary process of law appears inefficacious, that this Court interferes even where other remedies are available.

(Para 5)

Then again this Court refrains from acting under Article 32 if the party has already moved the High Court under Article 226, with a similar complaint and for the same relief and failed. This Court insists on an appeal to it and does not allow fresh proceedings. In this the principle of *res judicata* is applied, although the expression is somewhat inapt and unfortunate. The rule is based on public policy but the motivating factor is the existence of another parallel jurisdiction in another Court. Where an order is not speaking or the matter has been disposed of on some other ground at the threshold this Court in a suitable case entertains the application before itself. This Court also does not allow a new ground to be taken in appeal. Similarly, this Court has refrained from taking action when

a better remedy is to move the High Court under Article 226 which can go into the controversy more comprehensively than this Court can under Art. 32.

(Para 6)

This Court will not inquire into belated and stale claims or take note of evidence of neglect of one's own rights for a long time. The party claiming Fundamental Rights must move the Court before other rights of innocent parties emerge by reason of delay on the part of the person moving the Court.

(Para 7)

English and American practice indicated.

(Para 8)

A petition under Article 32 is not a suit and it is also not a petition or an application to which the Limitation Act applies. Legislative curbs might be questioned under Article 13 (2). A short period of limitation might well frustrate the Fundamental Right. Too long a period might enable stale claims to be made to the detriment of other rights which might emerge.

(Para 9)

Utmost expedition is the sine qua non for such claims. The party aggrieved must explain satisfactorily all semblance of delay. No period can be indicated which may be regarded as the ultimate limit of action for that would be taking upon itself legislative functions. In England a period of 6 months has been provided statutorily, but that could be because there is no guaranteed remedy and the matter is one entirely of discretion. In India each case will have to be considered on its own facts. Avoidable delay affecting the merits of the claim, will disentitle a party to invoke the extraordinary jurisdiction.

(Para 10)

The question is one of discretion for this Court to follow from case to case. This Court need not necessarily give the total time to the litigant to move this Court under Article 32, even though he may be within statutory limitation. Similarly in a suitable case this Court may entertain a petition even after limitation. It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose.

(Para 11)

The Sales Tax Officer, on 17-3-1958, ordered a forfeiture under Section 21 (4) of the Bombay Sales Tax Act (Bombay Act III of 1953), which provision is similar to Section 12A (4) of the Bombay Sales Tax Act, 1946. Petitioner's writ petition and then his appeal before the Division Bench failed on 7-7-1959. The

petitioner paid the sum due in various instalments upto 8-8-1960. Meanwhile on September 29, 1967, the Supreme Court in AIR 1968 SC 445 in a case from Gujarat in 16 STC 973 struck down S. 12-A on ground that it infringed Art. 19 (1) (f). On 9-2-1968, the petitioner filed a petition praying that the order dated March 17, 1958, be quashed.

Before the Bombay High Court the petitioner did not set out the ground on which ultimately Section 12A (4) was struck down in the Gujarat Case, nor did he file an appeal before the Supreme Court.

Held, (Per Majority: Sikri and Hegde, JJ, contra) that the petitioner could not take advantage of the Supreme Court decision in the Gujarat case after a lapse of a number of years. His contention that the ground on which the statute was struck down was not within his knowledge and therefore he could not pursue it in this Court would not stand, since the law will presume that he knew the exact ground of unconstitutionality. It was his duty to have brought the matter before the Supreme Court for consideration. In any event having set the machinery of law in motion he could not abandon it to resume it after a number of years. There was no question here of a mistake of law entitling the petitioner to invoke analogy of the Article in the Limitation Act.

(Paras 12, 33, 37)

Per Bachawat, Mitter and Hegde, JJ.: As the earlier petition filed in the High Court was not dismissed on the merits, the present petition was not barred by res judicata or principle analogous thereto.

(Paras 29, 54, 57)

Per Mitter, J.:— A claim for money paid under coercion is covered by Article 113 of the Limitation Act, 1963 giving a period of three years from the 1st of January 1964 on which date the Act came into force and the suit would have to be filed by the 1st January 1967. The facts negative any claim of payment under a mistake of law and are only consistent with a claim for money paid under coercion. As the petitioners have come to this Court in February, 1968 long after the date when they could have properly filed a suit, the application must be rejected.

(Para 53)

Per Sikri, J. (Contra) — That the petitioner was under a mistake of law, when

be paid up, the mistake being that he thought that Section 12A (4) was a valid provision in spite of its imposing unreasonable restrictions. This mistake he discovered like all assessee when this Court struck down Section 12A (4) of the Bombay Sales Tax Act. He came to this Court within six months of that day and there was no delay. (Para 27)

Per Hegde, J. (Contra): A mere impression of a party that a provision of law might be ultra vires the Constitution could not be equated to knowledge that the provision is invalid. Hope and desire are not the same things as knowledge. A law passed by a competent legislature is bound to be presumed to be valid until it is struck down by a competent Court. The fact that after a futile attempt to get the provision in question declared invalid the petitioners gave up their fight and submitted to the law which was apparently valid is no proof of the fact that they knew that the provision in question is invalid.

(Para 63)

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cates and Mr. J. B. Dadachanji, Advo-
cate of M/s. J. B. Dadachanji and Co.,
for Petitioners; Mr. C. K. Daphtary,
Attorney-General for India, (M/s. R.
Gopalakrishnan, R. H. Dhebar and S. P.
Nayar, Advocates, with him), for Respon-
dents.
- The following Judgments of the Court
were delivered by
- HIDAYATULLAH, C. J.: This petition
has led to a sharp division of opinion
among my brethren; Sikri and Hegde, JJ.

would allow the petition and Bachawat and Mitter, JJ., would dismiss it. They have differed on the question whether the petition deserves to be dismissed on the ground of delay. I agree in the result reached by Bachawat and Mitter, JJ., and would also dismiss it. I wish to state briefly my reasons.

2. At the threshold it appears to me that as there is no law which prescribes a period of limitation for such petitions, each of my brethren has really given expression to the practice he follows or intends to follow. I can do no more than state the views I hold on this subject and then give my decision on the merits of the petition in the light of those views.

3. The problem divides itself into two. The first part is a general question to be considered in two aspects: (a) whether any limit of time at all can be imposed on petitions under Article 32, and (b) whether this Court would apply by analogy an article of the Indian Limitation Act appropriate to the facts of the case or any other limit? The second is what is to be done in this case? I shall begin by stating my views on the first question.

4. There appears to be some confusion about the scope of Article 32. That Article gives the right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of the Constitution. The provision merely keeps open the doors of this Court, in much the same way, as it used to be said, the doors of the Chancery Court were always open. The State cannot place any hindrance in the way of an aggrieved person seeking to approach this Court. This is logical enough for it is against State action that Fundamental Rights are claimed. But the guarantee goes no further at least on the terms of Article 32. Having reached this Court, the extent or manner of interference is for the Court to decide. It is clear that every case does not merit interference. That must always depend upon the facts of the case. In dealing with cases which have come before it, this Court has already settled many principles on which it acts. A few of them may be mentioned here.

5. This Court does not take action in cases covered by the ordinary jurisdiction of the civil courts, that is to say, it does not convert civil and criminal actions into proceedings for the obtainment of writs. Although there is no rule

or provision of law to prohibit the exercise of its extraordinary jurisdiction this Court has always insisted upon recourse to ordinary remedies or the exhaustion of other remedies. It is in rare cases, where the ordinary process of law appears to be inefficacious, that this Court interferes even where other remedies are available. This attitude arises from the acceptance of a salutary principle that extraordinary remedies should not take the place of ordinary remedies.

6. Then again this Court refrains from acting under Article 32 if the party has already moved the High Court under Article 226. This constitutes a comity between the Supreme Court and the High Court. Similarly, when a party had already moved the High Court with a similar complaint and for the same relief and failed, this Court insists on an appeal to be brought before it and does not allow fresh proceedings to be started. In this connection the principle of *res judicata* has been applied, although the expression is somewhat inapt and unfortunate. The reason of the rule no doubt is public policy which Coke summarised as "*interest reipublicae res judicatas non rescindi*" but the motivating factor is the existence of another parallel jurisdiction in another Court and that Court having been moved, this Court insists on bringing its decision before this Court for review. Again this Court distinguishes between cases in which a speaking order on merits has been passed. Where the order is not speaking or the matter has been disposed of on some other ground at the threshold, this Court in a suitable case entertains the application before itself. Another restraint which this Court puts on itself is that it does not allow a new ground to be taken in appeal. In the same way, this Court has refrained from taking action when a better remedy is to move the High Court under Article 226 which can go into the controversy more comprehensively than this Court can under Article 32.

7. It follows, therefore, that this Court puts itself in restraint in the matter of petitions under Article 32 and this practice has now become inveterate. The question is whether this Court will inquire into belated and stale claims or take note of evidence of neglect of one's own rights for a long time? I am of opinion that not only it would (not ?) but also that it should (not ?). The party claiming Fundamental Rights must move

the Court before other rights come into existence. The action of courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court. This principle is well-recognised and has been applied by Courts in England and America.

8. The English and American practice has been outlined in Halsbury's Laws of England and Corpus Juris Secundum. It has been mentioned by my brethren in their opinions and I need not traverse the same ground again except to say this that Courts of Common Law in England were bound by the Law of Limitation but not the Courts of Chancery. Even so the Chancery Courts insisted on expedition. It is trite learning to refer to the maxim "delay defeats equity" or the latin of it that the Courts help those who are vigilant and do not slumber over their rights. The Courts of Chancery, therefore, frequently applied to suits in equity the analogy of the law of Limitation applicable to actions at law and equally frequently put a special limitation of their own if they thought that the suit was unduly delayed. This was independently of the analogy of law relating to limitation. The same practice has been followed in the United States.

9. In India we have the Limitation Act which prescribes different periods of limitation for suits, petitions or applications. There are also residuary Articles which prescribe limitation in those cases where no express period is provided. If it were a matter of a suit or application, either an appropriate article or the residuary article would have applied. But a petition under Art. 32 is not a suit and is also not a petition or an application to which the Limitation Act applies. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well be questioned under Article 13 (2). The reason is also quite clear. If a short period of limitation were prescribed the Fundamental Right might well be frustrated. Prescribing too long a period might enable stale claims to be made to the detriment of other rights which might emerge.

10. If then there is no period prescribed what is the standard for this Court to follow? I should say that utmost expedition is the *sine qua non* for such claims. The party aggrieved must move the Court at the earliest possible time and explain satisfactorily all semblance

of delay. I am not indicating any period which may be regarded as the ultimate limit of action for that would be taking upon myself legislative functions. In England a period of 6 months has been provided statutorily, but that could be because there is no guaranteed remedy and the matter is one entirely of discretion. In India I will only say that each case will have to be considered on its own facts. Where there is appearance of avoidable delay and this delay affects the merits of the claim, this Court will consider it and in a proper case hold the party disentitled to invoke the extraordinary jurisdiction.

11. Therefore, the question is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within Limitation Act by reason of some Article but this Court need not necessarily give the total time to the litigant to move this Court under Art. 32. Similarly in a suitable case this Court may entertain such a petition even after a lapse of time. It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose.

12. Applying these principles to the present case what do I find? The petitioner moved the High Court for relief on the ground that the recovery from him was unconstitutional. He set out a number of grounds but did not set out the ground on which ultimately in another case recovery was struck down by this Court. That ground was that the provisions of the Act were unconstitutional. The question is: can the petitioner in this case take advantage, after a lapse of a number of years, of the decision of this Court? He moved the High Court but did not come up in appeal to this Court. His contention is that the ground on which his petition was dismissed was different and the ground on which the statute was struck down was not within his knowledge and therefore he did not know of it and pursue it in this Court. To that I answer that law will presume that he knew the exact ground of unconstitutionality. Everybody is presumed to know the law. It was his duty to have brought the matter before this Court for consideration. In any event, having set the machinery of law in motion he cannot abandon it to resume it after a number of years, be-

cause another person more adventurous than him in his turn got the statute declared unconstitutional, and got a favourable decision. If I were to hold otherwise, then the decision of the High Court in any case once adjudicated upon and acquiesced in may be questioned in a fresh litigation revived only with the argument that the correct position was not known to the petitioner at the time when he abandoned his own litigation. I agree with the opinion of my brethren Bachawat and Mitter, JJ., that there is no question here of a mistake of law entitling the petitioner to invoke analogy of the Article in the Limitation Act. The grounds on which he moved the Court might well have impressed this Court which might have also decided the question of the unconstitutionality of the Act as was done in the subsequent litigation by another party. The present petitioner should have taken the right ground in the High Court and taken it in appeal to this Court after the High Court decided against it. Not having done so and having abandoned his own litigation years ago, I do not think that this Court should apply the analogy of the Article in the Limitation Act and give him the relief now. The petition, therefore, fails and is dismissed with costs.

13. SIKRI, J.: I have had the advantage of reading the drafts of the judgments prepared by Mitter, J., and Bachawat, J. I agree with Mitter, J., in his conclusion that the rule laid down in *Daryao v. State of U. P.*, 1962-1 SCR 574 = (AIR 1961 SC 1457) is inapplicable to the facts of the case, but for the reasons I will presently give, in my opinion the petition should be allowed.

14. Article 32 (2) of the Constitution confers a judicial power on the Court. Like all judicial powers unless there is an express provision to the contrary, it must be exercised in accordance with fundamental principles of administration of justice. General principles of *res judicata* were accordingly applied by this Court in 1962-1 SCR 574 = (AIR 1961 SC 1457), and *Amalgamated Coalfields Ltd. v. Janapada Sabha, Chindwara*, AIR 1964 SC 1013 at p. 1018. I understand that one of the fundamental principles of administration of justice is that, apart from express provisions to the contrary, stale claims should not be given effect to. But what is a stale claim? It is not denied that the Indian Limitation Act does not directly apply to a petition under

Article 32. Both the English Courts and the American Courts were confronted with a similar problem. In the United States the Federal Courts of Equity solved the problem thus:

"Except perhaps, where the statute by its express terms applies to suits in equity as well as to actions at law, or where the jurisdiction of law and equity is concurrent, the rule appears to be that Federal courts sitting in equity are not bound by State statutes of limitation. Nevertheless, except where unusual conditions or extraordinary circumstances render it equitable to do so, the Federal courts usually act in analogy to the State statutes of limitation applicable to cases of like character." (Vol. 34, *American Jurisprudence, Limitation of Actions*, S. 54)". In Courts of Admiralty, where the statutes of limitation do not control proceedings, the analogy of such statutes is ordinarily followed unless there is something exceptional in the case. (*ibid*)

15. Story on Equity Jurisprudence states the legal position thus:

"It was, too, a most material ground, in all bills for an account, to ascertain whether they were brought to open and correct errors in the account *recenti facto*; or whether the application was made after a great lapse of time. In cases of this sort, where the demand was strictly of a legal nature, or might be cognizable at law, courts of equity governed themselves by the same limitations as to entertain such suits as were prescribed by the Statute of Limitations in regard to suits in courts of common law in matters of account. If, therefore, the ordinary limitation of such suits at law was six years, courts of equity would follow the same period of limitation. In so doing, they did not act, in cases of this sort (that is, in matter of concurrent jurisdiction) so much upon the ground of analogy to the Statute of Limitations, as positively in obedience to such statute. But where the demand was not of a legal nature, but was purely equitable, or where the bar of the statute was inapplicable; courts of equity had another rule, founded sometimes upon the analogies of the law, where such analogy existed, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches and negligence. Hence, in matters of account, although not barred by the Statute of Limitations, courts of equity refused to interfere after a consi-

derable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, when the original transactions had become obscure by time and the evidence might have been lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *Vigilantibus, nondormientibus jura subveniunt*. Under peculiar circumstances, however, excusing or justifying the delay, courts of equity would not refuse their aid in furtherance of the rights of the party; since in such cases there was no pretence to insist upon laches or negligence, as a ground for dismissal of the suit; and in one case carried back the account over a period of fifty years." (Third Edition, page 224, S. 529).

16. In England, as pointed out by Bachawat, J., the Court of Chancery acted on the analogy of Statute of Limitation (vide Halsbury, Vol. 14, p. 647, art. 1190).

17. It seems to me, however, that the above solution is not quite appropriate for petitions under Article 32. A delay of 12 years or 6 years would make a strange bed-fellow with a direction or order or writ in the nature of mandamus, certiorari and prohibition. Bearing in mind the history of these writs I cannot believe that the Constituent Assembly had the intention that five Judges of this Court should sit together to enforce a fundamental right at the instance of a person, who had without any reasonable explanation slept over his rights for 6 or 12 years. The history of these writs both in England and the U. S. A. convinces me that the underlying idea of the Constitution was to provide an expeditious and authoritative remedy against the inroads of the State. If a claim is barred under the Limitation Act, unless there are exceptional circumstances, *prima facie* it is a stale claim and should not be entertained by this Court. But even if it is not barred under the Indian Limitation Act, it may not be entertained by this Court if on the facts of the case there is unreasonable delay. For instance, if the State had taken possession of property under a law alleged to be void, and if a petitioner comes to this Court 11 years after the possession was taken by the State, I would dismiss the petition on the ground of delay, unless there is some reasonable explanation. The fact that a suit for possession of land

would still be in time would not be relevant at all. It is difficult to lay down a precise period beyond which delay should be explained. I favour one year because this Court should not be approached lightly, and competent legal advice should be taken and pros and cons carefully weighed before coming to this Court. It is common knowledge that appeals and representations to the higher authorities take time; time spent in pursuing these remedies may not be excluded under the Limitation Act, but it may ordinarily be taken as a good explanation for the delay.

18. It is said that if this was the practice the guarantee of Article 32 would be destroyed. But the article nowhere says that a petition, howsoever late, should be entertained and a writ or order or direction granted, howsoever remote the date of infringement of the fundamental right. In practice this Court has not been entertaining stale claims by persons who have slept over their rights. There is no need to depart from this practice and tie our hands completely with the shackles imposed by the Indian Limitation Act. In the case of applications under Article 226 this Court observed in *State of Madhya Pradesh v. Bhailal Bhai*, 1964-6 SCR 261 at pp. 271-72 = (AIR 1964 SC 1003 at p. 1011):

"It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a *prima facie* triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution."

In *State of Kerala v. Aluminium Industries* (1965) 18 STC 689 at p. 692 (SC) Wanchoo, J., speaking on behalf of a large Bench of this Court, observed

"There is no doubt in view of the decision of this Court in *Sales Tax Officer v. Kanhalayalal*, 1959 SCR 1350 = (AIR

1959 SC 135) that money paid under a mistake of law comes within the word "mistake" in Section 72 of the Contract Act and there is no question of estoppel when the mistake of law is common to both the parties, which was the case here inasmuch as the respondent did not raise the question relating to Article 286 of the Constitution and the Sales Tax Officer had no occasion to consider it. In such a case where tax is levied by mistake of law it is ordinarily the duty of the State subject to any provision in the law relating to sales tax (and no such provision has been brought to our notice) to refund the tax. If refund is not made, remedy through court is open subject to the same restrictions and also to the period of limitation (see Article 96 of the Limitation Act, 1908), namely, three years from the date when the mistake becomes known to the person who has made the payment by mistake (see 1964-6 SCR 261 = (AIR 1964 SC 1006)). In this view of the matter it was the duty of the State to investigate the facts when the mistake was brought to its notice and to make a refund if mistake was proved and the claim was made within the period of limitation.

But these cases cannot directly apply to petitions under Article 32 because they proceed from the premise that the remedy is discretionary under Article 226.

19. Coming to the facts of this case, which have been stated in detail by Mitter, J., it seems to me that the delay in coming to this Court has been adequately explained. In brief, the facts are these: The Sales Tax Officer, by his order dated March 17, 1958, forfeited a sum of Rs. 26,563.50 under Section 21 (4) of the Bombay Sales Tax Act (Bombay Act III of 1953), which provision is similar to Section 12A (4) of the Bombay Sales Tax Act, 1946. The petitioner promptly filed a writ petition in the Bombay High Court challenging this order. His petition was dismissed on November 28, 1958. He also failed in appeal before the Division Bench on July 7, 1959. An order of attachment followed. The petitioner paid the sum of Rs. 26,563.50 in various instalments from October 3, 1959, to August 8, 1960. By letter dated January 9, 1962, the petitioner was called upon to pay a penalty amounting to Rs. 12,517/68 on account of late payment of Sales Tax dues but this order of penalty was ultimately cancelled.

20. The Gujarat High Court (Shelat, C. J., and Bhagwati, J.) in *Kantilal Babulal v. H. C. Patel*, Sales Tax Officer, (1965) 16 STC 973 (Guj) held on December 2, 1963, that Section 12A (4) of the Bombay Sales Tax Act, 1946, was valid and did not violate Article 19 (1) (f) as it was saved by Article 19 (5). On September 29, 1967, this Court, on appeal, in *Kantilal Babulal v. H. C. Patel*, Sales Tax Officer, 21 STC 174 = (AIR 1968 SC 445) struck down this provision as it infringed Article 19 (1) (f). On February 9, 1968, four petitioners — hereinafter compendiously referred to as the petitioner — filed this petition praying that the order dated March 17, 1958, and the notice and order dated December 18, 1958, and December 24, 1958, be quashed.

21. There is no doubt that under Section 72 of the Contract Act the petitioner would be entitled to the relief claimed and the refund of the amount if he paid the money under mistake of law. I find it difficult to appreciate why the payment was not made under a mistake of law. In my opinion the petitioner was mistaken in thinking that the money was liable to be refunded under a valid law. Nobody has urged before us that the grounds which he had raised before the High Court were sound.

22. The petitioner had attempted to raise before the Bombay High Court the following grounds:

1. Inasmuch as the sum of Rs. 26,563.50 was paid by way of refund under the Bombay Sales Tax Act 1946, the taxing authorities had exceeded their power under Section 21 (4) of the Act of 1953, in forfeiting the said sum of money.

2. Assuming that the respondent had power to forfeit the sum under the Act of 1953 it was strictly limited to taxes payable under the provisions of the Act and as no tax was payable on outside sales the authorities had no power to forfeit the sum of Rs. 26,563.50.

3. xx xx xx xx

4. Even assuming while denying that the respondent had power to forfeit the sum of Rs. 26,563.50, the power to forfeit an amount as a tax presupposes a power to impose a tax and inasmuch as on a proper construction of the relevant provisions of the Constitution no State Legislature had at any time a power to impose tax on the aforesaid transactions, the power to forfeit tax in respect of those

transactions is ultra vires the State Legislature."

23. The learned Single Judge held:

"This appears to me to be a gross case where even if I was of the opinion that the order is invalid and involved violation of fundamental rights I would not in my discretion interfere by way of issuing a writ. I am not depriving the petitioner of any other appropriate remedy. I have, therefore, decided to dismiss this petition on that single ground."

24. The Division Bench, on appeal, decided on the limited ground that "Mr. Justice K. K. Desai having exercised his discretion no case is made out for interference with the exercise of that discretion." The petitioner rightly did not file an appeal to this Court for he would have had little chance of succeeding.

25. Suppose a petitioner challenges a provision of the Sales Tax Act before the High Court on the ground that it does not fall within List II or List III of the Seventh Schedule. He fails and pays the tax and does not appeal to the Supreme Court. Ultimately, in another petition the provision is struck down under Article 14 or Article 19, a point which he and his lawyers never thought of. All assesseees who had paid tax without challenging the provision would be entitled to approach this Court under Article 32 and claim a refund (see 1959 SCR 1350 = (AIR 1959 SC 135)). But why not the assessee who applied to the High Court? The answer given is that he had thought at one time that the law was bad, though on wrong grounds. If a law were framed sanctioning the above discrimination, I believe, it would be difficult to sustain it under Article 14, but yet this is the discrimination which the respondent wants me to sanction.

26. The grounds extracted above show that it never struck the petitioner that the provision could be challenged on the ground ultimately accepted by this Court. If the petitioner had not thought of going to the Bombay High Court on the points he did, and had paid on demand, as most of the assesseees do, he would, I imagine, have been entitled to maintain this petition. But it is now said that the petitioner's position is worse because he exercised his right to approach the High Court under Article 226. The contention seems to be that when a petitioner approaches a High Court and fails, he can no longer suffer from any mistake

of law even if the point on which this Court ultimately strikes down the provisions, never struck him or his lawyer or the Court. I cannot uphold this contention.

27. In my opinion the petitioner was under a mistake of law, when he paid up, the mistake being that he thought that Section 12A (4) was a valid provision in spite of its imposing unreasonable restrictions. This mistake he discovered like all assesseees when this Court struck down Section 12A (4) of the Bombay Sales Tax Act. He has come to this Court within six months of that day and there is no delay.

28. The petition is accordingly allowed and the impugned order dated March 17, 1958, quashed and the respondent directed to refund the amount. Under the circumstances there will be no order as to costs.

29. BACHAWAT, J.:— I have had the advantage of reading the judgment prepared by G. K. Mitter, J. For the reasons given in this judgment, I agree with the order proposed by him. As the earlier petition filed in the High Court was not dismissed on the merits, the present petition is not barred by res judicata or principle analogous thereto.

30. The petitioners realised Rupees 26,563.50 P. from their customers outside Bombay on account of sales tax. The Sales Tax Officer by his order dated March 17, 1958 forfeited this sum under Section 21 (4) of the Bombay Sales Tax Act 3 of 1953. On March 28, 1958 the petitioners filed a writ petition in the Bombay High Court seeking to restrain the Sales Tax Officer from recovering the amount. They pleaded that they were not liable to pay the amount, that Section 21 (4) was ultra vires the powers of the State legislature and that the order of forfeiture was violative of Articles 19 (1) (f) and 365 of the Constitution and was invalid. On November 28, 1958, K. K. Desai, J., dismissed the petition. He held that the petitioners having defrauded other persons were not entitled to any relief. The petitioners filed an appeal against the order. In the memorandum of appeal they pleaded that the threatened levy was in violation of Articles 19 (1) (f) and 31 of the Constitution. The appeal was dismissed on July 13, 1959. In the meantime on December 24, 1958 the Collector of Bombay attached the petitioners' properties. Between August 3, 1959 and August 8, 1960 the petitioners

paid the sum of Rs. 26, 563.50 P. to the Collector of Bombay. In Civil Appeal No. 126 of 1966, decided on September 29, 1967 = (reported in AIR 1968 SC 445) this Court struck down Section 12-A (4) of the Bombay Sales Tax Act, 1946 as unconstitutional and violative of Article 19 (1) (f). The arguments in the present appeal proceeded on the assumption that Section 21 (4) of the Bombay Sales Tax Act, 1953 is liable to be struck down on the same ground. On February 9, 1968 the petitioners filed the present writ petition under Article 32 of the Constitution claiming refund of Rs. 26,563.50 P. under Section 72 of the Indian Contract Act 1872. They alleged that they paid this sum to the Collector under coercion and/or mistake of law, and that they discovered the mistake on September 29, 1967.

31. The points arise for decision in this writ petition: (1) Would the claim be barred by limitation if it were the subject-matter of a suit in February 1968 and (2) if so, are the petitioners entitled to any relief in this petition under Article 32 of the Constitution.

32. Subject to questions of limitation, waiver and estoppel, money paid under mistake or coercion may be recovered under Section 72 of the Indian Contract Act. The right to relief under Section 72 extends to money paid under mistake of law, i.e., "mistake in thinking that the money paid was due when, in fact, it was not due," *Shiba Prasad Singh v. Srish Chandra Nandi*, 76 Ind App 244 at p. 254 = (AIR 1949 PC 297 at p. 302), 1959 SCR 1350 at pp. 1361, 1362 = (AIR 1959 SC 135 at p. 143).

33. In my opinion, the petitioners were not labouring under any mistake of law when they made the payments. As early as March 1958 they filed a writ petition for restraining the levy under the order dated March 17, 1958, claiming that the order was invalid and that Section 21 (4) of the Bombay Sales Tax Act, 1953 was ultra vires and unconstitutional. They might not have then known the precise ground upon which the Court subsequently struck down a similar provision of law, but they had discovered presumably under legal advice that they were not legally bound to make any payment. After the writ petition was dismissed their properties were attached and they made the payments under coercion

in 1959 and 1960. The payments were not made under a mistake of law or as pointed out in *Shiba Prasad Singh's case*, 76 Ind App 244 = (AIR 1949 PC 297) (supra) under a mistake in thinking that the money was due. They cannot claim any relief on the ground of mistake.

34. As we are assuming in favour of the petitioners that S. 21 (4) of the Bombay Sales Tax Act 1953 as invalid, we must hold that they made the payments under coercion. A suit for the recovery of the money on this ground instituted on January 1, 1964 would be governed by Article 24 of the Limitation Act, 1963 and the period of limitation would be three years from the dates in 1959 and 1960 when the money was received by the respondents. The petitioners cannot obtain an extension of the period under Section 30 (a) of the Limitation Act, 1963 as Article 62 of the Indian Limitation Act, 1908 prescribed the same period of limitation. A suit for recovery of tax or other levy illegally collected was governed by Article 62 and not by Article 120, see *A. Venkata Subba Rao v. State of Andhra Pradesh*, 1965-2 SCR 577 at pp. 612, 620 = (AIR 1965 SC 1773 at pp. 1790-1793). Accordingly a suit for the recovery of money instituted in February 1968 would be barred by limitation.

35. If the petitioners could claim relief on the ground of mistake, the suit would be governed by Article 96 of the Indian Limitation Act, 1908 and time would begin to run from the date when the mistake becomes known to the plaintiff. In 1964-6 SCR 261 at p. 274 = (AIR 1964 SC 1006 at p. 1012) and *State of Kerala v. Aluminium Industries Ltd.*, 1965-16 STC 689 at p. 692 (SC), it was held that Article 96 applied to a suit for recovery of money paid under a mistake of law. Section 17 (1) (c) of the Limitation Act 1963 now provides that in the case of a suit for relief from the consequences of a mistake the period of limitation does not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it. Section 17 (1) (c) corresponds to Section 26 (c) of the Limitation Act, 1939 (2 & 3 Geo. 6, c. 21). It was held in *In Re Diplock*, 1948 Ch. 465 at pp. 515, 516 that Section 26 (c) applied by analogy to a suit for recovery of money paid under mistake of law. On appeal, the House of Lords said that the

section presented many problems and refrained from saying more about it, see *Ministry of Health v. Simpson*, 1951 AC 251 at p. 277. In some American States, it has been held that a mistake of law cannot be regarded as a mistake within a similar statute and time ran from the date of the accrual of the cause of action, see *Corpus Juris Secundum*, vol. 54, *Limitation of Actions*, Article 198, page 202, *Morgan v. Jasper County*, 11 ALR 634= 274 NW 310, and the cases referred to therein. It is not necessary to pursue the matter any further as the petitioners cannot claim relief on the ground of mistake. Accordingly, I express no opinion on the scope of Section 17 (c) of the *Limitation Act*, 1963. For the reasons already stated a suit for the recovery of the money instituted in February 1963 would be barred by limitation.

36. The next and the more fundamental question is whether in the circumstances the Court should give relief in a writ petition under Article 32 of the Constitution. No period of limitation is prescribed for such a petition. The right to move this Court for enforcement of fundamental rights is guaranteed by Article 32. The writ under Article 32 issues as a matter of course if a breach of a fundamental right is established. Technical rules applicable to suits like the provisions of Section 60 of the *Code of Civil Procedure* are not applicable to a proceeding under Article 32. But this does not mean that in giving relief under Article 32 the Court must ignore and trample under foot all laws of procedure, evidence, limitation, *res judicata* and the like. Under Article 143 (1) (c) rules may be framed for regulating the practice and procedure in proceedings under Article 32. In the absence of such rules the Court may adopt any reasonable rule of procedure. Thus a petitioner has no right to move this Court under Article 32 for enforcement of his fundamental right on a petition containing misleading and inaccurate statements, and if he files such a petition the Court will dismiss it, see W. P. No. 183 of 1966, *Indian Sugar and Refineries Ltd. v. Union of India* decided on March 12, 1967 (SC). On grounds of public policy it would be intolerable if the Court were to entertain such a petition. Likewise the Court held in 1962-1 SCR 574= (AIR 1961 SC 1457) that the general principles of *res judicata* applied to a writ petition under Article 32. Similarly, this Court has summarily dismissed

innumerable writ petitions on the ground that it was presented after unreasonable delay.

37. The normal remedy for recovery of money paid to the State under coercion or mistake of law is by suit. Articles 32 and 226 of the Constitution provide concurrent remedy in respect of the same claim. The extraordinary remedies under the Constitution are not intended to enable the claimant to recover monies, the recovery of which by suit is barred by limitation. Where the remedy in a writ application under Article 32 or Article 226 corresponds to a remedy in an ordinary suit and the latter remedy is subject to the bar of a statute of limitation, the Court in its writ jurisdiction acts by analogy to the statute, adopts the statute as its own rule of procedure and in the absence of special circumstances imposes the same limitation on the summary remedy in the writ jurisdiction. On similar grounds the Court of Chancery acted on the analogy of the Statutes of limitation in disposing of stale claims though the proceeding in a Chancery was not subject to any express statutory bar, see *Halsbury's Laws of England*, vol. 14, page 647, Article 1190, *Knox v. Gye*, 5 HL 656 at p. 674. Likewise, the High Court acts on the analogy of the statute of limitation in a proceeding under Article 226 though the statute does not expressly apply to the proceeding. The Court will almost always refuse to give relief under Article 226 if the delay is more than the statutory period of limitation, see 1964-6 SCR 261= (AIR 1964 SC 1006) (supra) at pp. 273-274 (of SCR)= (at p. 1012 of AIR).

37-A. Similarly this Court acts on the analogy of the statutes of limitation in respect of a claim under Article 32 of the Constitution though such claim is not the subject of any express statutory bar of limitation. If the right to a property is extinguished by prescription under Section 27 of the *Limitation Act*, 1963 the petitioner has no subsisting right which can be enforced under Article 32, see *Sobhraj Odharmal v. State of Rajasthan*, (1963) Supp (1) SCR 99 at p. 111= (AIR 1963 SC 640 at p. 845). In other cases where the remedy only and not the right is extinguished by limitation, it is on grounds of public policy that the Court refuses to entertain stale claims under Article 32. The statutes of limitation are founded on sound principles of public

policy. As observed in Whitley Stoke's Anglo-Indian Codes, vol. 11 p. 940: "The law is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence, and to prevent oppression." In *Her Highness Ruckmaboye v. Lulloobhoy Mottickshund*, (1851-52) 5 Moo Ind App 234 the Privy Council observed that the object of the statutes of limitation was to give effect to the maxim, "*interest reipublicoe ut sit finis litium*" (co litt 303) — the interest of the State requires that there should be a limit to litigation. The rule of *res judicata* is founded upon the same rule of public policy, see 1962-1 SCR 574= (AIR 1961 SC 1457) (*supra*) at p. 584 (of SCR)= (at p. 1462 of AIR). The other ground of public policy upon which the statutes of limitation are founded is expressed in the maxim "*vigilantibus non dormientibus jura subveniunt*" (2 Co. Inst. 690) — the laws aid the vigilant and not those who slumber. On grounds of public policy the Court applies the principles of *res judicata* to writ petitions under Article 32. On like grounds the Court acts on the analogy of the statutes of limitation in the exercise of its jurisdiction under Art. 32. It follows that the present petition must be dismissed.

38. MITTER, J.:— The facts leading up to the filing of the petition under Article 32 of the Constitution are as follows.

38-A. The first petitioner before us is a registered partnership firm (hereinafter referred to as 'the firm') carrying on business in Bombay and the other petitioners are partners of the said firm. The firm has been carrying on business as a dealer in and a trader of textiles and art silk etc. It was registered as a dealer and has held registration certificates under the various sales tax laws prevailing in the State of Bombay from 1946 onwards including the Bombay Sales Tax Act 5 of 1946, the Bombay Sales Tax Act 3 of 1963 and the Bombay Sales Tax Act 51 of 1959.

39. In the course of assessment for the assessment period commencing on April 1, 1949, and ending on 31st October 1952, the firm contended that its sales of the value of Rs. 13,42,165-15-6 were not liable to be taxed under the provisions of the Bombay Sales Tax Act then in force as the goods were delivered as a direct result of such sales for purposes of

consumption outside the State of Bombay. The firm claimed that it was entitled to a refund of the amount which it had collected from its customers and paid on account of the aforesaid sales at the time of submitting the returns of its turnover. The Sales Tax Officer did not accept this contention but on appeal the Assistant Collector of Sales Tax upheld the firm's contention after examining the details submitted by it and found that the sales involving the sum of Rupees 26,563-8-0 realised by way of tax were protected under Article 286 of the Constitution. He therefore directed that the said sum be refunded to the firm on a proper application. This appellate order was passed on November 7, 1956. The firm preferred an application for refund of Rs. 26,563-50 on November 13, 1956 whereupon the Assistant Collector (the appellate authority) simultaneously with the issue of a cheque for the above amount by way of refund wrote a letter dated May 11, 1957 to the effect that the petitioner should produce before him within one month of the date of the cheque receipt totalling Rs. 26,563.50 from its customers outside Bombay State to show that the refund had been passed on to them. It appears that the petitioner did not fulfil this condition and a notice dated 28th January 1958 was issued calling upon the firm to show cause why the said sum of Rs. 26,563.50 should not be forfeited under Section 21 (4) of the Bombay Sales Tax Act, 1953. In reply thereto, the firm stated by letter dated February 7, 1958 that it had collected from its customers outside the State of Bombay the said sum of money and "under an honest mistake of law had paid the same to the sales tax authorities." The firm went on to add that the order for refund had been made only when the authorities were satisfied that it was not liable to pay the said sum but the latter had insisted upon a condition that the firm should in its turn refund the said amount to its customers from whom the collection had been made. The letter records that the firm "had agreed to that condition under coercion even though in law the authorities were bound to refund the said amount without any such condition." Further the firm's case in that letter was that the authorities had "no right to forfeit any amount collected by a dealer under a mistake of law in respect of these transactions" and the threat to forfeit the

amount on the ground that it had not been refunded to the firm's customers was without the authority of law.

40. The order on the show cause notice passed on March 17, 1958 records that though given sufficient opportunity to produce stamped receipts from its customers the firm had failed to do so and had thereby contravened the provisions of Section 21 (2) of the Bombay Sales Tax Act. The firm was directed to refund the said sum to the Reserve Bank of India on or before April 1, 1958 failing which it would be recoverable as arrears of land revenue from the firm together with penalty. The order was purported to be passed under Section 21 (4) of the Bombay Sales Tax Act, 1953.

41. Within a few days thereafter i.e., on March 28, 1958, the firm presented an application to the High Court of Bombay under Article 226 of the Constitution for the issue of a writ in nature of certiorari quashing the above mentioned order of forfeiture and for incidental reliefs. In paragraph 4 of the petition it was stated that the order of forfeiture was "without the authority of law and therefore in violation of Article 19 (1) (g) and Article 265 of the Constitution."

42. It appears that a similar application had been presented on behalf of Pasha Bhai Patel and Co. (P) Ltd., to the Bombay High Court and the application of the firm along with the first mentioned application were disposed of by a learned single Judge of the Bombay High Court on November 28, 1958. The main judgment was delivered in Pasha Bhai Patel and Company's case. The learned Judge observed in the course of his judgment that there was no merit whatsoever in it and "justice did not lie on his (the petitioner's) side and this was a matter in which the Court should not interfere by way of a writ and give relief to the petitioner-company." The Judge further observed that "the petitioner has not referred to fundamental rights of any kind in the petition and said:

"This appears to me to be a gross case where even if I was of the opinion that the order is invalid and involved violation of fundamental rights, I would not in my discretion interfere by way of issuing a writ. I am not depriving the petitioner of any other appropriate remedy. I have therefore decided to dismiss this petition on that single ground."

No copy of the petition in Pasha Bhai Patel and Company's case is before us but the present petitioner, as shown already, did complain of violation of Article 19 (1) (g) and Article 265 of the Constitution besides contending that the order was "ultra vires" bad and inoperative in law." Dealing with the petition of the firm the learned Judge said that "there was no merit in the case and justice did not lie on the side of the petitioner" and for reasons given in Pasha Bhai Patel and Co.'s case the petition was dismissed.

43. The firm went up in appeal to the same High Court. A note may be taken of some of the grounds in the memorandum of appeal filed by the firm. They were inter alia:—

"(13) The learned Judge erred in not deciding the petition on merits even when there was a question of violation of fundamental rights.

(16) The learned Judge erred in holding that this was a gross case where even if he had been of the opinion that the order was invalid or that it involved violation of fundamental rights, he would not in his discretion interfere by way of issuing a writ.

(30) The learned Judge failed to appreciate that the order of forfeiture was nothing but the deprivation of property without the authority of law and the action of the respondent was an unreasonable restriction on the fundamental rights of the petitioner under Article 19 (1) (f) and Article 31 of the Constitution of India."

In dismissing the appeal the learned Judges of the Division Bench observed:

"The appellant claims to retain with himself amounts to which he has no claim and the appellant is seeking to come before this Court to retain with himself amounts which he has obtained from the sales tax authorities on a representation that he is going to refund the same and which he has not refunded. Mr. Justice K. K. Desai was of the view that the claim made by the appellant was a gross claim and even if it involved violation of fundamental rights, in exercise of his discretion, he will not interfere by issuing a writ. The learned Judge having exercised his discretion which he undoubtedly was entitled to exercise, we do not think sitting in appeal we would be justified in exercising our powers as an appellate Court in interfering with the order under appeal. We may observe that we are not dealing with this case on the merits

at all. We have not considered the question whether the appellant is entitled in law to retain the moneys which he has obtained from the sales tax department. We have decided this appeal on the limited ground that Mr. Justice K. K. Desai having exercised his discretion, no case is made out for our interference with the exercise of that discretion."

It is therefore amply clear from the above that the learned Judges of the Bombay High Court did not examine the merits of the firm's contention that the order of refund was without the authority of law or ultra vires or in violation of any fundamental rights of the partners of the firm. They merely exercised their discretion on the question of issue of a writ under Article 226 of the Constitution in view of the firm's conduct in obtaining an order for refund of the amount mentioned and later on refusing to fulfil the condition imposed.

44. It does not appear that the firm took any further steps in the Court of Law for vindicating its position before filing the present writ petition. It received a notice dated December 18, 1958, under the Bombay City Land Revenue Act 2 of 1876 calling upon it to pay the said sum of Rs. 26,563.50 to the State of Bombay failing which proceedings were threatened to be taken by attachment and sale of its property and by other remedies provided by Section 13 of the Land Revenue Act. It appears that the Collector of Bombay actually issued an order of attachment on the right, title and interest of two of the partners of the firm including the goodwill and tenancy right in the premises where the business was carried on. The firm paid the sum of Rs. 26,563.50 in various instalments beginning on October 3, 1959 and ending on August 8, 1960.

45. In paragraph 8 of the present petition to this Court it is submitted that the petitioners "paid the sum to the State of Bombay under coercion and/or mistake of law." The petitioners also state they "did not know that the sections of the Sales Tax Acts under which the said sum was sought to be forfeited and/or recovered and/or retained were ultra vires." In paragraph 10 of the petition it is stated that the petitioners discovered their mistake in law when they came to know of the decision of this Court dated September 29, 1967 that Section 12A (4) of the Bombay Sales Tax Act 5 of 1946 was

ultra vires. In paragraph 14 of the petition the firm also states

"that the said sum had been forfeited and/or recovered and/or retained by the respondents from the petitioners in violation of Article 265, Article 31 and Article 19 (1) (f) of the Constitution. The fundamental rights of the petitioners have thus been violated. The petitioners submit that they have been deprived of their property, to wit, the said sum, by the respondents without any authority in law and contrary to the fundamental rights guaranteed to the petitioners by Articles 19 (1) (f) and 31 of the Constitution." The grounds of law under which the firm claimed that the actions of the State of Bombay and the respondents in recovering, retaining, forfeiting and not returning the said sum were void and invalid in law are set forth in paragraph 15 of the petition. In the view which we take of the firm's claim and in view of the decision of this Court in 21 STC 174= (AIR 1968 SC 445) dated September 29, 1967, it is not necessary to examine the validity or otherwise of the provisions of Section 12A (4) of the Act of 1946 or the corresponding section of the Act of 1953 i. e., Section 21 (4). The appeal of 21 STC 174= (AIR 1968 SC 445) (supra) decided by this Court on September 29, 1967 was from a decision of the High Court of Gujarat reported in 16 Sales Tax Cases 973. The Gujarat High Court had held that Section 12A (4) was saved by Article 19 (5) of the Constitution. The appeal by the assessee was allowed by this Court on the short ground that assuming that Section 12A (4) was a penal provision within the legislative competence of the legislature, it was violative of Article 19 (1) (f) inasmuch as it did not lay down any procedure for ascertaining whether in fact the dealer concerned had collected any amount by way of tax from his purchasers outside the State and if so what that amount was. It was further observed that the section did not contemplate any adjudication nor did it provide for making any order and on a reasonable interpretation of the impugned provision it was observed "that the power conferred under Section 12A (4) was unguided, uncanalised and uncontrolled." On the above reasoning the Court held that the provisions in Section 12A (4) were not a reasonable restriction on the fundamental right guaranteed under Article 19 (1) within the meaning of Article 19 (5).

tioners (the Madhya Pradesh Sales Tax Act) infringed Article 301 of the Constitution and did not come within the special provision of Article 304 (a). In all the petitions a prayer was made for refund of the taxes collected. The High Court allowed the prayer for refund in 24 applications but rejected the same in the other applications. This Court agreed with the decision of the High Court that the imposition of the tax contravened the provisions of Article 301 of the Constitution and was not within the saving provisions of Article 304 (a) and on that view observed that the payment was made under a mistake within Section 72 of the Indian Contract Act and so the government to whom the payment had been made must repay it. The tax provisions under which these taxes had been assessed and paid were declared void by the High Court of Madhya Pradesh in their decision in *Mohammad Siddique v. State of M. P.*, on 17th January, 1956, (reported in AIR 1956 Madh Bha 214). The respondents claimed to have discovered their mistake in making the payments after they came to know of these decisions. Sixteen of the applications out of 31 were made to the High Court within three years from 17th January 1956 and the High Court took the view that this was not an unreasonable delay and in that view ordered refund. The High Court also ordered refund in seven other applications made more than three years eight months after the said 17th January, 1956.

47. This Court although of opinion that the High Court had power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law, observed:

"At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a Civil Court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special re-

medy and what excuse there is for it. Thus, where, as in these cases, a person comes to the Court for relief under Article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the Court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule of universal application. It may however be stated as a general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil Court and to refuse to exercise in his favour the extraordinary remedy under Article 226 of the Constitution."

In (1965) 16 STC 689 (SC) the respondents after submitting returns under the Sales Tax Act for the period May 30, 1950 to March 31, 1951 showing a net turnover exceeding Rs. 23 lakhs and depositing necessary sales tax claimed a refund on the ground of having discovered their mistake soon after March 7, 1951. The petition to the Kerala High Court under Article 226 of the Constitution was opposed on behalf of the State on various grounds. Holding that money paid under a mistake of law was recoverable, this Court called for a finding from the Sales Tax Officer on the question whether the writ petition was within three years of the date on which the mistake first became known to the respondent so that a suit for refund on that date would not be barred under Article 96 of the Indian Limitation Act of 1908.

48. Speaking for myself I am not satisfied that the petitioners in this case had made a mistake in thinking that the

money paid was due when in fact it was not due. As already noted, in their reply to the show cause notice dated February 7, 1958 the petitioners' case was that the threat of the sales tax authorities to forfeit the amount was without the authority of law and that the firm had agreed to the condition of refunding the amount received to its own customers under coercion even though in law the authorities were bound to refund without any such condition. The petitioners did not content themselves merely by opposing the claim of the sales tax authorities to forfeit the amount but suited their action to their belief by presenting a writ petition to Bombay High Court describing the order of forfeiture as without the authority of law and in violation of Article 19 (1) (g) and Article 265 of the Constitution and praying for the necessary reliefs. They did not accept the decision of the learned Single Judge of the Bombay High Court under Article 226 of the Constitution but filed their appeal raising practically the same contentions as they have done in the present petition except that they did not state having discovered any mistake on a perusal of the decision of any Court of law. The grounds of appeal to the Divisional Bench of the Bombay High Court are illustrative of the frame of mind and view point of the petitioners then. They complained about the violation of their fundamental rights, the illegality of the order of forfeiture and in particular mentioned the unreasonable restriction on their fundamental rights enshrined in Article 19 (1) (f) of the Constitution. Further, they had the benefit of the judgment of the appeal Bench of the Bombay High Court that the case was not being decided on the merits at all and even if there was any violation of the fundamental rights of the petitioners the exercise of discretion by the learned Single Judge would not be interfered with in appeal.

49. It was therefore clear to the petitioners that there was no adjudication as to their fundamental rights or the merits of their claim and there was nothing to prevent the petitioners then from coming up to this Court by preferring an appeal from the judgment of the Bombay High Court or by instituting a suit for declaration of the order of forfeiture illegal and ultra vires and for an injunction restraining the State from giving effect thereto. Before the Bombay High Court the petitioners questioned the legality of

the order of forfeiture, and prayed for quashing it on the ground of the threatened invasion of their fundamental rights. On these facts it is idle to suggest that the petitioners ever entertained any belief or thought that the money was legally due from them. The way they asserted their position under the law precludes any inference that they were ever influenced by a mistake of law or that they ever failed to appreciate the correct position under the law. Even after the decision of the Bombay High Court they did not willingly pay up the amount forfeited but only made disbursements after an attachment had been levied on the business including the tenancy of the premises and its good-will. They protested against the order of forfeiture not only out of Court but in Court and only paid after the issue of a legal process.

50. It is therefore not possible to hold that the payments complained of following the order of forfeiture were made in mistake of law. They were payments under compulsion or coercion. A payment under coercion has to be treated in the same way for the purpose of a claim to refund as a payment under mistake of law, but there is an important distinction between the two. A payment under mistake of law may be questioned only when the mistake is discovered but a person who is under no misapprehension as to his legal rights and complains about the illegality or the ultra vires nature of the order passed against him can immediately after payment formulate his cause of action as one of payment under coercion.

51. The Limitation Acts do not in terms apply to claims against the State in respect of violation of fundamental rights. A person complaining of infraction of any such right has one of three courses open to him. He can either make an application under Article 226 of the Constitution to a High Court or he can make an application to this Court under Article 32 of the Constitution, or he can file a suit asking for appropriate reliefs. The decision of various High Courts in India have firmly laid down that in the matter of the issue of a writ under Article 226 the Courts have a discretion and may in suitable cases refuse to give relief to the person approaching it even though on the merits the applicant has a substantial complaint as regards violation of fundamental rights. Although the Limita-

tion Act does not apply, the Courts have refused to give relief in cases of long unreasonable delay. As noted above in Bhailal Bhai's case, 1964-6 SCR 261= (AIR 1964 SC 1006) (supra), it was observed that the "maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured." On the question of delay, we see no reason to hold that a different test ought to be applied when a party comes to this Court under Article 32 from one applicable to applications under Article 226. There is a public policy behind all statutes of limitation and according to Halsbury's Laws of England (Third Edition Vol. 24) Article 330 at Page 181:

"The Courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim and (3) that persons with good causes of action should pursue them with reasonable diligence."

52. In my view, a claim based on the infraction of fundamental rights ought not to be entertained if made beyond the period fixed by the Limitation Act for the enforcement of the right by way of suit. While not holding that the Limitation Act applies in terms I am of the view that ordinarily the period fixed by the Limitation Act should be taken to be a true measure of the time within which a person can be allowed to raise a plea successfully under Article 32 of the Constitution. Article 16 of the Limitation Act of 1908 fixed a period of one year for a suit against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears, from the date when the payment was made. As an attachment was levied under Section 13 of the Bombay City Land Revenue Act II of 1876 it is a moot question as to whether the payments made in 1959 and 1960 in this case would not attract the said article of the Limitation Act of 1908. It was held by this Court in 1965-2 SCR 577=(AIR 1965 SC 1773) that the period of limitation for a suit to recover taxes illegally collected

was governed by Article 62 of the Limitation Act of 1908 providing a space of three years from the date of payment. But taking the most favourable view of the petitioners' case Article 120 of the Limitation Act of 1908 giving a period of six years for the filing of a suit would apply to the petitioners' claim. The period of six years would have expired some time in 1966 but the Limitation Act of 1908 was repealed by the Limitation Act of 1963 and by Section 30 (a) of the Act of 1963 it was provided that:

"Notwithstanding anything contained in this Act—

(a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of five years next after the commencement of this Act, or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier:

(b) xx xx xx xx"

53. A claim for money paid under coercion would be covered by Article 113 of the Limitation Act, 1963 giving a period of three years from the first of January 1964 on which date the Act came into force. The period of limitation for a suit which was formerly covered by Article 120 of the Act of 1908 would in case like this be covered by Article 113 of the new Act and the suit in this case would have to be filed by the 1st January, 1967. As the petition to this Court was presented in February 1968 a suit, if filed, would have been barred and in my view the petitioners' claim in this case cannot be entertained having been preferred after the 1st of January, 1967. The facts negative any claim of payment under a mistake of law and are only consistent with a claim for money paid under coercion. As the petitioners have come to this Court long after the date when they could have properly filed a suit, the application must be rejected.

54. I may also note in brief another contention urged on behalf of the respondents that the present petition is barred by principles analogous to *res judicata*. It was contended by learned counsel for the respondents that the decisions of the Bombay High Court were speaking orders and even if the petition to the Bombay High Court had been dismissed in limine there would be a decision on the merits. I am unable to uphold this contention.

It was held in 1962-1 SCR 574= (AIR 1961 SC 1457), that when a petition under Article 226 is dismissed not on the merits but because of laches on the party applying for the writ or because an alternative remedy is available to him, such dismissal is no bar to the subsequent petition under Article 32 except in cases where the facts found by the High Court might themselves be relevant under Article 32. It was pointed out in Joseph v. State of Kerala, AIR 1965 SC 1514 that:

"Every citizen whose fundamental right is infringed by the State has a fundamental right to approach this Court for enforcing his right. If by a final decision of a competent Court his title to property has been negatived, he ceases to have the fundamental right in respect of that property and, therefore, he can no longer enforce it. In that context the doctrine of res judicata may be invoked. But where there is no such decision at all, there is no scope to call in its aid."

The judgment of the Bombay High Court in 1958 clearly shows that the merits of the petitioners' claim were not being examined. I can however find no merit in the contention that because there is an invasion of a fundamental right of a citizen he can be allowed to come to this Court, no matter how long after the infraction of his right he applies for relief. The Constitution is silent on this point; nor is there any statute of limitation expressly applicable, but nevertheless, on grounds of public policy I would hold that this Court should not lend its aid to a litigant even under Article 32 of the Constitution in case of an inordinate delay in asking for relief and the question of delay ought normally to be measured by the periods fixed for the institution of suits under the Limitation Acts.

55. The petition therefore fails and is dismissed with costs.

56. HEGDE, J.—I had the advantage of studying the judgments just delivered by my brothers Sikri, Bachawat and Mitter, JJ. The facts of the case are fully set out in those judgments. I shall not restate them.

57. I agree with the decision of Mitter, J., that to the facts of this case the rule laid down by this Court in 1962-1 SCR 574= (AIR 1961 SC 1457) is inapplicable. The principle underlying that decision as I understand, is that the right claimed by the petitioner therein had been negatived by a competent Court and

that decision having become final as it was not appealed against, he could not agitate the same over again. It is in that context the principle of res judicata was relied on. A fundamental right can be sought to be enforced by a person who possesses that right. If a competent Court holds that he had no such right, that decision is binding on him. The binding character of judgments of Courts of competent jurisdiction is in essence a part of the rule of law on which administration of justice depends.

58. In view of the decision of this Court in 21 STC 174= (AIR 1963 SC 445) that Section 12A (4) of the Bombay Sales Tax Act, 1948 is violative of Article 19 (1) (f) of the Constitution on the grounds that that section did not lay down any procedure for ascertaining whether in fact the dealer concerned had collected any amount by way of tax from its purchasers outside the State and if so what amount that was; neither the section nor any rule framed under the Act contemplated any enquiry much less a reasonable enquiry in which the dealer complained of could plead and prove his case or satisfy the authorities that their assumptions were wholly or partly wrong and further the section also did not provide for any enquiry on disputed questions of fact or law or for making an order, it follows that the impugned collection was without the authority of law and consequently the same is an exaction resulting in the infringement of one of the proprietary rights of the petitioners guaranteed to them under Article 19 (1) (f) of the Constitution. Hence the petitioners have a fundamental right to approach this Court under Article 32 of our Constitution for appropriate relief and this Court has a duty to afford them appropriate relief. In Kahrak Singh v. The State of U. P., 1964-1 SCR 332 = (AIR 1963 SC 1205) Rajagopala Ayyangar, J., speaking for the majority observed that once it is proved to the satisfaction of this Court that by State action the fundamental right of a petitioner has been infringed it is not only the right but the duty of this Court under Article 32 to afford relief to him by passing appropriate orders in that behalf. The right given to the citizens to move this Court under Article 32 is itself a fundamental right and the same cannot be circumscribed or curtailed except as provided by the Constitution. It is inappropriate to equate the duty imposed on this Court

to the powers of the Chancery Court in England or the equitable jurisdiction of the American Courts. A duty imposed by the Constitution cannot be compared with discretionary powers. Under Article 32 the mandate of the Constitution is clear and unambiguous and that mandate has to be obeyed. It must be remembered, as emphasized by several decisions of this Court that this Court is charged by the Constitution with the special responsibility of protecting and enforcing the fundamental rights under Part III of the Constitution. If I may with respect, borrow the felicitous language employed by Chief Justice Patanjali Sastri in *State of Madras v. V. G. Rao*, 1952 SCR 597 = (AIR 1952 SC 196) that as regards fundamental rights this Court has been assigned the role of a Sentinel on the qui vive. The anxiety of this Court not to whittle down the amplitude of the fundamental rights guaranteed has found expression in several of its judgments. It has not allowed its vision to be blurred by the fact that some of the persons who invoked its powers had no equity in their favour. It always took care to see that a bad case did not end in laying down a bad law. I am not unaware of the fact that the petitioners before us have no equity in their favour but that circumstance is irrelevant in deciding the nature of the right available to an aggrieved party under Article 32 of the Constitution.

59. All of us are unanimous on the question that the impugned collection amounts to an invasion of one of the fundamental rights guaranteed to the petitioners. Our difference primarily centres round the question whether their right to get relief under Article 32 is subject to any limitation or to be more accurate whether this Court has any discretion while exercising its jurisdiction under that Act? As mentioned earlier a right to approach this Court under Article 32 is itself a fundamental right. In that respect our Constitution makes a welcome departure from many other similar Constitutions. As seen earlier a party aggrieved by the infringement of any of its fundamental rights has a right to get relief at the hands of this Court and this Court has a duty to grant appropriate relief—see AIR 1965 SC 1514. The power conferred on this Court by that Article is not a discretionary power. This power is not similar to the power conferred on the High Courts under Article 226 of

the Constitution. Hence laches on the part of an aggrieved party cannot deprive him of the right to get relief from this Court under Article 32. A Division Bench of the Bombay High Court in *Kamalabai Harjivandas Parekh v. T. B. Desai*, 67 Bom LR 85 = (AIR 1966 Bom 36) held that where a constitutional objection to the validity of a legislation is taken in a petition under Article 226, the question of mere delay will not affect the maintainability of that petition. Law reports do not show a single instance, where this Court had refused to grant relief to a petitioner in a petition under Article 32 on the ground of delay.

60. There has been some controversy whether an aggrieved party can waive his fundamental right. That question was elaborately considered in *Basheshar Nath v. The Commissioner of Income Tax, Delhi, Rajasthan*, (1959) Supp (1) SCR 528 = (AIR 1959 SC 149) by a Constitution Bench consisting of S. R. Das, C. J. and Bhagwati, S. K. Das, S. L. Kapur and Subba Rao, JJ. The learned Chief Justice and Kapur, J. held that there could be no waiver of a fundamental right founded on Article 14. Bhagwati and Subba Rao JJ. held that no fundamental right can be waived and S. K. Das, J. held that only such fundamental rights which are intended to the benefit of a party can be waived. I am mentioning all these aspects to show how jealously this Court has been resisting every attempt to narrow down the scope of the rights guaranteed under Part III of our Constitution.

61. Admittedly the provisions contained in the Limitation Act do not apply to proceedings under Article 226 or Art. 32. The Constitution makers wisely, if I may say with respect, excluded the application of those provisions to proceedings under Articles 226, 227 and 32 lest the efficacy of the constitutional remedies should be left to the tender mercies of the legislatures. This Court has laid down in *I. C. Golaknath v. State of Punjab*, 1967-2 SCR 762 = (AIR 1967 SC 1643) that the Parliament cannot by amending the Constitution abridge the fundamental rights conferred under Part III of the Constitution. If we are to bring in the provisions of Limitation Act by an indirect process to control the remedies conferred by the Constitution it would mean that what the Parliament cannot do directly it can do indirectly by

curtailing the period of limitation for suits against the Government. We may console ourselves by saying that the provisions of the Limitation Act will have only persuasive value but they do not limit the power of this Court but the reality is bound to be otherwise. Very soon the line that demarcates the rule of prudence and binding rule is bound to vanish as has happened in the past. The fear that forgotten claims and discarded rights may be sought to be enforced against the Government after lapse of years if the fundamental rights are held to be enforceable without any time limit appears to be an exaggerated one. It is for the party who complains the infringement of any right to establish his right. As years roll on his task is bound to become more and more difficult. He can enforce only an existing right. A right may be lost due to an earlier decision of a competent court or due to various other reasons. If a right is lost for one reason or the other there is no right to be enforced. In this case we are dealing with an existing right even if it can be said that the petitioners' remedy under the ordinary law is barred. If the decision of Bachawat and Mitter, JJ. is correct, startling results are likely to follow. Let us take for example a case of a person who is convicted and sentenced to long period of imprisonment on the basis of a statute which had been repealed long before the alleged offence was committed. He comes to know the repeal of the statute long after the period prescribed for filing appeal expires. Under such a circumstance according to the decision of Bachawat and Mitter, JJ. he will have no right—the discretion of the Court apart—to move this Court for a writ of habeas corpus.

62. Our Constitution makers in their wisdom thought that no fetters should be placed on the right of an aggrieved party to seek relief from this Court under Article 32. A comparison of the language of Article 226 with that of Article 32 will show that while under Article 226 a discretionary power is conferred on the High Courts the mandate of the Constitution is absolute so far as the exercise of this Court's power under Article 32 is concerned. Should this Court an institution primarily created for the purpose of safeguarding the fundamental rights guaranteed under Part III of the Constitution, narrow down those rights? The implications of this decision are

bound to be far-reaching. It is likely to pull down from the high pedestal now occupied by the fundamental rights to the level of other civil rights. I am apprehensive that this decision may mark an important turning point in downgrading the fundamental rights guaranteed under the Constitution. I am firmly of the view that a relief asked for under Article 32 cannot be refused on the ground of laches. The provision of the Limitation Act have no relevance either directly or indirectly to proceedings under Article 32. Considerations which are relevant in proceedings under Article 226 are wholly out of place in a proceeding like the one before us. The decisions of this Court referred to in the judgment of Bachawat and Mitter, JJ. where this Court has taken into consideration the laches on the part of the petitioners are not apposite for our present purpose. None of those cases deal with proceedings under Article 32 of the Constitution. The rule enunciated by this Court in 1964-6 SCR 261 = (AIR 1964 SC 1006) is only applicable to proceedings under Art. 226. At page 271 of the report Das Gupta, J. who spoke for the Court specifically referred to this aspect when he says:

"that it has been made clear more than once that power to relief under Art. 226 is a discretionary power".

Therefore those decisions are of no assistance to us in deciding the present case. Once it is held that the power of this Court under Article 32 is a discretionary power—that in my opinion is the result of the decision of Bachawat and Mitter, JJ.—then it follows that this Court can refuse relief under Article 32 on any one of the grounds on which relief under Article 226 can be refused. Such a conclusion militates not only against the plain words of Article 32 but also the lofty principle underlying that provision. The resulting position is that the right guaranteed under that Article would cease to be a fundamental right.

63. Assuming that the rule enunciated by this Court in *Sales Tax Officer v. Kanhaiya Lal Makund Lal Saraf*, 1959 SCR 1350 = (AIR 1959 SC 135) and further refined by this Court in 1964-6 SCR 261 = (AIR 1964 SC 1006) can apply to the facts of this case even then I am of opinion that the petitioners are entitled to the relief that they have asked for. As could be gathered from the decision of Bachawat and Mitter JJ., the Bombay High Court did not decide the merits of

the case in the writ petition filed by the petitioners. In that petition the Court refused to exercise its discretion in favour of the petitioners. The grounds on which the petitioners challenged the validity of Section 12-A (4) of the Bombay Sales Tax Act, 1946 before the High Court of Bombay have now been found to be unsustainable by Gujarat High Court in (1965) 16 STC 973 (SC). In the appeal against that decision this Court did not examine those grounds. It struck down S. 12A(4) on a wholly different ground, a ground not put forward by the petitioners in their writ petition before the Bombay High Court. A mere impression of a party that a provision of law may be ultra vires the Constitution cannot be equated to knowledge that the provision is invalid. Hope and desire are not the same things as knowledge. A law passed by a competent legislature is bound to be presumed to be valid until it is struck down by a competent court. The fact after a futile attempt to get the provision in question declared invalid the petitioners gave up their fight and submitted to the law which was apparently valid is no proof of the fact that they knew that the provision in question is invalid. As seen earlier that none of the grounds urged by the petitioners in support of their contention that the provision in question is invalid has been accepted by any court till now. Under these circumstances I see no justification to reject the plea of the petitioners that they became aware of the provision only after the decision of this Court in Kantilal Babulal's case, 21 STC 174 = (AIR 1968 SC 445) (supra) which decision was rendered on September 29, 1967. This petition was filed very soon thereafter. Hence this case under any circumstance falls within the rule laid down by this Court in Bhailal Bhai's case, 1964-6 SCR 261 (supra).

64. For the reasons mentioned above I allow this petition and grant the relief prayed for by the petitioners.

ORDER

65. In accordance with the opinion of the majority, the petition fails and is dismissed with costs.

Petition dismissed.

AIR 1970 SUPREME COURT 919 (V 57 C 192)

(From: Industrial Tribunal — Delhi)*
J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

The Delhi Cloth and General Mills Co. Ltd. etc., Appellants v. The Workmen and others etc., Respondents.

Civil Appeals Nos. 2168, 2569 of 1966, 76, 123 and 560 of 1967, D/- 27-9-1968.

(A) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Agreement between management of company and workmen — Held Industrial Tribunal was not incompetent to grant gratuity if the company acquired financial stability.

After the dispute was referred to the Industrial Tribunal, there were negotiations between the management and workmen represented by the Unions and an agreement was reached. Clause relating to the claim for gratuity read:

"The workmen agree not to claim any further increase in wages, basic or dearness, or make any other demand involving financial burdens on the company either on their initiative or as a result of any award till such time as the working of the mills results in profits." But in making the final award the Tribunal did not specifically refer to the settlement.

Held that the terms of the settlement clearly showed that if it be found that the company had acquired financial stability, it will be liable to pay gratuity to the workmen. It was not intended by the parties that the adjudication proceedings against the company should be dropped and after the company became financially stable a fresh claim should be made by the workmen on which a reference may be made by the Government for adjudication of the claim for gratuity against the company. The tribunal was not incompetent to determine the gratuity payable to the workmen of the company. (Para 12)

(B) Industrial Disputes Act (1947), Third Schedule Item 5 — Gratuity — Region-cum-industry principle or unit-wise basis can be adopted according to requirements of each case.

Region-cum-industry principle cannot be adopted in all cases in fixing the rates of gratuity. Rates of gratuity can be

* (I. D. No. 70 of 1958, D/- 30-6-1966 — Industrial Tribunal, Delhi.)

fixed unitwise also according to the circumstances.

Where the tribunal observed: "If a common scheme is framed for the entire textile industry of Delhi i. o. for all the four units the quantum of benefits under that scheme will naturally have to be much lower in consideration of the financial condition of the Ajudhia Textile Mill, than if a unitwise scheme is framed. Moreover in a common scheme of gratuity the quantum of benefits to be provided will have to be lower than the benefits already available to workmen in the D. C. M. and S. B. M. units for the most important contingencies for which gratuity benefits are meant, namely death and retirement on account of physical or mental incapacity. Such a lowering of the quantum of benefits would not be desirable as it would create legitimate discontent."

Held that no serious objection might be raised against the reasons set out by the Tribunal in support of the view that unitwise approach should be adopted in the reference before it and not the region-cum-industry approach. AIR 1960 SC 833 and AIR 1963 SC 839 and AIR 1962 SC 673, Rel. on. (Para 14)

(C) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Gratuity scheme can be effective though not accompanied by the fixation of the age of superannuation for the workmen in the industry. (Para 15)

(D) Industrial Disputes Act (1947), Section 10 — Reference not referring to fixing of age of superannuation — Tribunal is incompetent to do so.

By the express terms of reference the Tribunal was called upon to adjudicate on the question of fixation of gratuity; there was no reference either expressly or by implication to the fixation of the age of superannuation.

Held that in the absence of any reference relating to the fixation of the age of superannuation, the Tribunal was not competent to fix the age of superannuation. An enquiry into the question of fixing the age of superannuation did not arise out of the terms of reference. No such claim was made by workmen and even in the written statement filed by the employers no direct reference was made to the fixation of the age of superannuation, nor was there any plea that before framing a gratuity scheme the Tribunal should provide for the age of superannuation. Fixation of the age of

superannuation was not incidental to the framing of the gratuity scheme. (Para 16)

(E) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Object of.

Gratuity in its etymological sense means a gift especially for services rendered or return for favours received. For some time in the early stages in the adjudication of industrial disputes, gratuity was treated as a gift made by the employer at his pleasure and the workmen had no right to claim it. But since then there has been a long line of precedents in which it has been ruled that a claim for gratuity is a legitimate claim which the workmen may make and which in appropriate cases may give rise to an industrial dispute. Gratuity paid to workmen is intended to help them after retirement on superannuation, death, retirement, physical incapacity, disability or otherwise. The object of providing a gratuity scheme is to provide a retiring benefit to workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer. It is one of the efficiency devices, and is considered necessary for an orderly and human elimination from industry of superannuated or disabled employees who, but for such retiring benefits, would continue in employment even though they function inefficiently. It is not paid to an employee gratuitously or merely as a matter of boon. AIR 1907 SC 1280 and AIR 1962 SC 673 and AIR 1960 SC 833, Rel. oo. (Paras 17, 18)

(F) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Whether should be computed not on the consolidated wage but only on basic wage — (1957) 2 Lab LJ 420 (LATI-Bom), Overruled; Award of Industrial Tribunal, Delhi in I. D. No. 70 of 1958, D/- 30-6-1960, Reversed.

In determining the scope of an industrial reference it cannot be held that the words used either in the claim advanced or in the order of reference made by the Government under Section 10 of the Industrial Disputes Act must of necessity have the meaning they have under the Industrial Disputes Act. Merely because the expression 'wages' includes dearness allowance within the meaning of the Industrial Disputes Act, the Tribunal is not obliged to base a gratuity scheme on consolidated wages. Normally gratuity

is based not on the consolidated wage but on basic wage. The Tribunal is not justified in introducing a fundamental change in the concept of a benefit granted to the workmen in the textile industry all over the country by numerous schemes. The appropriate remedy is to introduce reservations protecting benefits already acquired and to frame a scheme consistent with the normal pattern prevailing in the industry. (Paras 20, 22)

If all over the country in the textile centres payment of gratuity is related to the basic wages and not on consolidated wages, any innovation in the Delhi region is likely to give rise to serious industrial disputes in other centres all over the country. If maintenance of industrial peace is a governing principle of industrial adjudication, it would be wise to maintain a reasonable degree of uniformity in the diverse units all over the country and not to make a fundamental departure from the prevailing pattern. Case law discussed. (1957) 2 Lab LJ 426 (LATI—Bom.), Overruled; (1962) 1 Lab LJ 388 (SC) not regarded as effective precedent — Award of Industrial Tribunal, Delhi in I. D. No. 70 of 1958, D/-30-6-1966, Reversed. (Para 32)

(G) Industrial Disputes Act (1947), Section 15 — Duty of Tribunal stated.

In adjudication of industrial disputes settled legal principles have little play; the awards made by industrial tribunals are often the result of ad hoc determination of disputed questions, and each determination forms a precedent for determination of other disputes. An attempt to search for principle from the law built upon those precedents is a futile exercise. In the branch of law relating to industrial relations the temptation to be crusaders instead of adjudicators must be firmly resisted. (1960) 363 US 593, Rel. on. (Paras 23, 24)

(H) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Conditions for grant of, stated.

There is undoubtedly no statutory direction for payment of gratuity as it is in respect of provident fund and retrenchment compensation. The conditions for the grant of gratuity are: (i) financial capacity of the employer; (ii) his profit making capacity; (iii) the profits earned by him in the past; (iv) the extent of his reserves; (v) the chances of his replenishing them; and (vi) the claim for capital invested by him. But these are not exhaustive and there may be

other material considerations which may have to be borne in mind in determining the terms and conditions of the gratuity scheme. Existence of other retiring benefits such as provident fund and retrenchment compensation or other benefits do not destroy the claim to gratuity; its quantum may however have to be adjusted in the light of the other benefits. (Para 26)

(I) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Termination of employment on ground of misconduct — When gratuity should be granted.

In a case of termination of employment on ground of misconduct a distinction should be made between technical misconduct which leaves no trial of indiscipline, misconduct resulting in damage to the employer's property which may be compensated by forfeiture of gratuity or part thereof and serious misconduct which though not directly causing damage such as acts of violence against the management or other employees or riotous or disorderly behaviour, in or near the place of employment is conducive to grave indiscipline. The first should involve no forfeiture; the second may involve forfeiture of an amount equal to the loss directly suffered by the employer in consequence of the misconduct and the third may entail forfeiture of gratuity due to the workmen. (Para 35)

(J) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Voluntary retirement — Qualifying length of service for voluntary retirement should be 10 years. (Paras 36, 37)

(K) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Badli workmen — Period of work.

The direction that gratuity shall be paid to Badli workmen for only those years in which a workman has worked for 240 days is correct. As gratuity is to be paid for service rendered merely because for maintaining his name on the record of the Badli workmen, a workman is required to attend the Mills he cannot be deemed to have rendered service and cannot on that account be entitled to claim gratuity. (Para 38)

(L) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Scheme — Expression 'average of the basic wage' — Meaning.

The expression "average of the basic wage" can only mean the wage earned by a workman during a month divided

by the number of days for which he has worked and multiplied by 26 in order to arrive at the monthly wage for the computation of gratuity payable.

(Para 39)

(M) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Reference in 1958 — Award by Tribunal given effect to from 1-1-1964 — Held giving the scheme effect before January 1, 1964, might rake up cases in which the workmen had left the establishments many years ago — It would not be conducive to industrial peace to allow such questions to be raised after long delay.

(Para 40)

(N) Industrial Disputes Act (1947), Third Sch. Item 5 — Gratuity — Uniformity in fixation of gratuity — Duty of legislature.

A departure made from the prevailing pattern in one region is likely to give rise to claims all over the country for modification of the gratuity schemes in operation, and have been accepted as fixing the basis gratuity schemes. If, having regard to the deteriorating value of the rupee, it is thought necessary that more generous benefits should be available to the workmen by way of gratuity, the remedy lies not before the adjudicators or the courts, but before the legislative branch of the State. Even in respect of gratuity a reasonably uniform scheme may be evolved by the Legislatures which could prevent resort to the adjudicators in respect of this complicated matter of dispute between the employers and the employees. It may not be difficult to evolve a scheme which would meet the legitimate claims of both the employers and the employees.

(Para 42)

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Association, Bombay 23, 34

Mr. S. T. Desai, Senior Advocate (M/s.

Rameshwar Nath and Mahinder Narain,

Advocates of M/s. Rajinder Narain and

Co. with him), for Appellant (In C. A.

No. 2163 of 1966 and Respondents Nos.

1 and 2 — As. Nos. 123 & 560 of 1967),

M/s. H. R. Gokhale and A. K. Sen, Senior Advocate (Mr. R. P. Kapur, Advocate for Mr. I. N. Shroff, Advocate with them), for Appellant (In C. A. No. 2569 of 1966 and Respondent No. 3 in C. As. Nos. 123 and 560 of 1967); Mr. B. Sen, Senior Advocate (Mr. I. D. Gupta, Advocate, and Mr. M. N. Shroff, Advocate for Mr. I. N. Shroff, Advocate with him), for Appellant (In C. A. No. 76 of 1967); M/s. M. K. Ramamurthi, Madan Mohan, Mrs. Shyamala Pappu and Mr. Vineet Kumar Advocates, for Appellant; (In C. A. No. 123 of 1967), Respondents Nos. 1 (a) and 4 (a), (In C. A. No. 2168 of 1966), Respondent No. 1 (In C. A. No. 2569 of 1966), Respondent No. 1 (In C. A. No. 76 of 1967) and Respondent No. 5 (In C. A. No. 560 of 1967); M/s. V. C. Parashar and O. P. Sharma, Advocates, for Appellant (In C. A. No. 560 of 1967) Respondents Nos. 1 (b) and 4 (b) (In C. A. No. 2168 of 1966), Respondent No. 2 (In C. A. No. 2569 of 1966) and Respondent No. 2 (In C. A. No. 76 of 1967).

The following Judgment of the Court was delivered by

SHAH, J.: These appeals arise out of an award made by the Industrial Tribunal, Delhi, in I. D. Reference No. 70 of 1958: the first three appeals are filed by the employers, and the last two by the employees. By its award the Industrial Tribunal, Delhi, has framed two schemes relating to payment of gratuity to the workmen employed in four textile units in the Delhi region. The employers and the workmen are dissatisfied with the schemes and they have filed these appeals challenging certain provisions of the schemes.

2. In the Delhi region there are four textile units: the Delhi Cloth Mills—which will be referred to as D. C. M.; Swatantra Bharat Mills—which will be referred to as S. B. M.; Birla Cotton Mills—which will be referred to as B. C. M.; and Ajudhia Textile Mills—which will be referred to as A. T. M. The D. C. M. and S. B. M. are under one management. On March 4, 1958 the Chief Commissioner of Delhi made a reference under Sections 10 (1) (d) and 12 (5) of the Industrial Disputes Act, 1947, relating to four matters in dispute, first of which is as follows:

"Whether a gratuity for retirement benefit scheme should be introduced for all workmen on the following lines and

what directions are necessary in this respect?

1. for service less than .. Nil
5 years
2. for service between .. 15 days'
5-10 years wages for every year of service
3. for service between .. 21 days'
10-15 years wages for every year of service
4. for service over 15 .. one month's
years wages for every year of service."

The reference related to workmen only and did not apply to the clerical staff or mistries.

3. There are two workmen's Unions in the Delhi region—the Kapra Mazdoor Ekta Union—hereinafter called 'Ekta Union', and the other, the Textile Mazdoor Union. The Ekta Union made a claim principally for fixation of gratuity in addition to the benefit of provident fund admissible to the workmen under the Employees' Provident Funds Act, to be computed on the consolidated wages inclusive of dearness allowance. The Ekta Union submitted by its statement of claim that a gratuity scheme based on the region-cum-industry principle i. e. a uniform scheme applicable to all the four units be framed. The Textile Mazdoor Union also supported the claim for the framing of a gratuity scheme on the basis of the consolidated wages of workmen but claimed that the scheme should be unit-wise. At the trial, it appears that both the Unions pressed for a unit-wise scheme of gratuity.

4. The Tribunal entered upon the reference in respect of the fixation of gratuity scheme in February 1964 and made an award on June 30, 1966, operative from January 1, 1964. The award was published on August 4, 1966. By the award two schemes were framed—one relating to the D. C. M. and S. B. M., and another relating to the B. C. M. and A. T. M. Under the second scheme the digit by which the number of completed year of service was to be multiplied in determining the total gratuity was smaller than the digit applicable in the case of the D. C. M. and the S. B. M. The distinction was made between the two sets of units, because the D. C. M. and S. B. M. were, in the view of the Tribunal more prosperous units than the

B. C. M. and A. T. M. The A. T. M., it was found was a new-comer in the field of textile manufacture, and had for many years been in financial difficulties.

5. The D. C. M. employs more than 8000 workmen in its textile unit; the S. B. M. has on its roll 5000 workmen; the B. C. M. has 6271 workmen and the A. T. M. has 1500 workmen. The D. C. M. and S. B. M. have a common retirement benefit scheme in operation since the year 1940. Under the scheme gratuity payable to workmen is determined by the length of service before retirement. The scheme of gratuity in operation in the D. C. M. and S. B. M. is as follows:

"In case of retirement from service of the Mills as a result of physical disability due to overage or on account of death after a minimum of seven years' service in the concern:

7 years	Rs. 350/-
8 years	Rs. 425/-
9 years	Rs. 500/-
10 years	Rs. 575/-
11 years	Rs. 650/-
12 years	Rs. 725/-
13 years	Rs. 800/-
14 years	Rs. 875/-
15 years	Rs. 950/-
16 years	Rs. 1050/-
17 years	Rs. 1150/-
18 years	Rs. 1250/-
19 years	Rs. 1350/-
20 years	Rs. 1500/-

The scale of gratuity, it is clear, is independent of the individual wage scale of the workman. In the B. C. M. and A. T. M. units there are no such schemes.

6. Till the year 1958 there were no standardised wages in the textile industry. According to the Report of the Central Wage Board for the Cotton Textile Industry which was published on November 22, 1959, there were in India 39 regions in which the textile industry was located. The basic monthly wages of the workmen in the year 1958 varied between Rs. 18/- in Patna and Rs. 30/- in various centres like Bombay, Indore, Madras, Coimbatore, Madurai, Bhiwani, Hissar, Ludhiana, Cannanore and certain regions in Rajasthan and Delhi. The Wage Board recommended in Paragraph 106 of its Report:

"The Board has come to the conclusion that an increase at the average rate of Rs. 8 per month per worker shall be given to all workers in mills of category I, from 1st January, 1960, and a further flat increase of Rs. 2 per month per

worker shall be given to them from 1st January, 1962. Likewise an increase at the average rate of Rs. 6 per month per worker shall be given to all the workers in mills of category II from 1st January, 1960, and a further flat increase of Rs. 2 per month per worker shall be given to them from 1st January, 1962. These increases are subject to the condition that the said sums of Rs. 8 and Rs. 6 shall ensure not less than Rs. 7 and Rs. 5 respectively to the lowest paid, and that the increase of Rs. 2 from 1st January, 1962 shall be flat for all."

Category I included the Delhi region. Since January 1, 1962, the basic minimum wage in the Delhi region is, therefore, Rs. 40/- according to the recommendations of the Wage Board. In Bombay City and Island (including Kurla), the basic wage, according to the Report of the Wage Board, was also Rs. 30/- and by the addition of Rs. 10 the basic wage of a workman came to Rs. 40. The workmen in other important textile centres also get the same rates.

7. The Tribunal was of the view that the average basic wage of the workman is Rs. 60/- since the implementation of the Wage Board in the Delhi region. No argument was advanced before this Court challenging the correctness of that assumption; by the employers or the workmen. It was also common ground that practically uniform basic wage levels prevail in all the large textile centres like Bombay, Ahmedabad, Coimbatore and Indore.

8. Besides the basic wage the workmen receive dearness allowance under diverse awards made by the Industrial Tribunals which "seek to neutralize the cost of living index." There is also a provident fund scheme under the Employees' Provident Funds Act, 1952, whereunder 8 1/3% of the basic wage and the dearness allowance and the retaining allowance for the time being in force is contributed by the employees. Besides, there is a right to retrenchment compensation under the Industrial Disputes Act, 1947 (S. 25 FFF) and the Employees Insurance Scheme. In view of the observations of this Court in *Burhanpur Tapti Mills Ltd. v. Burhanpur Tapti Mills Mazdoor Sangh*, (1965) 1 Lab LJ 453 = (AIR 1965 SC 839), that "It is no longer open to doubt that a scheme of gratuity can be introduced in concerns where there

already exist other schemes such as provident fund or retrenchment compensation. This has been ruled in a number of cases of this Court and recently again in *Wenger and Co. v. Their Workmen*, (1963) 2 Lab LJ 403 = (AIR 1964 SC 864) and *Indian Hume Pipe Co. Ltd. v. Their Workmen*, (1959) 2 Lab LJ 830 = (AIR 1960 SC 251). It is held in these cases that although provident fund and gratuity are benefits available at retirement they are not the same and one can exist with the other", no serious argument was advanced that the existence of these additional benefits disentitled the workmen to obtain benefits under a gratuity scheme if the employer is able to meet the additional burden.

9. But on behalf of all the employers it was urged that (1) in determining the quantum of gratuity, basic wage alone could be taken into account and not the consolidated wage; and (2) it was necessary for the Tribunal to fix when introducing a gratuity scheme the age of superannuation. On behalf of the D. C. M., S. B. M. and B. C. M. it was urged in addition that a uniform scheme applicable to the entire industry on the region-cum-industry basis should have been adopted and not a scheme or schemes applicable to individual units. On behalf of the A. T. M. it was urged that its financial condition is not and has never been stable and the burden of payment of gratuity to workmen dying or disabled or on voluntary retirement from service or when their employment is terminated is excessive and the Unit was unable, to bear that burden. It was also urged on behalf of the A. T. M. that in view of a settlement which was reached between the management and workmen it was not open to the Tribunal to ignore that settlement and to impose a scheme for payment of gratuity in favour of the workmen in this reference.

10. While broadly supporting the award of the Tribunal the workmen claim certain modifications. They claim that a shorter period of qualifying service for workmen voluntarily retiring should be provided and gratuity should be worked out by the application of a larger multiple of days for each completed year of service; that the ceiling of gratuity should be related to a larger number of months' wages; that gratuity should be awarded for dismissal even for misconduct; that provision should be made for payment of gratuity

to Badli workmen irrespective of the number of days for which they work in a year; that the expression "average of the basic wage" should be appropriately clarified to avoid disputes in the implementation of the gratuity scheme, and that the award should be made operative not from January 1, 1964, but from the date of the reference to the Tribunal.

11. The two schemes which have been framed may be set out:

ANNEXURE 'A'

"Gratuity scheme applicable to the Delhi Cloth Mills and the Swatantra Bharat Mills.

Gratuity will be payable to the employees concerned, in this reference, on the scale and subject to the conditions laid down below:

1. On the death of employee while in the service of the mill company or on his becoming physically or mentally incapacitated for further service:

- (a) After 5 years' continuous ... 12 days wages for service and less than each completed 10 years' service year of service.
- (b) After continuous service of ... 15 days' wages for each completed 10 years. year of service.

"The gratuity will be paid in each case under Clauses 1 (a) and 1 (b) to the employees, his heirs or executors, or nominee as the case may be:

Provided that in no case will an employee, who is in service on the date on which this scheme is brought into operation, be paid an amount less than what he would have been entitled to under the pre-existing scheme of the Employees' Benefit Fund Trust.

(ii) Provided further that the maximum payment to be made shall not exceed the equivalent of 15 months wages.

(iii) Provided further that gratuity under this scheme will not be payable to any employee who has already received gratuity under the pre-existing scheme of the Employees' Benefit Fund Trust.

- 2. On voluntary retirement or ... 15 days' wages resignation after 15 years' for each completed service. year of service.

Provided that the maximum payment to be made shall not exceed the equivalent of 15 months' wages.

- 3. On termination of service ... As in Clauses 1(a) on any ground whatsoever and 1 (b) above. except on the ground of misconduct.

Provided that the maximum payment to be made shall not exceed the equivalent of 15 months' wages.

4. Definitions:

(a) "Wages"

The term "wages" in the scheme will mean the average of the basic wage plus the dearness allowance drawn during the 12 months next preceding death, incapacitation, voluntary retirement, resignation or termination of service and will not include overtime wages.

(b) "Basic wages"

The term "basic wage" will have the meaning as defined in paragraph 110 of the Report of the First Central Wage Board for Cotton Textile Industry.

(c) "Continuous service"

"Continuous service" means un-interrupted service and includes service which may be interrupted on account of sickness authorised leave, strike which is not illegal, lockout, or cessation of work which is not due to any fault on the part of the employee:

Provided that interruption in service upto six months' duration at any one time and 18 months' duration in the aggregate of the nature other than those specified above shall not cause the employee to lose the credit for previous service in the mills for the purpose of calculation of gratuity, but at the same time shall not entitle him to claim benefit of gratuity for period of such interruption. Service for the purposes of gratuity will include service under the previous management whether in the particular mill or other sister mill under the same management.

(d) "Resignation"

The word "resignation" will include abandonment of service by an employee provided he submits his resignation within a period of three months from the first day of absence without leave.

(e) "Length of service"

For counting "length of service" fraction of a year exceeding six months shall count as one full year, and six months or less shall be ignored.

5. "Application for gratuity"

Any person eligible to claim payment of gratuity under this scheme shall, so far as possible, send a written application to the employer within a period of six months from the date its payment becomes due.

6. "Payment of gratuity"

The employer shall pay the amount of gratuity to employee and in the event of his death before the payment to the person or persons entitled to it under clause 1 above within a period of 90 days

of the claim being presented to the employer and found valid.

7. "Claims by persons who are no longer in service"

Claims by persons who are no longer in service of the Company on the date of the publication of this award shall not be entertained unless the claims are preferred within six months from the date of publication of this award.

8. "Badli service"

Gratuity shall be paid for only those years of Badli service in which the employee has worked for not less than 240 days.

9. "Proof of incapacity"

In proof of physical or mental incapacity it will be necessary to produce a certificate from any one of the Medical Authorities out of a panel to be jointly drawn up by the parties.

10. "Nomination"

(a) Each employee shall, within six months from the date of the publication of this award make a nomination conferring the right to receive the amount of gratuity that may be due to him in the event of his death, before payment has been made.

(b) A nomination made under sub-clause (a) above may, at any time, be modified by the employee after giving a written notice of his intention of doing so. If the nominee pre-deceases the employee, the interest of the nominee shall revert to the employee who may make a fresh nomination in respect of such interest.

ANNEXURE 'B'

Gratuity scheme applicable to the Birla Cotton Spg. & Wvg. Mills and the Ajudhia Textile Mills.

Gratuity will be payable to the employees concerned in this reference, on the scale and subject to the conditions laid down below:—

1. On the death of an employee while in the service of the Mill company or on his becoming physically or mentally incapacitated for further service:

(a) After 5 years' continuous service and less than 10 years' service.

One-fourth month's wages for each completed year of service.

(b) After continuous service of 10 years.

One-third month's wages for each completed year of service.

"The gratuity will be paid in each case under Clauses 1 (a) and 1 (b) to the em-

ployee, his heirs or executors, or nominee, as the case may be.

Provided that the maximum payment to be made shall not exceed the equivalent of 12 months' wages.

2. On voluntary retirement, ... On the same or resignation after 15 scale as in cl. 1 (b) yca s' service. above.

Provided that the maximum payment to be made shall not exceed the equivalent of 12 months' wages.

3. On termination of service ... As in clauses 1 (a) by the employer for any and 1 (b) above. reason whatsoever except on the ground of misconduct.

Provided that the maximum payment to be made shall not exceed the equivalent of 12 months' wages."

[Clauses 4 to 10 of Annexure 'B' are the same as in Annexure 'A' and need not be reported.]

Whether against the A.T.M. the Tribunal was incompetent to make an award framing a scheme for payment of gratuity may first be considered. Counsel for the A. T. M. urged that there was a settlement between the workmen and the management of the A. T. M. in consequence of which the Tribunal was incompetent to make an award. The facts on which reliance was placed are these. After the dispute was referred to the Industrial Tribunal, there were negotiations between the management of the A. T. M. and workmen represented by the two Unions and an agreement was reached, the terms whereof were recorded in writing. Clauses 6 and 11 (4) of the agreement relate to the claim for gratuity:

"6 The workmen agree not to claim any further increase in wages, basic or dearness, or make any other demand involving financial burdens on the Company either on their initiative or as a result of any award, till such time as the working of the mills results in profits.

11. The parties hereto agree to jointly withdraw in terms of this settlement, the following pending cases and proceedings before the Courts, Tribunals and Authorities and more especially—

x x x x x x x
(4) With regard to I. D. No. 70 of 1953 the workers agree not to claim any benefits that may be granted under the above reference by the Hon'ble Industrial Tribunal in case the award is given in favour of the workmen, subject to Cl. 7 above.

(It is common ground that reference to Clause 7 is erroneous: it should be to Clause 6.)"

The workmen and the management of the unit submitted an application before the Tribunal on December 28, 1959, admitting that there had been an "overall settlement" of all the pending disputes between the management of A. T. M. and its workmen represented by the two Unions, and requested that an interim award be made in terms of the agreement insofar as the dispute related to the A. T. M. No order was passed by the Tribunal on that application. On June 4, 1962, the Manager of the A. T. M. applied to the Tribunal that an interim award be pronounced in terms of the agreement. The workmen had apparently changed their attitude by that time and filed a written statement and requested that the prayer contained in paragraph-3 of the application "be rejected as impermissible in law." The Tribunal made an order on November 26, 1962, and observed:

".....the only interpretation that can be given to clause 11 (4) of the settlement read with Clause 7 is that the workers of the Ajudhia Textile Mills had bound themselves not to claim any benefits that might be granted by the tribunal in the award on the present reference, if it turns out to be in favour of the workmen unless and until the working of the Mills results in profit. The fact that the passing of an award on the demands was envisaged under the settlement goes to show that the demands were to be adjudicated upon in any case.

The main case will now proceed in respect of all the mills and the effect of the settlement and of the application dated 28th December, 1959, and of the 5th July 1962 will be considered at the time of the final award."

12. But in making the final award the Tribunal did not specifically refer to the settlement. The terms of Clause (6) of the settlement clearly show that if it be found that the A. T. M. had acquired financial stability, it will be liable to pay gratuity to the workmen. We are unable to agree with the contention of counsel for the A. T. M. that it was intended by the parties that the adjudication proceedings against the A. T. M. should be dropped, and after the A. T. M. became financially stable a fresh claim should be made by the workmen on which a reference may be made by the Government for adjudication of the claim for gratuity against the A. T. M. The contention by the management of the

A. T. M. that the Tribunal was incompetent to determine the gratuity payable to the workmen of the A. T. M. must therefore fail.

13. The other contention raised on behalf of the A. T. M. that its financial position was "unstable" need not detain us. The Tribunal has held that the A. T. M. was working at a loss since the year 1953-54 and the losses aggregated to Rs. 6.22 lakhs in the year 1958-59, but thereafter the financial position of the unit improved. The trading account for the period ending March 31, 1966, showed profits amounting to Rs. 3.10 lakhs. In 1960-61 there was a surplus of Rs. 11.18 lakhs out of which adjusting the depreciation, development rebate reserve and reserve for bad and doubtful debts, there was a balance of Rs. 7.10 lakhs. In 1961-62 the net profits of the Unit amounted to Rs. 7.48 lakhs and the A. T. M. distributed Rs. 52,500 as dividend. In 1962-63 there was a gross profit of Rs. 4.18 lakhs and after adjusting depreciation and development rebate reserve there was a net deficit of Rs. 30,517. In 1963-64 there was a gross profit of Rs. 14.29 lakhs and after adjusting depreciation, reserve for doubtful debts, bonus to employees and development rebate reserve, there remained a net profit of Rs. 4.71 lakhs. The Tribunal observed that by 1961-62 all previous losses of the Unit were wiped out and that even during the year 1962-63 in which there was labour unrest the gross profits were substantial and taking into consideration the reserves built by the Company "the picture was not disheartening and from the great progress that had been made since 1959-60 there was every reason to think that the Mill had achieved stability and reasonable prosperity and that it had an assured future", and the Company was in a position to meet the burden of a modest gratuity scheme. We see no reason to disagree with the finding recorded by the Tribunal on this question.

14. On behalf of the D. C. M., S. B. M. and B. C. M. it was urged that normally gratuity schemes are framed on the region-cum-industry principle, i. e. a uniform scheme applicable to all units in an industry in a region is framed, and no ground for departure from that rule was made out. It was urged that this Court has accepted invariably the region-cum-industry principle in fixing the rates at which gratuity should be paid. In our judgment no such rule has been enunciated by this Court. In *Bharatkhand Tex-*

files Mfg. Co. Ltd. v. Textile Labour Association, Ahmedabad, (1960) 3 SCR 329 = (AIR 1960 SC 833) this Court in dealing with the question whether the Industrial Court had committed an error in dealing with the claim for gratuity on industry-wise basis negatived the contention of the employers that the unit-wise basis was the only basis which could be adopted in fixing the rates of gratuity. It was observed at p. 345 (of SCR) = (at p. 840 of AIR):

"Equality of competitive conditions is in a sense necessary from the point of view of the employers themselves; that in fact was the claim made by the Association which suggested that the gratuity scheme should be framed on industry-wise basis spread over the whole of the country. Similarly equality of benefits such as gratuity is likely to secure contentment and satisfaction of the employees and lead to industrial peace and harmony. If similar gratuity schemes are framed for all the units of the industry migration of employees from one unit to another is inevitably checked, and industrial disputes arising from unequal treatment in that behalf are minimised. Thus, from the point of view of both employers and employees industry-wise approach is on the whole desirable."

It is clear that the Court rejected in that case the argument that rates of gratuity should be determined unit-wise; the Court did not rule that in all cases the region-cum-industry principle should be adopted in fixing the rates of gratuity. That was made explicit in a later judgment of this Court in (1965) 1 Lab LJ 453 = (AIR 1965 SC 839). This Court observed at p. 456 (of Lab LJ) = (at p. 841 of AIR):

"...it has been laid down by this Court that there are two general methods of fixing the terms of a gratuity scheme. It may be fixed on the basis of industry-cum-region or on the basis of units. Both systems are admissible but regard must be had to the surrounding circumstances to select the right basis. Emphasis must always be laid upon the financial position of the employer and his profit-making capacity whichever method is selected."

In *Garment Cleaning Works v. Its Workmen*, (1961) 1 Lab LJ 513 = (AIR 1962 SC 673) this Court observed at p. 515:

"....It is one thing to hold that the gratuity scheme can, in a proper case, be framed on industry-cum-region basis, and another thing to say that industry-cum-region basis is the only basis on which gratuity scheme can be framed. In fact, in a large majority of cases gratuity schemes are drafted on the basis of the units and it has never been suggested or held that such schemes are not permissible."

The Tribunal in the award under appeal observed:

"There are x x certain peculiar features in the textile industry in this region which militate against an industry-cum-region approach. Apart from the fact that one of the four units, namely, the Ajudhia Textile Mills is a much weaker unit than the rest and has passed through a chequered career during its existence, it has to be borne in mind that two of the units namely D. C. M. and S. B. M. which are sister concerns, already have some sort of a gratuity scheme providing for two important retiral benefits, namely death and physical disablement on a scale which is independent of wage variations and is not unsubstantial at least for categories in the lower levels." The Tribunal further observed:

"If a common scheme is framed for the entire textile industry at Delhi i. e., for all the four units the quantum of benefits under that scheme will naturally have to be much lower in consideration of the financial condition of the Ajudhia Textile Mill than if a unit-wise scheme is framed. Moreover in a common "scheme of gratuity the quantum of benefits to be provided will have to be lower than the benefits already available to workmen in the D. C. M. and S. B. M. units for the most important contingencies for which gratuity benefits are meant, namely, death and retirement on account of physical or mental incapacity. Such a lowering of the quantum of benefits would not in my view be desirable as it would create legitimate discontent."

In our judgment, no serious objection may be raised against the reasons set out by the Tribunal in support of the view that unitwise approach should be adopted in the reference before it and not the region-cum-industry approach. No case is therefore made out for interference with the award made determining the rates of gratuity unit-wise.

15. We also agree with the Tribunal that on the terms of the reference it was

incompetent to fix the age of superannuation for workmen. We are unable to hold that a gratuity scheme may be implemented only if the age of superannuation of the workmen is determined by the award. Support was sought to be derived by counsel for the employers in support of his plea from the observations made by this Court in *Burhanpur Tapti Mills Ltd.'s case*, 1965-1 Lab LJ 453 = (AIR 1965 SC 839), where in examining the nature of gratuity, it was observed:

"The voluntary retirement of an inefficient or old or worn out employee on the assurance that he is to get a retiral benefit leads to the avoidance of industrial disputes, promotes contentment among those who look for promotions, draws better kind of employees and improves the tone and morale of the industry. It is beneficial all round. It compensates the employee who as he grows old knows that some compensation for the gradual destruction of his wage-earning capacity is being built up. By inducing voluntary retirement of old and worn out workmen it confers on the employer a benefit akin to the replacing of old and worn out machinery."

There is, in our judgment, nothing in these observations which justifies the view that a gratuity scheme cannot be effective unless it is accompanied by the fixation of the age of superannuation for the workmen in the industry.

16. There is another objection to the consideration of this claim made on behalf of the employers. By the express terms of reference the Tribunal is called upon to adjudicate on the question of fixation of gratuity: there is no reference either expressly or by implication to the fixation of the age of superannuation and in the absence of any reference relating to the fixation of the age of superannuation, the Tribunal was not competent to fix the age of superannuation. A gratuity scheme may, in our judgment, be implemented even without fixing the age of superannuation. The gratuity scheme in operation in the D. C. M. and S. B. M. has been effectively in operation without any age of superannuation for the workmen in the two units. An enquiry into the question of fixing the age of superannuation did not arise out of the terms of reference. No such claim was made by workmen and even in the written statement filed by the employers no direct reference was made to the fixation of the age of superannuation, nor was there any plea

that before framing a gratuity scheme the Tribunal should provide for the age of superannuation. We agree with the Tribunal that fixation of the age of superannuation was not incidental to the framing of the gratuity scheme and it was neither necessary nor desirable that it should be fixed.

17. Counsel for the employers urged that the Tribunal committed a serious error in relating the computation of gratuity payable to the workmen on retirement on the consolidated monthly wage and not on the basic wage. "Gratuity" in its etymological sense means a gift especially for services rendered or return for favours received. For some time in the early stages in the adjudication of industrial disputes, gratuity was treated as a gift made by the employer at his pleasure and the workmen had no right to claim it. But since then there has been a long line of precedents in which it has been ruled that a claim for gratuity is a legitimate claim which the workmen may make and which in appropriate cases may give rise to an industrial dispute.

18. In *Garment Cleaning Works' case*, (1961) 1 Lab LJ 513 = (AIR 1962 SC 673) it was observed that gratuity is not paid to the employees gratuitously or merely as a matter of boon. It is paid to him for the service rendered by him to the employer. The same view was expressed in *Bharatkhand Textile Mfg. Ltd.'s case*, (1960) 3 SCR 329 = (AIR 1960 SC 833) and *Calcutta Insurance Ltd. v. Their Workmen*, 1967-2 Lab LJ 1 = (AIR 1967 SC 1286). Gratuity paid to workmen is intended to help them after retirement on superannuation, death, retirement, physical incapacity, disability or otherwise. The object of providing a gratuity scheme is to provide a retiring benefit to workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer. It is one of the 'efficiency devices' and is considered necessary for an 'orderly and human elimination' from industry of superannuated or disabled employees who, but for such retiring benefits, would continue in employment even though they function inefficiently. It is not paid to an employee gratuitously or merely as a matter of boon; it is paid to him for long and meritorious service rendered by him to the employer.

19. On the findings recorded by the Tribunal all the textile units in the Delhi

region are able to meet the additional financial burden, resulting from the imposition of a gratuity scheme. The D. C. M. and S. B. M. have their own schemes which enable the workmen to obtain substantial benefit on determination of employment. The B. C. M. though a weaker unit is still fairly prosperous and is able to bear the burden; so also the A. T. M.

20. But the important question is whether these four units should be made liable to pay gratuity computed on the consolidated wage i.e., basic wage plus the dearness allowance. The Tribunal was apparently of the view that in determining the question the definition of the word "wages" in the Industrial Disputes Act, 1947, would come to the aid of workmen. The expression "wages" as defined in Section 2 (rr) of the Industrial Disputes Act means all remuneration, capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes, among other things, such allowances (including dearness allowance) as the workman is for the time being entitled to. But we are unable to hold that in determining the scope of an industrial reference, words used either in the claim advanced or in the order of reference made by the Government under Section 10 of the Industrial Disputes Act must of necessity have the meaning they have under the Industrial Disputes Act. Merely because the expression "wages" includes dearness allowance within the meaning of the Industrial Disputes Act the Tribunal is not obliged to base a gratuity scheme on consolidated wages.

21. The Tribunal has observed that the basic average wage of a workman in the textile industry in the Delhi region may be taken at Rs. 60/- per month, and the dearness allowance at Rs. 100/- per month, and even if full one month's basic wage is adopted as the minimum quantum of benefits to be allowed in the case of wage group with service of five years and more the scale of benefit would be very much lower than the present scale in the two contingencies provided in the Employees Benefit Fund Trust Scheme in operation in the D. C. M. and S. B. M. And observed the Tribunal:

"In view of the limitations of the terms of the reference, the quantum cannot ex-

ceed 15 days' wages for every year of service from 5 to 10 years and 21 days' wages for every year of service from 10 to 15 years. Any scheme framed within the limitations of the terms of reference on the basis of basic wage alone will therefore mean a scale of benefits much lower than even the present scheme under the Employees Benefit Fund Trust. Such a scheme cannot, therefore, be framed without causing grave injustice and acute discontent, because it will mean the deprivation of even the present scale of benefits in the case of large body of workers. In order to maintain, so far as possible, the present level of benefits I have, therefore, no alternative but to frame for these two units a scheme based on basic wage plus dearness allowance."

A scheme of gratuity based on consolidated wages was also justified in the view of the Tribunal because it "was also necessary to compensate for the ever diminishing market value of the rupee."

22. The Tribunal did however observe that normally gratuity is based not on the consolidated wage but on basic wage. But since 13000 workmen out of a total of 20000 workmen in the region would stand to lose the benefits granted to them under a voluntary scheme introduced by the D. C. M. and S. B. M. a departure from the normal pattern should be made and gratuity should be based on the consolidated monthly wage. In our judgment, the conclusion of the Tribunal cannot be supported. The primary object of industrial adjudication is, it is said, to adjust the relations between the employers and employees or between employees inter se with the object of promoting industrial peace, and a scheme which deprives workmen of what has been granted to them by the employer voluntarily would not secure industrial peace. But on that account the Tribunal was not justified in introducing a fundamental change in the concept of a benefit granted to the workmen in the textile industry all over the country by numerous schemes. The appropriate remedy is to introduce reservations protecting benefits already acquired and to frame a scheme consistent with the normal pattern prevailing in the industry.

23. We consider it right to observe that in adjudication of industrial disputes settled legal principles have little play: the awards made by industrial tribunals are often the result of ad hoc determination of disputed questions, and each de-

termination forms a precedent for determination of other disputes. An attempt to search for principle from the law built up on those precedents is a futile exercise. To the Courts accustomed to apply settled principles to facts determined by the application of the judicial process, an essay into the unsurveyed expanses of the law of industrial relations with neither a compass nor a guide, but only the pillars of precedents is a disheartening experience. The Constitution has however invested this Court with power to sit in appeal over the awards of Industrial Tribunals which are, it is said, founded on the somewhat hazy background of maintenance of industrial peace, which secures the prosperity of the industry and improvement of the conditions of workmen employed in the Industry and in the absence of principles precedents may have to be adopted as guides — somewhat reluctantly to secure some reasonable degree of uniformity of harmony in the process.

24. But in the branch of law relating to industrial relations the temptation to be crusaders instead of adjudicators must be firmly resisted. It would not be out of place to remember the statement of the law made in a different context — but nonetheless appropriate here — by Douglas, J., of the Supreme Court of the United States in *United Steel Workers of America v. Enterprise Wheel and Car Corporation*, (1960) 363 US 593:

"..... as arbitrator x x x does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, Courts have no choice but to refuse enforcement of the award."

We may at once state that we are not for a moment suggesting that the law of industrial relations developed in our country has proceeded on lines parallel to the direction of the law in the United States.

25. One of the grounds which appealed to the Tribunal in relating the rate of gratuity to the consolidated wage was the existence of a gratuity scheme in the D. C. M. and S. B. M. and the assumption that the Tribunal adjudicating a dispute is always, in exercise of its jurisdiction, limited when determining the rate of gratuity to the multiple number

of days of service in the order of reference, and cannot depart therefrom. We are unable to hold that Industrial Tribunal is subject to any such restriction. Its power is to adjudicate the dispute. It cannot proceed to adjudicate disputes not referred; but when called upon to adjudicate whether a certain scheme "on the lines indicated" should be framed the basic guidance cannot be deemed to impose a limit upon its jurisdiction.

26. As already stated, gratuity is not in its present day concept merely a gift made by the employer in his own discretion. The workmen have in course of time acquired a right to gratuity on determination of employment, provided the employer can afford, having regard to his financial condition, to pay it. There is undoubtedly no statutory direction for payment of gratuity as it is in respect of provident fund and retrenchment compensation. The conditions for the grant of gratuity are, as observed in *Bharatkhanda Textile Mfg. Co., Ltd's case*, (1960) 3 SCR 329 = (AIR 1960 SC 833, (i) financial capacity of the employer; (ii) his profit making capacity; (iii) the profits earned by him in the past; (iv) the extent of his reserves; (v) the chances of his replenishing them; and (vi) the claim for capital invested by him. But these are not exhaustive and there may be other material considerations which may have to be borne in mind in determining the terms and conditions of the gratuity scheme. Existence of other retiring benefits such as provident fund and retrenchment compensation or other benefits do not destroy the claim to gratuity: its quantum may however have to be adjusted in the light of the other benefits.

27. We may repeat that in matters relating to the grant of gratuity and even generally in the settlement of disputes arising out of industrial relations, there are no fixed principles, on the application of which the problems arising before the Tribunal or the Courts may be determined and often precedents of cases determined ad hoc are utilised to build up claims or to resist them. It would in the circumstances be futile to attempt to reduce the grounds of the decisions given by the Industrial Tribunals, the Labour Appellate Tribunals and the High Courts to the dimensions of any recognized principle. We may briefly refer to a few of the precedents relating to the grant of gratuity. In *May and Baker (India) Ltd. v. Their Workmen*, (1961) 2 Lab LJ 94=

(AIR 1967 SC 678) the claim of the workmen to fix gratuity on the basis of gross salary was rejected by the Industrial Tribunal and the quantum was related to basic salary i.e., excluding dearness allowance. The view taken by the Tribunal was affirmed by this Court. In *British India Corporation v. Its Workmen*, (1965) 2 Lab LJ 556 (SC) the existing gratuity scheme directed payment of gratuity in terms of consolidated wages. The Tribunal however modified the scheme while retaining the basis of consolidated wages which was held to be justified and reasonable. This Court observed that *prima facie* gratuity is awarded not by reference to consolidated wages but on basic wages and the Tribunal had made a departure from that. But in the view of the Court no interference with the scheme framed by the Tribunal was called for. In *British Paints (India) Ltd. v. Its Workmen*, (1966) 1 Lab LJ 407 = (AIR 1966 SC 732), the Court followed the judgment in *May and Baker (India) Ltd.*, (1961) 2 Lab LJ 94 = (AIR 1967 SC 678) that it would be proper to follow the usual pattern of fixing the quantum of gratuity on basic wage excluding dearness allowances. But same principle was not adhered to in all cases. For instance in *Hindustan Antibiotics Ltd. v. Their Workmen*, (1967) 1 Lab LJ 114 = (AIR 1967 SC 948), it was observed:

"The learned counsel for the Company then argued that there is a flagrant violation or departure from the accepted norms in fixing the wage structure and the dearness allowance and therefore, as an exceptional case, we should set aside the award of the Tribunal and direct it to re-fix the wages."

In that case the Tribunal had awarded gratuity related to consolidated wages and without any contest the order of the Tribunal was confirmed. In *Remington Rand of India Ltd. v. The Workmen*, (1963) 1 Lab LJ 542 (SC) it was contended on behalf of the employer that the Tribunal was not justified in awarding gratuity on the basis of consolidated wages and should have awarded it on the basic wages alone. In dealing with that plea this Court observed that the Tribunal was on the facts of the case justified in proceeding in that way.

28. It is not easy to extract any principle from these cases, as precedents they are conflicting. If the matter rested there, we could not interfere with the conclusion of the Tribunal, but the Tri-

bunal has failed to take into account the prevailing pattern in the textile industry all over the country. The Textile industry is spread over the entire country, in pockets some large other small. There are large and concentrated pockets in certain regions and smaller pockets in other regions. Except in two or three of the smaller States, textile units are to be found all over the country. It is a country-wide industry and in that industry, except in one case to be presently noticed, gratuity has never been granted on the basis of consolidated wages. Out of 39 centres in which the textile industry is located there is no centre in which gratuity payable to workmen in the textile industry pursuant to awards or settlements is based on consolidated wages. In the two principle centres, viz., Bombay and Ahmedabad, schemes for payment of gratuity to workmen in the textile industry the rates of gratuity are related to basic wages. The B. C. M. have tendered before the Tribunal a chart setting out the names of textile units in which the gratuity is paid to the workmen on basic wages. These are — the Textile Units Bhavnagar (Gujarat); Shahu Chhatrapati Mills Kolhapur (Maharashtra); Jivajirao Cotton Mills, Gwalior (Madhya Pradesh); Madhya Pradesh Mills-owners' Association, (Indore) Bombay, Ahmedabad (Gujarat); New Sherrock Spg. & Wvg. Co. Ltd., Nadiad (Gujarat); Raja Bahadur Motilal Mills, Poona (Maharashtra); Shree Gajanan Wvg. Mills, Sangli (Maharashtra); T. I. T. Bhiwani (Haryana); Jagatjeet Cotton Mills, Phagwada (Punjab); 36 Textile Mills in West Bengal; and Umed Mills (Rajasthan). It is true that the chart does not set out the gratuity schemes, if any, in all the 39 centres referred to in the Report of the First Wage Board, but the chart relates to a fairly representative segment of the industry. No evidence has been placed before the Court to prove that in determining gratuity payable under any other scheme in a textile unit the rate is related to consolidated wages. The two large centres in which the industry is concentrated are Bombay and Ahmedabad. In *Rashtriya Mill Mazdoor Sangh, Bombay v. Millowners' Association, Bombay*, 1957 Industrial Court Reporter 561 a scheme was framed by the Industrial Court, exercising power under the Bombay Industrial Relations Act 11 of 1947, in which the quantum of gratuity was related to the basic wages alone. In paragraph 27 at p. 583 the Tribunal rejected

the argument advanced by counsel for the workmen that since benefits like provident Fund, retrenchment compensation, State Insurance Scheme, are granted in terms of monthly wages, gratuity should also be related to consolidated wages. They observed that in a large majority of awards of the Labour Appellate Tribunal and Industrial Tribunals gratuity had been awarded in terms of basic wages, and that,

"The basic wages reflect the differentials between the workers more than the total wages, as dearness allowance to all operatives is paid at a flat rate varying with the cost of living index. The gratuity schemes for the supervisory and technical staff as well as for clerks are also in terms of basic wages."

They accordingly related gratuity with the average basic wage earned by the workman during the twelve months preceding death, disability, retirement, resignation or termination of service. The scheme in the Bombay region was adopted in the dispute between the Textile Labour Association and the Ahmedabad Mill Owners' Association. The award is reported in the Textile Labour Association, Ahmedabad v. Ahmedabad Mill-owners' Association, 1958-1 Lab LJ 349. The question whether gratuity should be fixed on the basis of consolidated wages was apparently not mooted, but it was accepted on both the sides that gratuity should be related to basic wages. An appeal against that decision in the Ahmedabad Mill Owners' Association case, (1958) 1 Lab LJ 349 was brought before this Court in *Bharatkhand Textile Manufacturing Co., Ltd.'s case*, (1960) 3 SCR 329= (AIR 1960 SC 833), but no objection was raised to the award relating gratuity to basic wages. In the report of the Central Wage Board for the Cotton Textile Industry, 1959, in paragraph 110 gratuity was directed to be given on the basis of wages plus the increases given under paragraph 106, but excluding the dearness allowance.

29. The only departure from the prevailing pattern to which our attention is invited was made by the Labour Appellate Tribunal in regard to the textile units in the Coimbatore Region: *Rajalakshmi Mills Ltd. v. Their Workmen*, (1957) 2 Lab LJ 426. There was apparently no discussion on the question about the basis on which gratuity should be awarded. The Labour Appellate Tribunal observed:

2. "In all the appeals there is a contest by the mills on the subject of gratuity, and it is contended that the gratuity as awarded is too high. Both sides had much to say on the subject to the gratuity scheme as given by the adjudicator. During the course of the bearing we indicated to the parties the lines on which the gratuity scheme could be suitably altered to meet their respective points of view."

3. "We accordingly give the following scheme in substitution of the scheme at Paragraph 85 of the award:

All persons with more than five years and less than ten years' continuous service to their credit, on termination of their service by the company, except in cases of dismissals for misconduct involving moral turpitude, shall be paid gratuity at the rate of ten days' average rate of pay inclusive of dearness allowance for each completed year of service."

xx xx xx xx
But this award was modified later by the Industrial Tribunal in Coimbatore District Mill Workers' Union v. Rajalakshmi Mills Ltd., 1964-1 Lab LJ 638. The earlier award made in 1957 was sought to be reviewed before the Industrial Tribunal. The Tribunal observed that it would be the duty of the Tribunal to modify a gratuity scheme based upon some agreement or settlement if the terms of that agreement are found to be onerous and oppressive. The Tribunal stated that the original scheme was not applicable to all the units and taking into consideration the statutory provident fund scheme and "the fact that recently basic wages and dearness allowance have leaped up", there was no justification for including the dearness allowance in any new scheme that might be framed for the new Mills; and that it would be most undesirable to have two sets of gratuity schemes in the same region with varying rates. In the view of the Tribunal there should be a uniform scheme for all the Mills, old and new, and on that ground also the retention of the dearness allowance under the old scheme must be refused.

50. Counsel for the workmen relied upon an award made by the Industrial Tribunal in the Chemical Unit belonging to the D. C. M. which is published in D. C. M. Chemical Works v. Its Workmen, (1962) 1 Lab LJ 383 (SC). In that case gratuity was related to consolidated wages. The unit though belonging to the D. C. M. is entirely independent of the

textile unit. The Company was treating the unit as separate from the textile unit and distinct for the purpose of recruitment of labour, sales and conditions of service for the workmen employed therein. The Chemical Unit had separate muster-rolls for its employees and transfers from one unit to the other even where such transfers were possible, considering the utterly different kinds of businesses carried on in the different units, usually took place with the consent of the employee concerned. In upholding the gratuity scheme which was based on the consolidated wages, this Court observed:

"As to the burden of the scheme, we do not think that, looking at it from a practical point of view and taking into account the fact that there are about 800 workmen in all in the concern, the burden per year would be very high, considering that the number of retirements is between three to four per centum of the total strength."

The gratuity scheme was in a chemical unit, and not in a textile unit. The judgment of this Court merely affirmed the award of the Tribunal and sets out no reasons why gratuity should be related to consolidated wages. We do not regard the affirmance by this Court to the award of the Industrial Tribunal as an effective or persuasive precedent justifying a variation from the normal pattern of gratuity schemes in operation in the textile industry all over the country.

31. It is clear that in the gratuity schemes operative at present to which our attention has been invited, in force in the textile industry payment of gratuity is related not to consolidated wages but to basic wages. It is true that under the scheme which is in operation in the D. C. M. and S. B. M. payment which is related to the length of service may in some cases exceed the maximum awardable under a scheme of gratuity benefit related to basic wages. That cannot be a ground for making a vital departure from the prevailing pattern in the other textile units in the country. But it may be necessary to protect the interest of the members governed by the original scheme.

32. Determination of gratuity is not based on any definite rules. In each case it must depend upon the prosperity of the concern, needs of the workmen and the prevailing economic conditions, examined in the light of the auxiliary bene-

fits which the workmen may get on determination of employment. If all over the country in the textile centres payment of gratuity is related to the basic wages and not on consolidated wages, any innovation in the Delhi region is likely to give rise to serious industrial disputes in other centres all over the country. The award if confirmed would not ensure industrial peace if it is likely to foment serious unrest in other centres. If maintenance of industrial peace is a governing principle of industrial adjudication, it would be wise to maintain a reasonable degree of uniformity in the diverse units all over the country and not to make a fundamental departure from the prevailing pattern. We are, therefore, of the view that the Tribunal's award granting gratuity on the basis of consolidated wage cannot be upheld. This modification will not, however, affect the existing benefits which are available under the schemes framed by the D. C. M. and S. B. M. insofar as those two units are concerned.

33. Mr. Ramamurthi for the workmen also contended that in the matter of relating gratuity to wages — consolidated or basic — the principle of region-cum-industry should be applied and an "overall view of similar and uniform conditions in the industry in different centres" should not be adopted. It was also urged that the basic wage is very low and the class of wage to which gratuity was related played a very important part in the determination of gratuity. The basic wage is however low in all the centres and if it does not play an important part in other centres, we see no reason why it should play only in the Delhi region a decisive part so as to make vital departure from the scheme in operation in the other centres in the country. We are strongly impressed by the circumstances that acceptance of the award of the Tribunal in the present case is likely to create conditions of great instability all over the country in the textile industry. In that view, we decline to uphold the order of the Tribunal fixing gratuity on the basis of consolidated wages inclusive of dearness allowance.

34. We may refer to the contentions advanced by counsel for the workmen in the two appeals filed by them. It was urged that the Tribunal was in error in denying to the workmen gratuity when employment is determined on the ground of misconduct. It was urged that it is

now a rule settled by decisions of this Court that the employer is bound to pay gratuity notwithstanding termination of employment on the ground of misconduct. It may be noticed that in the *Rashtriya Mill Mazdoor Sangh's case*, 1957 Industrial Court Reporter 561 and in the *Ahmedabad Millowners' Association case*, 1958-1 Lab LJ 349 provision was expressly made denying gratuity to the workmen dismissed for misconduct. But in later cases a less rigid approach was adopted. In *Garment Cleaning Works case*, (1961) 1 Lab LJ 513 = (AIR 1962 SC 673) this Court observed:

"On principle, if gratuity is earned by an employee for long and meritorious service, it is difficult to understand why the benefit thus earned by long and meritorious service should not be available to the employee even though at the end of such service he may have been found guilty of misconduct which entails his dismissal. Gratuity is not paid to the employee gratuitously or merely as a matter of boon. It is paid to him for the service rendered by him to the employer, and when it is once earned, it is difficult to understand why it should necessarily be denied to him whatever may be the nature of misconduct of his dismissal."

In later judgments also the Courts upheld the view that denial of the right to gratuity is not justified even if employment is determined for misconduct. In *Motipur Zamindari (P) Ltd. v. Their Workmen*, (1965) 2 Lab LJ 139 (SC), this Court opined that the workmen should not be wholly deprived of the benefit earned by long and meritorious service, even though at the end of such service he may be found guilty of misconduct entailing his dismissal, and therefore the condition in a gratuity scheme that no gratuity should be payable to a workman dismissed "for misconduct involving moral turpitude" should be held unjustified. The Court therefore modified the condition and directed that while paying gratuity to a workman who was dismissed for misconduct only such amount should be deducted from the gratuity due to him in respect of which the employer may have suffered loss by the misconduct of the employee.

35. A similar view was expressed in *Ramington Rand of India Ltd.'s case*, 1968-2 Lab LJ 542 (SC). In *Calcutta Insurance Co. Ltd.'s case*, 1967-2 Lab LJ 1 = (AIR 1967 SC 1286) however protest was raised against acceptance of

this rule without qualification. Mitter, J., observed at p. 9, (of Lab LJ)= (at p. 1293 of AIR) that it was difficult to concur in principle with the opinion expressed in the Garment Cleaning Works case, 1961-1 Lab LJ 513= (AIR 1962 SC 673). Mitter, J., observed:

"We are inclined to think that it (gratuity) is paid to a workman to ensure good conduct throughout the period he serves the employer. 'Long and meritorious service' must mean long and unbroken period of service meritorious to the end. As the period of service must be unbroken, so must the continuity of meritorious service be a condition for entitling the workman to gratuity. If a workman commits such misconduct 'as causes financial loss to his employer, the employer would, under the general law, have a right of action against the employee for the loss caused, and making a provision for withholding payment of gratuity where such loss was caused to the employer does not seem to aid to the harmonious employment of labourers or workmen. Further, the misconduct may be such as to undermine the discipline in the workers — a case in which it would be extremely difficult to assess the financial loss to the employer."

"Misconduct" spreads over a wide and bazy spectrum of industrial activity: the most seriously subversive conduct rendering an employee wholly unfit for employment to mere technical default are (sic) covered thereby. The Parliament enacted the Industrial Employment (Standing Orders) Act, 1946, which by Sec. 15 has authorised the appropriate Government to make rules to carry out the purposes of the Act and in respect of additional matters to be included in the Schedule. The Central Government has framed certain model standing rules by notification dated December 18, 1946, called "The Industrial Employment (Standing Orders) Central Rules, 1946". In Schedule I—Model Standing Orders—Clause 14 provides:

(1) x x x x
(2) A workman may be suspended for a period not exceeding four days at a time, or dismissed without notice or any compensation in lieu of notice, if he is found to be guilty of misconduct.

(3) The following acts and omissions shall be treated as misconduct:—

(a) wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior,

(b) theft, fraud or dishonesty in connection with the employer's business or property,

(c) wilful damage to or loss of employer's goods or property,

(d) taking or giving bribes or any illegal gratification,

(e) habitual absence without leave or absence without leave for more than 10 days,

(f) habitual late attendance,

(g) habitual breach of any law applicable to the establishment,

(h) riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline,

(i) habitual negligence or neglect of work,

(j) frequent repetition of any act or omission for which a fine may be imposed to a maximum of 2 per cent. of the wages in a month,

(k) striking work or inciting others to strike work in contravention of the provisions of any law, or rule having the force of law."

A hare perusal of the Schedule shows that the expression "misconduct" covers a large area of human conduct. On the one hand are the habitual late attendance, habitual negligence and neglect of works; on the other hand are riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline, wilful insubordination or disobedience. Misconduct falling under several of these latter heads of misconduct may involve no direct loss or damage to the employer, but would render the functioning of the establishment impossible or extremely hazardous. For instance, assault on the Manager of an establishment may not directly involve the employer in any loss or damage which could be equated in terms of money, but it would render the working of the establishment impossible. One may also envisage several acts of misconduct not directly involving the establishment in any loss, but which are destructive of discipline and cannot be tolerated. In none of the cases cited any detailed examination of what type of misconduct would or would not involve to the employer loss capable of being compensated in terms of money was made: it was broadly stated in the cases which have come before this Court that notwithstanding dismissal for misconduct a workman will be entitled to gratuity after deducting the loss occasioned to the employer."

If the cases cited do not enunciate any broad principle we think that in the application of those cases as precedents a distinction should be made between technical misconduct which leaves no trial of indiscipline, misconduct resulting in damage to the employer's property, which may be compensated by forfeiture of gratuity or part thereof, and serious misconduct which though not directly causing damage, such as acts of violence against the management or other employees or riotous or disorderly behaviour, in or near the place of employment is conducive to grave indiscipline. The first should involve no forfeiture: the second may involve forfeiture of an amount equal to the loss directly suffered by the employer in consequence of the misconduct and the third may entail forfeiture of gratuity due to the workmen. The precedents of this Court e.g., (1963) 2 Lab LJ 403 = (AIR 1964 SC 864), Ramington Rand of India Ltd. case, (1968) 2 Lab LJ 542 (SC) and Motipur Zamindari (P) Ltd's case, 1965-2 Lab LJ 139 (SC) do not compel us to hold that no misconduct however grave may be visited with forfeiture of gratuity. In our judgment, the rule set out by this Court in Wenger & Co.'s case, 1963-2 Lab LJ 403 = (AIR 1964 SC 864) and Motipur Zamindari (P) Ltd's case, 1965-2 Lab LJ 139 (SC) applies only to those cases where there has been by action wilful or negligent any loss occasioned to the property of the employer and the misconduct does not involve acts of violence against the management or other employees, or riotous or disorderly behaviour in or near the place of employment. In these exceptional cases—the third class of cases—the employer may exercise the right to forfeit gratuity: to hold otherwise would be to put a premium upon conduct destructive of maintenance of discipline.

36. It was urged on behalf of the workmen that the minimum period of 15 years fixed for voluntary retirement is too long and it should be reduced to 10 years. In 1959-2 Lab LJ 830 = (AIR 1960 SC 251) and Hydro (Engineers) Private Ltd. v. Workmen, Civil Appeal No. 1934 of 1967, D/- 30-4-1968 = (reported in AIR 1969 SC 182) the minimum period for qualifying for gratuity on voluntary retirement was fixed at 15 years. In other cases a shorter period of 10 years was adopted: Garment Cleaning Works, 1961-1 Lab LJ 513 = (AIR

1962 SC 673), British Paints (India) Ltd., 1966-1 Lab LJ 407 = (AIR 1966 SC 732), Calcutta Insurance Co. Ltd., 1967-2 Lab LJ 1 = (AIR 1967 SC 1286) and Wenger & Co., (1963) 2 Lab LJ 403 = (AIR 1964 SC 864).

37. Counsel for the employers have accepted that qualifying length of service for voluntary retirement should be reduced to 10 years. Counsel for the employers have also accepted that having regard to all the circumstances, notwithstanding the direction given by the Tribunal and the schemes prevailing in the other parts of the country in the textile industry, the maximum gratuity should not exceed 20 months' basic wages and not 15 months' as directed by the Tribunal. Further counsel for the D. C. M. and S. B. M. have agreed that in case of termination of employment on voluntary retirement one full month's basic wages for each completed year of service not exceeding 20 months' wages should be granted to workmen. Counsel for the B. C. M. has agreed that gratuity at the rate of 21 days' wages for each completed year of service in case of voluntary retirement or resignation after 10 years' service may be awarded as gratuity to the workmen. Counsel for the A. T. M. has shown no disinclination to fall in line with this suggestion. Counsel for the A. T. M. has also not objected to appropriate adjustments in view of the concessions made by management of the D. C. M., S. B. M. and B. C. M.

38. It was urged by counsel for the workmen that in providing that gratuity shall be paid to Badli workmen for only those years in which a workman has worked for 240 days, the Tribunal has committed an error. It was urged that a Badli workman has to register himself with the management of the textile unit and is required every day to attend the factory premises for ascertaining whether work would be provided to him, and since a Badli workman has to remain available throughout the year when the factory is open, a condition requiring that the Badli workman has worked for not less than 240 days to qualify for gratuity is unjust. We are unable to agree with that contention. If gratuity is to be paid for service rendered, it is difficult to appreciate the grounds on which it can be said that because for maintaining his name on the record of the Badli workmen, a workman is required to attend the Mills he may be deemed to have rendered

ed service and would on that account be entitled also to claim gratuity. The direction is unexceptionable and the contention must be rejected.

39. It was also urged by Mr. Ramamurthi that the expression "average of the basic wage" in the definition of "wages" in Clause 4 of the Schemes is likely to create complications in the implementation of the schemes. He urged that if the wages earned by a workman during a month are divided by the total number of working days, the expression "wages" will have an artificial meaning and especially where the workman is old or disabled or incapacitated from rendering service, gratuity payable to him will be substantially reduced. We do not think that there is any cause for such apprehension. The expression "average of the basic wage" can only mean the wage earned by a workman during a month divided by the number of days for which he has worked and multiplied by 28 in order to arrive at the monthly wage for the computation of gratuity payable. Counsel for the employers agree to this interpretation.

40. It was then urged that whereas the reference to the Industrial Tribunal was made by the Delhi Administration sometime in March 1958, the award is given effect to from January 1, 1964, and for a period of nearly six years the workmen have been deprived of gratuity, when the delay in the disposal of the proceedings was not due to any fault or delaying tactics on the part of the workmen. The reference was made in the first week of March, 1958. The Textile Mazdoor Union then applied to be impleaded on September 15, 1959, the D. C. M. and S. B. M. moved the High Court of Punjab at Delhi and obtained an order for stay of proceedings in writ petition filed against the order of the Tribunal impleading the Textile Mazdoor Union. That writ petition was dismissed in February 1961 and the proceedings were resumed on December 12, 1962. Thereafter preliminary issues were decided and on December 3, 1963, an interim award relating to other disputes was made. It must, however, be noticed that there were four claims and the claim relating to gratuity was taken in hand by the Tribunal after disposal of the other claims. Neither party was dilatory in the prosecution of any claim before the Tribunal. It has also to be noticed that in the D. C. M. and S. B. M. there

was in fact a gratuity scheme already in operation. The liability of the A. T. M. to pay gratuity arises after that unit acquired sufficient financial stability and it is not suggested that the unit had acquired financial stability before January 1, 1964. The issue remains a live issue only in respect of the B. C. M. It is true that the gratuity scheme of the D. C. M. and S. B. M. was related only to the length of service and did not take into account the varying rates of wages received by the workmen. But the question if at all would be one of making minor adjustment in the liability of the two units to pay gratuity in the event of gratuity being payable under this award at a higher rate than the gratuity awardable under the scheme already in operation in the two units. If in respect of the A. T. M. which had no scheme of gratuity for all practical purposes becomes operative from January 1, 1964, we do not see any reason why in respect of the B. C. M. any different rule should be provided for. Again the Tribunal has fixed January 1, 1964, as the date for the commencement of the schemes. Giving the schemes effect before January 1, 1964, may rake up cases in which the workmen have left the establishments many years ago. It would not be conducive to industrial peace to allow such questions to be raised after this long delay. The question is not capable of solution on the application of any principle and must be decided on the consideration of expediency. We do not think that any ground is made out for altering the award of the Industrial Tribunal in this behalf.

41. It was then urged that in any event the workmen of the D. C. M. and S. B. M. should not be deprived of the right to gratuity under the scheme of the two units, if gratuity at a higher rate is payable to them under the voluntary scheme. This contention must be accepted. We direct that in respect of all workmen of the D. C. M. and S. B. M. who were employed before January 1, 1964, and continued to remain employed till that date, gratuity at the higher of the two rates applicable to each workman when he becomes entitled to gratuity either computed under the Employees Benefit Fund Trust scheme of the D. C. M. and S. B. M. or under the terms of this award shall be paid. Workmen employed after January 1, 1964, will be entitled to the benefit of this award alone.

42. Industrial disputes have given rise to considerable strife holding up development of industry and the economic welfare of the nation. Awards have been made by the Tribunals often on consideration ad hoc and based on no principle and Courts have upheld or modified those awards without enunciation of any definite or generally accepted principle. In the present case we have been largely guided by the consideration of securing a reasonable degree of uniformity in the fixation of gratuity in the textile industry, for, in our view, a departure made from the prevailing pattern in one region is likely to give rise to claims all over the country for modification of the gratuity schemes in operation, and have been accepted as fixing the basis of gratuity schemes. If, having regard to the deteriorating value of the rupee, it is thought necessary that more generous benefits should be available to the workmen by way of gratuity, the remedy lies not before the adjudicators or the Courts, but before the legislative branch of the State. In respect of the bonus, provident fund, retrenchment compensation, State Insurance Schemes as well as medical benefits, legislation has been introduced bringing a reasonable degree of certainty in the law governing the various benefits available to the workmen and we are of the view that even in respect of gratuity a reasonably uniform scheme may be evolved by the Legislatures which could prevent resort to the adjudicators in respect of this complicated matter of dispute between the employers and the employees. It may not be difficult to evolve a scheme which would meet the legitimate claims of both the employers and the employees and which might, while eliminating cause for friction, simultaneously conduce to greater certainty in the administration of the law governing industrial disputes, and secure benefits to the employers as well as the employees and conduce to the prosperity of the industry as well as of the workmen.

43. We propose to summarise the effect of our judgment:

(1) A unit-wise approach in framing the gratuity scheme for the four units was appropriate, and on the terms of the references the plea of the employees to fix the age of superannuation was beyond the scope of reference. The financial condition of the D. C. M., S. B. M. and B. C. M. justifies imposition of gratuity schemes as from January 1, 1964. Even

the A. T. M. which is the weakest of the four units is financially stable from the date on which the award becomes operative;

(2) The settlement between the workmen and the A. T. M. did not operate to bar the jurisdiction of the Tribunal to make the scheme of gratuity payable to the workmen of the A. T. M.;

(3) That the Tribunal was in error in relating gratuity awardable to the workmen to the consolidated wage;

(4) That the minimum period for qualifying for voluntary retirement should be reduced to 10 years and one month's basic wage in the case of D. C. M. and S. B. M. and 21 days' basic wage in the case of B. C. M. and A. T. M. for each completed year of service should be paid but not exceeding 20 months' wages in the aggregate. (This direction is made with the consent of the Advocates of the employers);

(5) That workmen dismissed or discharged from service for misconduct will not be entitled to gratuity if guilty of conduct involving acts of violence against the management or other employees, or riotous or disorderly behaviour in or near the place of employment;

(6) No modification need be made with regard to Badli workmen;

(7) The award needs no modification with regard to the date of operation of the award; and

(8) The workmen of the D. C. M. and S. B. M. who commenced service and continued to serve till January 1, 1964, and thereafter will be entitled to elect at the time when gratuity becomes due to claim gratuity either on the scheme in force under Employees Benefit Fund Trust of the employers or under this award. We have made some incidental changes to streamline the scheme.

44. On the view we have taken of the schemes, Annexure 'A' relating to the D. C. M. and S. B. M. of the award will be modified in the following respects:

45. In clause 1 (a) instead of "12 days' wages", the expression "20 days' wages" will be substituted.

46. In clause 1 (b) for the expression "15 days' wages", the expression "1 month's wages" will be substituted.

47. In proviso (ii) to clause 1 for the expression "15 months' wages", the expression "20 months' wages" will be substituted.

48. In clause 2 for the expression "15 days' wages", the expression "1 month's

wages" will be substituted; and for the expression "15 years' service", "10 years' service" will be substituted.

49. In the proviso to clause 2 for the expression "15 months' wages" the expression "20 months' wages" will be substituted.

50. In clause 3 in the proviso for the expression "15 months' wages", the expression "20 months' wages" will be substituted.

51. Clause 3 will be followed by an Explanation:

"Explanation. — The expression "misconduct" means acts involving violence against the management or other employees or riotous or disorderly behaviour in or near the place of employment.

Where the workman is guilty of conduct which involves the management in financial loss, the loss occasioned may be deducted from the gratuity payable."

52. In clause 4 the words "plus the dearness allowance" will be omitted.

53. The remaining clauses will stand unaffected except that for the words, "within six months from the date of publication of this Award" the words "within six months from the date of this judgment" will be substituted.

54. Annexure 'B' relating to the B. C. M. and A. T. M. will be modified in the following respects.

55. In clause 1 (a) for the expression "one-fourth month's wages", the expression "15 days wages" will be substituted;

56. In clause 1 (b) for the expression "one-third month's wages" the expression "21 days' wages" will be substituted.

57. In the proviso for the expression "12 months' wages", the expression "20 months' wages" will be substituted.

58. In clause 2 for the words "15 years' service", the expression "10 years' service" will be substituted.

59. In clause 3 in the proviso for the expression "12 months' wages", the expression "20 months' wages" will be substituted and it will be followed by the Explanation of "misconduct" as in Annexure 'A'.

AIR 1978 SUPREME COURT 910 (V 57 C 193)

(From: (1) Calcutta (2) Bombay)*

J. C. SHAI, V. RAMASWAMI, C. K. MITTER, K. S. HECDE AND A. N. CROVER, JJ.

(1) In Cr. Appeal No. 27 of 1967: Ramesh Chandra Mehta, Appellant v. The State of West Bengal, Respondent;

(2) In Cr. Appeal No. 45 of 1968: Dattatraya Waman Chitnis, Appellant v. H. R. Siyam, Assistant Collector of Customs, Bombay & another, Respondents; In Cr. Appeal No. 46 of 1968: Dady Adavji Fatakia, Appellant v. K. K. Ganguli, Asstt. Collector of Customs, Bombay and another, Respondents; In Cr. Appeal No. 47 of 1968. Punamchand Ramlalji Appellant v. R. R. Gomes, Assistant Collector of Customs, Bombay and another, Respondents.

Criminal Appeals Nos. 27 of 1967, 45, 46 and 47 of 1968, D/- 18-10-1968.

(A) Sea Customs Act (1878), Sec. 171A — Statement under — Admissibility must be adjudged in the light of taint attaching thereto at the time of statement.

The admissibility of statements recorded by a Customs Officer under Sec. 171A of the Sea Customs Act, 1878, depends upon the determination of the question whether the statements when made were inadmissible under Section 25 of the Evidence Act, and Article 20 (3) of the Constitution. Even after the repeal of the Sea Customs Act, admissibility of the statement made in a complaint made before a Magistrate for contravention of the provision of that Act must be adjudged in the light of the taint, if any, attaching thereto when the statement was made. It will not be correct to say that the statements must be deemed by virtue of Section 160 of the Customs Act 52 of 1962 to be recorded under the provisions of that Act and that their admissibility may be adjudged in the light of that Act alone. (Para 4)

(B) Evidence Act (1872), Section 25 — Police Officer who is — Officer of Customs is not police officer.

A Customs Officer is not a member of the police force. He is not entrusted with

*(1) Cr. Revn. No. 231 of 1965, D/- 8-9-1966 (Cal). (2) Cr. Revn. Nos. 682, 417 and 475 of 1967, D/- 14-11-1967, 9-11-1967 and 9-11-1967, respectively — Bombay.)

the duty to maintain law and order. He is entrusted with power which specifically relates to the collection of customs duties and prevention of smuggling. The test for determining whether an officer of customs is to be deemed a police officer is whether he is invested with all the powers of a police officer qua investigation of an offence, including the power to submit a report under Section 173 of the Code of Criminal Procedure. A Customs Officer exercising power to make an enquiry cannot submit a report under Section 173 of the Code of Criminal Procedure. AIR 1962 SC 276 & AIR 1966 SC 1746 & 1968 SCD 385, Rel. on; AIR 1964 SC 828, Dist. (Paras 5, 10)

(C) Constitution of India, Article 20 (3) — “Accused of any offence” — Person against whom enquiry is held under Section 171A Sea Customs Act (1878) is not a person accused of any offence — AIR 1956 Cal 253 and AIR 1958 Cal 682, Overruled.

By Article 20 (3) of the Constitution a person who is accused of any offence may not be compelled to be a witness against himself. The guarantee is, it is true, not restricted to statements made in the witness box. But in order that the guarantee against testimonial compulsion incorporated in Article 20 (3) may be claimed by a person it has to be established that when he made the statement sought to be tendered in evidence against him, he was a person accused of an offence. Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an Officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trying the offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, which he is bound to do under Article 22 (1) of the Constitution for the purposes of holding an enquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate. Hence a person against whom an enquiry is made by the Customs

Officer under the Sea Customs Act is not a person accused of an offence and the evidence, if any, collected by examining him under Section 171A of the Sea Customs Act is not inadmissible. Case Law discussed; AIR 1956 Cal 253 & AIR 1958 Cal 682, Overruled; AIR 1967 Mad 263 & AIR 1965 Bom 195, Approved.

(Paras 11, 14)

(D) Evidence Act (1872), S. 25 — Police Officer — Customs Officer acting under Customs Act of 1962 — Not a police officer.

The Customs Officer under Section 104 (3) is, it is true, invested with the powers of an officer-in-charge of a police station for the purpose of releasing any person on bail or otherwise. The expression “or otherwise” however does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premises or conveyances without recourse to a Magistrate do not make him an officer-in-charge of a police station. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue. Thus a Customs Officer is, under the Act of 1962, not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Evidence Act. Cr. A. 27 of 1967, D/- 18-10-1968 (SC) & AIR 1966 SC 1746, Rel. on. (Paras 24, 25)

(E) Constitution of India, Article 20 (3) — “Accused of any offence” — Statement made under Sections 107 and 108 of Customs Act (1962) — Statement not by person accused of any offence.

Section 104 (1) of the Customs Act 1962 only prescribes the conditions in which the power of arrest may be exercised. The Officer must have reason to believe that a person has been guilty of an offence punishable under Section 135; otherwise he cannot arrest such person. But by informing such person of the grounds of his arrest the Customs Officer does not formally accuse him with the commission of an offence. Even under the Act of 1962 a formal accusation can only be deemed to be made when a complaint is made before Magistrate competent to try the person guilty of the infraction under Sections 132, 133, 134 and 135 of the Act. Any statement made under Sections 107

and 108 of the Customs Act by a person against whom an enquiry is made by a Customs Officer is not a statement made by a person accused of an offence.

(Paras 28, 27)

Cases Referred: Chronological Paras

(1967) Criminal App. Nos. 52 and 104 of 1965, D/- 12-12-1967= 1968 SCD 385, P. Shankar Lall v. Asst. Collector of Customs Madras

(1967) AIR 1967 Mad 263 (V 54)= 1967 Cri LJ 1007, Collector of Customs, Madras v. Kotumal Bhirumal Pihlajani

(1966) AIR 1966 SC 1746 (V 53)= 1966-3 SCR 698= 1966 Cri LJ 1353, Badku Joti Sawant v. State of Mysore

(1965) AIR 1965 Bom 195 (V 52)= 67 Bom LR 317= 1965 (2) Cri LJ 616, Laxman Padma Bhagat v. State

(1964) AIR 1964 SC 828 (V 51)= 1964-2 SCR 752= 1964 (1) Cri LJ 705, Raja Ram Jaiswal v. State of Bihar

(1963) Cri As. Nos. 131 and 132 of 1961, D/- 20-9-1963 (SC), Bhagawandas Goenka v. Union of India

(1962) AIR 1962 SC 276 (V 49)= 1962-3 SCR 333= 1962 (1) Cri LJ 212, State of Punjab v. Barkat Ram

(1961) AIR 1961 SC 29 (V 48)= 1961-1 SCR 417, Raja Narayan Lal Bansilal v. Maneck Phiroz Mistry

(1961) AIR 1961 SC 1808 (V 48)= 1962-3 SCR 10= 1961 (2) Cri LJ 856, State of Bombay v. Kathi Kalu Oghad

(1958) AIR 1958 Cal 682 (V 45)= 1958 Cri LJ 1469, Collector of Customs v. Calcutta Motor Cycle and Co.

(1956) AIR 1956 Cal 253 (V 43)= 60 Cal WN 67, Calcutta Motor and Cycle Co. v. Collector of Customs

(1954) AIR 1954 SC 300 (V 41)= 1954 SCR 1077= 1954 Cri LJ 865, M. P. Sharma v. Satishchand

(1953) AIR 1953 SC 325 (V 40)= 1953 SCR 730= 1953 Cri LJ 1432, Maqbool Hussain v. State of Bombay

(In Cr. A. No. 27 of 1967)

Mr. B. C. Misra, Sr. Advocate (Mr. P. K. Ghosh, Advocate, for Mr. P. K. Chakravarty, Advocate with him), for Appellant; Mr. C. K. Daphtary, Attorney-Gen-

eral for India, and Mr. B. Sen, Sr. Advocate (Mr. C. S. Chatterjee, Advocate with them), for Respondents.

(In Cr. A. No. 45 of 1968)

Mr. K. Rajendra Chaudhuri, Advocate for Appellant; Mr. B. Sen, Sr. Advocate, (Mr. S. P. Nayar, Advocate, with him), for Respondents.

(In Cr. A. No. 46 of 1968)

Mr. A. K. Sen, Sr. Advocate (M/s. Porus A. Mehta and Janendra Lal Advocates and M/s. J. R. Cagrat and B. R. Agarwala, Advocates of M/s. Cagrat and Co. with him), for Appellant; Mr. B. Sen, Sr. Advocate (M/s. A. P. Candhi, R. N. Sachthey, S. P. Nayar and B. D. Sharma, Advocates, with him), for Respondents.

(In Cr. A. No. 47 of 1968)

Mr. A. S. R. Chari, Sr. Advocate (M/s. B. M. Patel and M. V. Coswami, Advocates, with him), for Appellant; Mr. B. Sen, Sr. Advocate (M/s. A. P. Candhi, R. N. Sachthey and S. P. Nayar Advocates with him), for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.:— The Assistant Collector of Customs filed a complaint against Ramesh Chandra Mehta and four others in the Court of the Additional District Magistrate, 24 Parganas, charging them with offences under Section 120B Indian Penal Code read with Section 167 (81) of the Sea Customs Act, 1878, Section 5 of the Import and Export Control Act, 1947, and for specific offences committed in pursuance of the conspiracy. It was the case of the complainant that when Mehta was searched on December 13, 1962, at the Dum Dum Airport, Calcutta, diamonds and jewellery worth Rupees 1,91,000/- were found on his person and currency notes of Rs. 27,000/- were found in a suit-case with him and that pursuant to a statement made by Mehta diamonds, pearls and jewellery of the value of Rs. 2,61,800/- and correspondence, telegrams and cables bearing upon the conspiracy to smuggle gold, precious stones etc., into India from foreign countries were recovered from different places.

2. The complainant tendered in evidence at the trial certain confessional statements which he claimed were made before the Customs Authorities in an enquiry under Section 171-A of the Sea Customs Act, 1878, by Mehta and the other persons accused. Counsel for the accused objected to the admissibility of that evidence but the objection was over-

ruled by the Trial Magistrate. The High Court of Calcutta rejected a petition invoking their revisional jurisdiction against the order of the Trial Magistrate. With special leave, Mehta has appealed to this Court.

3. Counsel for Mehta urged three contentions in support of the appeal:

(1) that the statements tendered in evidence by the Customs Officer must be deemed by virtue of Section 160 of the Customs Act 52 of 1962 to be recorded under the provisions of that Act and their admissibility may be adjudged in the light of that Act alone;

(2) that an Officer of Customs is a "police officer" within the meaning of Section 25 of the Indian Evidence Act, 1872, and a confessional statement made before him is inadmissible in evidence at the trial of the appellant and his co-accused;

(3) that the statements made before the Customs Officer were otherwise inadmissible, because Mehta and others being persons accused of an offence were compelled by the provisions of Section 171-A of the Sea Customs Act, 1878, to be witnesses against themselves within the meaning of Article 20 (3) of the Constitution.

4. By Section 160 (1) of Act 52 of 1962 read with the Schedule to that Act, the Sea Customs Act 8 of 1878 was repealed. By sub-section (3) of Section 160 it is provided:

"Notwithstanding the repeal of any enactment by this section, —

(a) any notification, rule, regulation, order or notice issued or any appointment or declaration made or any licence, permission or exemption granted or any assessment made, confiscation adjudged or any duty levied or any penalty or fine imposed or any forfeiture, cancellation or discharge of any bond ordered or any other thing done or any "other action taken under any repealed enactment shall, so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provision of this Act;

(b) x x x x x."

But the admissibility of statements recorded by a Customs Officer under Section 171-A of the Sea Customs Act 1878, depends upon the determination of the question whether the statements when made were inadmissible under Section 25 of the Evidence Act, and Article 20 (3) of the Constitution. Even after the repeal of the Sea Customs Act, admissibility

of the statement made in a complaint made before a Magistrate for contravention of the provision of that Act must be adjudged in the light of the taint, if any, attaching thereto when the statement was made. The first contention must, therefore, fail.

5. Section 25 of the Indian Evidence Act, 1872, enacts that "No confession made to a police officer shall be proved as against a person accused of any offence. The broad ground for declaring confessions made to a police-officer inadmissible is to avoid the danger of admitting false confessional statements obtained by coercion, torture or ill-treatment. But a Customs Officer is not a member of the police force. He is not entrusted with the duty to maintain law and order. He is entrusted with power which specifically relates to the collection of customs duties and prevention of smuggling. There is no warrant for the contention raised by counsel for Mehta that a Customs Officer is invested in the enquiry under the Sea Customs Act with all the powers which a police-officer in-charge of a police station has under the Code of Criminal Procedure. Under the Sea Customs Act, a Customs Officer is authorised to collect Customs duty to prevent smuggling and for that purpose he is invested with the power to search any person on reasonable suspicion (Section 169); to screen or X-ray the body of a person for detecting secreted goods (Section 170A); to arrest a person against whom a reasonable suspicion exists that he has been guilty of an offence under the Act (Section 173); to obtain a search warrant from a Magistrate to search any place within the local limits of the jurisdiction of such Magistrate (Section 172); to collect information by summoning persons to give evidence and produce documents (Section 171-A); and to adjudge confiscation under Section 182. He may exercise these powers for preventing smuggling of goods dutiable or prohibited and for adjudging confiscation of those goods. For collecting evidence the Customs Officer is entitled to serve a summons to produce a document or other thing or to give evidence, and the person so summoned is bound to attend either in person or by an authorized agent, as such officer may direct, and the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes a statement and to produce such

documents and other things as may be required. The power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Officer for enforcing compliance with the provisions of the Sea Customs Act. For purpose of Sections 193 and 228 of the Indian Penal Code the enquiry made by a Customs Officer is a judicial proceeding. An order made by him is appealable to the Chief Customs-authority under Section 188 and against that order revisional jurisdiction may be exercised by the Chief Customs-authority and also by the Central Government at the instance of any person aggrieved by any decision or order passed under the Act. The Customs Officer does not exercise, when enquiring into a suspected infringement of the Sea Customs Act powers of investigation which a police officer may in investigating the commission of an offence. He is invested with the power to enquire into infringements of the Act primarily for the purpose of adjudicating forfeiture and penalty. He has no power to investigate an offence triable by a Magistrate, nor has he the power to submit a report under Section 173 of the Code of Criminal Procedure. He can only make a complaint in writing before a competent Magistrate.

6. In *State of Punjab v. Barkat Ram*, 1962-3 SCR 338 = (AIR 1962 SC 276) this Court held (Subba Rao, J., dissenting) that a Customs Officer under the Land Customs Act 19 of 1924 or under the Sea Customs Act 8 of 1878 is not a police officer for the purpose of Section 25 of the Indian Evidence Act, 1872, and that conviction of the offender on the basis of his statements to the Customs Officer for offences under Section 167 (8) of the Sea Customs Act, 1878, and Section 23 (1) of the Foreign Exchange Regulation Act, 1947, is not illegal. Raghubar Dayal, J., who delivered the majority judgment of this Court observed:

"..... that the powers which the police officers enjoy are powers for the effective prevention and detention of crime in order to maintain law and order.

The powers of Customs Officers are really not for such purpose. Their powers are for the purpose of checking the smuggling of goods and the due realisation of customs duties and to determine the action to be taken in the interests of the revenues of the country by way of confiscation of goods on which no duty had

been paid and by imposing penalties and fines."

7. In *Raja Ram Jaiswal v. State of Bihar*, 1964-2 SCR 752 = (AIR 1964 SC 828) the decision in *Barkat Ram's* case, was distinguished and it was observed (Raghubar Dayal, J., dissenting) that the expression "police officer" in Section 25 of the Evidence Act was not to be construed narrowly but in a wide and popular sense. The Court in that case held that an Excise Inspector or Sub-Inspector under the Bihar and Orissa Excise Act 2 of 1915 upon whom all the powers of a police officer were conferred is entitled to investigate any offence under the Excise Act and to submit a charge-sheet and on that account he must be regarded as a police officer within the meaning of Section 25 of the Evidence Act. The Court observed that the object enacting Section 25 of the Evidence Act was to eliminate from consideration confessions made to an officer who by virtue of his position, could extract by force, torture or inducement a confession, and an Excise Officer acting under Section 78 (3) of the Bihar and Orissa Excise Act, 1915, was in the same position as an officer in charge of a police station making an investigation under Chapter XIV of the Code of Criminal Procedure, and had the same opportunities of extracting a confession from a suspect.

8. In *Badku Joti Savant v. State of Mysore*, 1966-3 SCR 698 = (AIR 1966 SC 1746) this Court held that the officer empowered under the Central Excises and Salt Act 1 of 1944 and when making enquiries for purposes of that Act invested with powers of an officer-in-charge of a police station investigating a cognizable offence, is not a police officer within the meaning of Section 25 of the Indian Evidence Act, and the statement of an accused person recorded by him is not hit by that section. The Court in that case distinguished the decision in *Raja Ram Jaiswal's* case, 1964-2 SCR 752 = (AIR 1964 SC 828) and observed that a Central Excise Officer was invested with powers of an officer-in-charge of a police station when investigating a cognizable offence, but he had no power to submit a report under Section 173 of the Code of Criminal Procedure, and on that account he was not a police officer within the meaning of Section 25 of the Evidence Act.

9. In *P. Shanker Lall v. Assistant Collector of Customs, Madras*, Cri. As. Nos. 52 and 104 of 1965, D/- 12-12-1967 =

(reported in 1968 SCD 385), Sikri, J., delivering the judgment of the Court observed that a confession made before the Assistant Collector of Customs was not inadmissible under Section 25 of the Indian Evidence Act.

10. Counsel for Mehta contended that a Customs Officer who has power to detain, to arrest, to produce the person arrested before a Magistrate, and to obtain an order for remand and keep him in his custody with a view to examine the person so arrested and other persons to collect evidence, has opportunities which a police officer has of extracting confessions from a suspect, and if the expression police officer be not narrowly understood, a statement recorded by him of a person who is accused of an offence is inadmissible by virtue of Section 25 of the Indian Evidence Act. But the test for determining whether an officer of Customs is to be deemed a police officer is whether he is invested with all the powers of a police officer qua investigation of an offence, including the power to submit a report under Section 173 of the Code of Criminal Procedure. It is not claimed that a Customs Officer exercising power to make an enquiry may submit a report under Section 173 of the Code of Criminal Procedure.

11. The remaining contention that a person against whom an enquiry is made by the Customs Officer under the Sea Customs Act is a person accused of an offence and on that account he cannot be compelled to be made a witness against himself, and the evidence if any collected by examining him under Section 171-A of the Sea Customs Act is inadmissible has, also no substance. By Article 20 (3) of the Constitution a person who is accused of any offence may not be compelled to be a witness against himself. The guarantee is, it is true, not restricted to statements made in the witness box. This Court in *State of Bombay v. Kathi-Kalu Oghad*, 1962-3 SCR 10= (AIR 1961 SC 1808) observed at p. 37 (of SCR) = (at p. 1817 of AIR).

"To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

"To be a witness" in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider

meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing." But in order that the guarantee against testimonial compulsion incorporated in Article 20 (3) may be claimed by a person it has to be established that when he made the statement sought to be tendered in evidence against him, he was a person accused of an offence. Under Section 171-A of the Sea Customs Act, a Customs Officer has power in an enquiry in connection with the smuggling of goods to summon any person whose attendance he considers necessary, to give evidence or to produce a document or any other thing, and by clause (3) the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes statements and to produce such documents and other things as may be required. The expression "any person" includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not, when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20 (3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an inquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer does not at that stage accuse the person suspected of infringing the provision of the Sea Customs Act with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of Customs: when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act, he is not accusing the person of any offence punishable at a trial before a Magistrate. In *Maqbool Hussain v. State of Bombay*, 1953 SCR 730= (AIR 1953 SC 325), the Court held that a person against whom an order for confiscation of goods had been made in proceedings taken by Customs Officer under Section 167 of the Sea Customs Act and was subsequently prosecuted before a Magistrate for offences under the Foreign Exchange Regulation Act, 1947, could not plead the protection of Article 20 (2), since he was not "prosecuted" before the Customs authorities,

and the order for confiscation was not a "punishment" inflicted by a Court or judicial tribunal within the meaning of Article 20 (2) of the Constitution and the prosecution was not barred.

12. In *M. P. Sharma v. Satish Chandra*, 1954 SCR 1077= (AIR 1954 SC 300) this Court observed that a compelled production of incriminating documents by a person against whom a First Information Report under the Code of Criminal Procedure has been made is testimonial compulsion within the meaning of Article 20 (3) of the Constitution. But a search and seizure of a document under the provisions of Sections 94 and 96 of the Code of Criminal Procedure do not amount to compelled production thereof within the meaning of Article 20 (3). It was observed by Jagannadhas, J., at p. 1087 (of SCR)= (at p. 304 of AIR):

"Broadly stated the guarantee in Article 20 (3) is against 'testimonial compulsion'. x x the protection afforded to an accused in 'so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution." The Court further observed that the guarantee under Article 20 (3) is available to the petitioners against whom a First Information Report had been recorded.

13. In *Raja Narayanlal Bansilal v. Maneek Phiroz Mistry*, 1961-1 SCR 417= (AIR 1961 SC 29) admissibility of a statement made before an Inspector appointed by the Government of India under the Indian Companies Act, 1913, to investigate the affairs of a Company and to report thereon was canvassed. It was observed at p. 436 (of SCR)= (at p. 83 of AIR):

"x x one of the essential conditions for invoking the constitutional guarantee enshrined in Article 20 (3) is that a formal accusation relating to the commission of an offence, which would normally lead to his prosecution, must have been levelled against the party who is being compelled to give evidence against him."

Sinha, C. J., speaking for the majority of the Court in *Kathi Kalu Oghad's case*, 1962-3 SCR 10= (AIR 1961 SC 1808) stated that:

"To bring the statement in question within the prohibition of Article 20 (3), the person accused must have stood in the character of an accused person at the time he had made the statement. It is not enough that he should become an accused, any time after the statement has been made".

14. In the two earlier cases *M. P. Sharma's case*, 1954 SCR 1077= (AIR 1954 SC 300) and *Raja Narayanlal Bansilal's case*, 1961-1 SCR 417= (AIR 1961 SC 29) this Court in describing a person accused used the expression "against whom a formal accusation had been made", and in *Kathi Kalu Oghad's case*, 1962-3 SCR 10= (AIR 1961 SC 1808) this Court used the expression "the person accused must have stood in the character of an accused person". Counsel for Mehta urged that the earlier authorities were superseded in *Kathi Kalu Oghad's case*, 1962-3 SCR 10= (AIR 1961 SC 1808) and it was ruled that a statement made by a person standing in the character of a person accused of an offence is inadmissible by virtue of Article 20 (3) of the Constitution. But the Court in *Kathi Kalu Oghad's case*, 1962-3 SCR 10= (AIR 1961 SC 1808) has not set out a different test for determining the stage when a person may be said to be accused of an offence. In *Kathi Kalu Oghad's case*, 1962-3 SCR 10= (AIR 1961 SC 1808) the Court merely set out the principles in the light of the effect of a formal accusation on a person, viz., that he stands in the character of an accused person at the time when he makes the statement. Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an Officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, (which he is bound to do under Article 22 (1) of the Constitution) for the purposes of holding an enquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an

officer competent in that behalf before the Magistrate.

15. The decision of this Court in *Bhagwandas Goenka v. Union of India*, Cri. As. Nos. 131 and 132 of 1961, D/- 20-9-1963 (SC) lays down no principle inconsistent with the view we have expressed. In *Bhagwandas Goenka's case*, Cri. As. Nos. 131 and 132 of 1961, D/- 20-9-1963 (SC) the appellant was charged with using a sum of 4000 dollars borrowed by him when he was on a visit to the United States of America and with depositing cheques of the value of 500 dollars with a foreign bank in which he had an account, and thereby infringing Sections 4 (1) & (3) read with Section 23 of the Foreign Exchange Regulation Act 7 of 1947. At the trial before a Magistrate the appellant contended that the information demanded and obtained from him on September 19, 1952 and May 14, 1953 by the Reserve Bank of India under Section 19 of the Foreign Exchange Regulation Act with respect to the two sums was inadmissible. This Court negatived the contention observing that no information was collected from the accused after July 4, 1955, when he was asked to show cause by the Reserve Bank why he should not be prosecuted for contravention of the various provisions of the Act with respect to the two sums. The Court observed:

"The information collected under Section 19 is for the purpose of seeing whether a prosecution should be launched or not. At that stage when information is being collected there is no accusation against the person from whom information is being collected. It may be that after the information has been collected the Central Government or the Reserve Bank may come to the conclusion that there is no case for prosecution and the person concerned may never be accused. It cannot therefore be predicated that the person from whom information is being collected under Section 19 is necessarily in the position of an accused. The question whether he should be made an accused is generally decided after the information is collected and it is when a show cause notice is issued, as was done in this case on July 4, 1955, that it can be said that a formal accusation has been made against the person concerned. We are therefore of the opinion that the appellant is not entitled to the protection of Article 20 (3) with respect to the information that might have been collected

from him under Section 19 before July 4, 1955."

Under Section 19 of the Foreign Exchange Regulation Act, 1947, it is open to the Central Government or the Reserve Bank of India, if it considers necessary or expedient, to obtain and examine any information, book or other document in the possession of any person or which in the opinion of the Central Government or the Reserve Bank it is possible for such person to obtain and furnish, by order in writing, to require any such person to furnish, or obtain and furnish, to the Central Government or the Reserve Bank or any person specified in the order with such information, book or other document. The information which was asked for and obtained in *Bhagwandas Goenka's case*, Cri. As. Nos. 131 and 132 of 1961, D/- 20-9-1963 (SC) under Section 19 of the Foreign Exchange Regulation Act was not held to be information obtained in violation of Article 20 (3) of the Constitution for the accusation in the view of the Court was made against the appellant for the first time on July 4, 1955, when the Reserve Bank of India called for an explanation of the appellant why he should not be prosecuted for contravention of the various provisions of the Foreign Exchange Regulation Act. Under the proviso to Section 23 (3) of that Act it is enacted that

"where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission."

In the light of the proviso the Court assumed that when an authority which is statutorily authorised and bound to call for an explanation before a complaint is filed, serves a formal notice calling for explanation, a formal accusation may be deemed to be made. But that is not the position in the present case.

16. In our judgment the view expressed by Sinha, J., in *Calcutta Motor and Cycle Co. v. Collector of Customs*, AIR 1956 Cal 253 that a proceeding under Section 171-A of the Sca Customs Act, 1878, being preliminary to a criminal trial any statement procured would be inadmissible under Article 20 (3) there being a formal accusation relating to the commission of an offence within the normal

course may result in prosecution, is not correct. Opinion of the Court recorded in appeal from that judgment in Collector of Customs v. Calcutta Motor and Cycle Co., AIR 1958 Cal 682 in which Chakravarti, C. J., observed that the protection of Article 20 (3) avails even where a person is not formally accused or charged is inconsistent with the judgments of this Court already referred, cannot also be accepted as correct.

17. The views expressed by the Madras High Court in Collector of Customs, Madras v. Kotumal Bhirumal Pihlajani, AIR 1967 Mad 263 (FB) at p. 275 that:

..... the bar under Article 20 (3) of the Constitution will not be available to the statements in the case, since it is not in dispute that they have been recorded only during an investigation undertaken by the Customs Officer under Sections 107 and 108 of the Customs Act of 1952 and at a time when the deponents did not stand in the position of accused in the light of the principles stated in the decisions cited above

and by the Bombay High Court in Laxman Padma Bhagat v. State, 67 Bom LR 317= (AIR 1965 Bom 195) that a person examined under Section 171-A of the Sea Customs Act, 1878, does not stand in the character of an accused person inasmuch as there is no formal accusation made against him by any person at that time are, in our judgment, substantially correct.

18. We therefore, agree with the High Court that the statements made by Mehta and the other persons accused before the Additional District Magistrate, 24 Parganas, were not inadmissible in evidence because of the protection granted under Article 20 (3) of Constitution.

Criminal Appeal No. 45 of 1968

19. On 6-3-1963, six parcels containing watches were seized by the Customs authorities at Santa Cruz Airport, Bombay. The Customs authorities recorded statements of the appellant Chitnis and attached certain documents from him. Thereafter the Customs authorities filed a complaint against Chitnis and thirteen others for offences under Section 120B, Indian Penal Code read with Section 167 (81) of the Sea Customs Act, and Section 135 of the Customs Act, 1962 read with Section 109, Indian Penal Code alleging that between August 15, 1952 and January 28, 1963, and between February 5, 1963 and March 6, 1963, the offenders had imported watches and had on that account committed offences under Sec-

tion 120-B, Indian Penal Code read with Section 167 (81) of Sea Customs Act, and Section 120, Indian Penal Code read with Section 135 of the Customs Act, 1962, read with Section 109, Indian Penal Code respectively. At the trial the prosecutor tendered in evidence certain statements made before the Customs authorities by the accused. The Advocate for the accused objected to the admissibility of those statements. The Trial Magistrate rejected the contention and in a revision application filed before the High Court of Bombay the order passed by the Presidency Magistrate was confirmed.

Criminal Appeal No. 46 of 1968

20. Dady Adarji Fatakia was arrested on December 26, 1964. At that time he was found in possession of 540 watches. He was served with a summons under Section 108 of the Customs Act, 1962, and he made a statement before a Customs Officer. Thereafter a complaint was filed before the Presidency Magistrate, Bombay, against Fatakia for offences under Section 135 (a) & (b) of the Customs Act, 1962. At the trial the Public Prosecutor supplied to the accused copies of the statements made by Fatakia. The accused Fatakia, then applied to the Magistrate that the statements if tendered in evidence would be inadmissible because they were inadmissible under Section 25 of the Evidence Act or Section 162 of the Code of Criminal Procedure or under Article 20 (3) of the Constitution. The contentions were negatived by the Magistrate and in a revision application to the High Court the order of the Presidency Magistrate was confirmed.

Criminal Appeal No. 47 of 1968

21. On May 30, 1965, the Customs Officers seized 11000 tolas of gold from a room in the occupation of the appellant Poonamchand and then recorded his statement after serving him with a summons under Section 108 of the Customs Act, 1962. A complaint was filed against the appellant and two others in the Court of Additional Chief Presidency Magistrate, 8th Court, Bombay, under Section 120-B, I. P. Code and Section 135 of the Customs Act, and Rule 126P (2) (II) and (IV) of the Defence of India Rules and Rule 126P (2) (II) and (IV) of the Defence of India Rules read with Section 109 I. P. Code and Section 135 of the Customs Act, 1962 read with Section 109, I. P. Code. At the trial evidence was given by the Superintendent, Central Excise, Marine and Preventive Division, that the persons accused had

made certain oral statements in his presence admitting their complicity in smuggling gold. An application by Poonamchand raising the contention that the statements were inadmissible under Section 25 of the Indian Evidence Act and Article 20 (3) of the Constitution was rejected on the ground that the application was premature. A revision application was then filed in the High Court and it was heard with the other petitions and was rejected.

22. In the three appeals Nos. 45, 46 and 47 of 1968 the statements were made to or recorded before the Customs Officers in an enquiry made under the Customs Act, 1962. It was urged on behalf of the appellants that the statements made before the Customs Officers exercising power under the Customs Act, 1962 are inadmissible at the trial of a person accused of an offence under the Customs Act, 1962, because of Section 25 of the Evidence Act and Article 20 (3) of the Constitution.

23. The scheme of the Customs Act, 1962, relating to searches, seizure and arrest, and confiscation of goods and conveyances and imposition of penalties may be briefly examined. Under Sections 100 and 101 a Customs Officer has power to search any person to whom these sections apply if the officer has reason to believe that such person has secreted about his person, any goods liable to confiscation or any documents relating thereto. Section 104 confers upon the Customs Officer power to arrest if he had reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under Section 135. Every person so arrested must be informed of the grounds for such arrest. Section 105 authorises any Assistant Collector of Customs to search any premises if he has reason to believe that goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under the Act, are secreted in any place, he may authorise any officer of Customs to search or may himself search for such goods, documents or things. Under Section 104 (3) where an officer of Customs has arrested any person under sub-section (1) he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of

Criminal Procedure, 1898. By Section 107 any officer of customs empowered in that behalf by general or special order of the Collector of Customs may, during the course of any enquiry in connection with the smuggling of any goods — (a) require any person to produce or deliver any document or thing relevant to the enquiry; and (b) examine any person acquainted with the facts and circumstances of the case. Section 108 confers upon a gazetted officer of customs the powers to summon any person whose attendance he considers necessary to give evidence or to produce a document or any other thing in any enquiry which such officer is making in connection with the smuggling of goods. The person so summoned is bound to attend and to state the truth upon any subject respecting which he is examined or make statements and produce such documents and other things as may be required, and every such inquiry shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. Section 110 authorises the proper officer to seize such goods as he has reason to believe are liable to confiscation under the Act. Sections 111 to 127 deal with confiscation of goods and conveyances and with imposition of penalties. An appeal lies to the appropriate authority at the instance of a person aggrieved by any decision or order passed under the Act within the time specified under Section 128. Under Section 130 the Central Board of Revenue may exercise revisional powers in respect of orders passed by the Subordinate Customs authorities and Section 131 authorises the Central Government on the application of any person aggrieved by certain orders specified therein to exercise the power to annul or modify such orders. Sections 132 to 139 deal with offences and prosecution. Section 135 provides, insofar as it is material:

“Without prejudice to any action that may be taken under this Act, if any person—

(a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing,

selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111, he shall be punishable, —

- (i) x x x x x x x x
(ii) x x x x x x x x

Section 137, insofar as it is material, provides:

"(1) No court shall take cognizance of any offence under Section 132, Section 133, Section 134 or Section 135, except with the previous sanction of the Collector of Customs.

(2) No court shall take cognizance of any offence under Section 136,—

(a) where the offence is alleged to have been committed by an officer of Customs not lower in rank than Assistant Collector of Customs except with the previous sanction of the Central Government;

(b) x x x x x x x x
The Customs Act 52 of 1962 invests the Customs Officer with the power to search a person and to arrest him, to search premises, to stop and search conveyances, and to examine persons, and also with the power to summon persons, to give evidence and to produce documents and (sic) seizure of goods, documents and things which are liable to confiscation. He is also invested with the power to release a person on bail. He is entitled to order confiscation of smuggled goods and impose penalty on persons proved to be guilty of infringing the provisions of the Act. It is implicit in the provisions of Section 137 that the proceedings before a Magistrate can only be commenced by way of a complaint and not on a report made by a Customs Officer.

24. In certain matters the Customs Act of 1962 differs from the Sea Customs Act of 1878. For instance, under the Sea Customs Act search of any place could not be made by a Customs Officer of his own accord: he had to apply for and obtain a search warrant from a Magistrate. Under Section 105 of the Customs Act, 1962, it is open to the Assistant Collector of Customs himself to issue a search warrant. A proper officer is also entitled under that Act to stop and search conveyances: he is entitled to release a person on bail, and for that purpose has the same powers and is subject to the same provisions as the officer in charge of a police station is. But these additional powers with which the Customs Officer is invested under the Act of 1962 do not, in our judgment,

make him a police officer within the meaning of Section 25 of the Evidence Act. He is, it is true, invested with the powers of an officer-in-charge of a police station for the purpose of releasing any person on bail or otherwise. The expression "or otherwise" does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premise or conveyances without recourse to a Magistrate, do not make him an officer-in-charge of a police station. Proceedings taken by him are for the purpose of holding an enquiry into suspected cases of smuggling. His orders are appealable and are subject also to the revisional jurisdiction of the Central Board of Revenue and may be carried to the Central Government. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue.

25. For reasons set out in the judgment in Criminal Appeal No. 27 of 1967 and the judgment of this Court in Badku Joti Savant's case, 1966-3 SCR 698 = (AIR 1966 SC 1746), we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Indian Evidence Act.

26. It was strenuously urged that under Section 104 of the Customs Act, 1962, the Customs Officer may arrest a person only if he has reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under Section 135 and not otherwise and he is bound to inform such person of the grounds of his arrest. Arrest of the person who is guilty of the offence punishable under Section 135 and information to be given to him amount, it was contended, to a formal accusation of an offence and in any case the person who has been arrested and who has been informed of the nature of the infraction committed by him stands in the character of an accused person. We are unable to agree with that contention. Section 104 (1) only prescribes the conditions in which the power of arrest may be exercised. The officer must have reason to believe that a person has been guilty of an offence punishable under Section 135,

otherwise he cannot arrest such person. But by informing such person of the grounds of his arrest the Customs Officer does not formally accuse him with the commission of an offence. Arrest and detention are only for the purpose of holding effectively an inquiry under Sections 107 and 108 of the Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalties. At that stage there is no question of the offender against the Customs Act being charged before a Magistrate. Ordinarily after adjudging penalty and confiscation of goods or without doing so, if the Customs Officer forms an opinion that the offender should be prosecuted he may prefer a complaint in the manner provided under Section 137 with the sanction of the Collector of Customs and until a complaint is so filed the person against whom an inquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under Section 135.

27. Section 167 of the Sea Customs Act, 1878, contained a large number of clauses which described different kinds of infractions and different penalties or punishments liable to be imposed in respect of those infractions. Under the Customs Act 1962 the Customs Officer is authorised to confiscate goods improperly imported into India and to impose penalties in cases contemplated by Sections 112 and 113. But on that account the basic scheme of the Sea Customs Act, 1878, is not altered. The Customs Officer even under the Act of 1962 continues to remain a revenue officer primarily concerned with the detection of smuggling and enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited. He does not on that account become either a police officer, nor does the information conveyed by him, when the person guilty of an infraction of the law is arrested, amount to making of an accusation of an offence against the person so guilty of infraction. Even under the Act of 1962 a formal accusation can only be deemed to be made when a complaint is made before a Magistrate competent to try the person guilty of the infraction under Sections 132, 133, 134 and 135 of the Act. Any statement made under Sections 107 and 108 of the Customs Act by a person against whom an enquiry is made by a Customs Officer is not a state-

ment made by a person accused of an offence.

28. Before parting with the case, we must observe that this Court has been invited in this group of appeals to consider the question of admissibility of evidence before the trial was completed. At various stages of argument counsel asked us to make several assumptions on matters of evidence which were not before this Court. In some cases the statements made by the accused before the Customs Officer were tendered in evidence and were objected to; in other cases even before the statements were tendered in evidence, objections were raised. We may also observe that we are not concerned in these appeals to decide whether the statements relied upon were obtained from persons charged with infraction of the provisions of the Customs Act by officers having authority over them, by inducement, threat or promise having reference to the inquiry made against them. These questions, if raised, have to be decided at the trial of the appellants. The appeals fail and are dismissed.

Appeals dismissed.

AIR 1970 SUPREME COURT 951 (V 57 C 194)

(From: Patna)

M. HIDAYATULLAH, C. J., S. M. SIKRI, G. K. MITTER, A. N. RAY AND P. JAGANMOHAN REDDY, JJ.

Ram Kirpal Bhagat and others, Appellants v. The State of Bihar, Respondent.

Criminal Appeal No. 182 of 1966, D/- 13-11-1969.

(A) Imports and Exports (Control) Act (1947), Section 3 (2) — "All the provisions of that Act shall have effect accordingly" — Not merely Section 19 of Sea Customs Act (1878) but all relevant provisions of that Act will apply.

Section 3 (2) of the Imports and Exports (Control) Act (1947) enacts that goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited under Section 19 of the Sea Customs Act, 1878 and under second limb of Section 3 (2) all the provisions of the Sea Customs Act (1878) have effect accordingly. To accede to the contention that, under Section 3 (2) only Section 19 of the Sea Customs Act, 1878 will apply

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and no other provision of the Sea Customs Act, 1878 will be effective or operative will be not only to render the words "and all the provisions of that Act shall have effect only" otiose but also nugatory. (1881) 31 Ch D 607 & AIR 1962 SC 316, Rel. on. (Para 18)

If Section 19 of the Sea Customs Act, 1878 were repealed then the provisions of Sea Customs Act, 1878 would not be attracted. But Section 19 of the Sea Customs Act, 1878 has not been repealed and is now re-enacted as Section 11 in the Customs Act, 1962 and there has been corresponding change in the Imports and Exports (Control) Act, 1947 by reference to the Customs Act, 1962 and Section 11 thereof. (Para 20)

(B) Government of India Act (1935), Section 92 — Applicability — Section 92 ceased to exist after repeal of the Government of India Act, 1935 by Article 395 of the Constitution. (Para 22)

(C) Constitution of India, Fifth Schedule, Clause 5 (2) (3) — "May make regulations" — Power to make regulations embraces power to apply laws.

The power to make regulations embraces the utmost power to make laws and to apply laws. Applying law to an area is making regulations which are laws. Further the power to apply laws is inherent when there is a power to repeal or amend any Act, or any existing law applicable to certain area. The power to apply laws is really to bring into legal effect sections of an Act as if the same Act had been enacted in its entirety. Application of laws is one of the recognised forms of legislation. Law can be made by referring to a statute or by citing a statute or by incorporating a statute or provisions or parts thereof in a piece of legislation as the law which shall apply. (Para 22)

(D) Constitution of India, Fifth Schedule, Clause 5 (2) — Power to apply laws under — Not synonymous with conditional or delegated legislations.

The Governor had full power to make regulations which are laws and just as Parliament can enact that a piece of legislation will apply to a particular State, similarly, the Governor under Paragraph 5 of the Fifth Schedule can apply specified laws to a Scheduled area. The Bihar Regulation 1 of 1951 is an instance of a valid piece of legislation emanating from the legislative authority in its plenitude of power and it cannot be said that the Regulation is either a piece of delegated

legislation or a conditional legislation.

(Para 23)

(E) Constitution of India, Article 372 — Existing Law — Scheduled area — Laws in other parts of India would not be existing Laws.

Laws which were existing law in territories other than excluded or partially excluded areas would not be existing law under Article 372 in relation to excluded or partially excluded areas. The Land Customs Act, 1924 cannot therefore be said to apply to Santhal Parganas as an existing law. (Para 25)

(F) Imports and Exports (Control) Act (1947), Section 3 (2) — Prohibited goods — Cloves are deemed to be prohibited goods.

Cloves are goods the import of which is prohibited by the Imports and Exports (Control) Act, 1947 and they are dutiable goods by reason of the meaning of cloves in column 3, Item No. 9 (3) of the First Schedule to the Tariff Act, 1934 having been attracted by the Imports Control Order, 1955. Cloves being prohibited goods within the Imports and Exports (Control) Act, 1947 are deemed to be prohibited under Section 19 of the Sea Customs Act, 1878. (Para 33)

(G) Sea Customs Act (1878), Section 0 — Officers appointed under Land Customs Act (1924) are treated as Customs Officers.

It will appear from the notifications No. 69 Cus. dated 28-9-1951 and C. B. R. Notification 1 L. Cus. dated 25-1-1958 as amended by No. 8 L. Cus. dated 17-5-1958, that under Section 6 of the Sea Customs Act, 1878 Land Customs Officers are appointed Officers of Customs. The provisions of the Sea Customs Act, 1878 apply in Santhal Parganas. Secondly, under the notification under the Land Customs Act all the Officers mentioned therein including the Inspectors of the Central Excise employed on the Central Excise or Customs Preventive Intelligence work and attached to the Headquarters are Land Customs Officers. The combined effect of both the notifications is that the Land Customs Officers and Inspectors of Central Excise were Officers of Customs as a result of the application of the Sea Customs Act, 1878. (Para 35)

(H) Sea Customs Act (1878), Section 178A — Burden of proof — In the absence of special notification under Section 178A specifying goods to which the section applies, the onus of proof under that section cannot be placed on persons whose goods are seized for violation of

other provisions of the Sea Customs Act, 1878. (Para 37)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 316 (V 49)=

(1962) 3 SCR 786 = 1962 (1) Cri LJ 364, Collector of Customs, Madras v. Nathella Sampathu Chetty 12, 13, 14, 15, 16, 17, 19

(1931) AIR 1931 PC 149 (V 18)=

58 Ind App 259, Secy. of State for India in Council v. Hindustan Co-operative Insurance Society Ltd. 16

(1886) 31 Ch D 607= 55 LJ Ch 488,

In re Woods' Estate 18

(1885) 10 AC 675= 55 LJPC 28,

Riel v. The Queen 21

The Judgment of the Court was delivered by

RAY, J.:— This is an appeal by special leave from the judgment of the High Court at Patna challenging first the authority of the Excise Inspectors as Officers of Customs, namely, public servants and secondly their power to arrest Nazir Mian and seize 2 bags of cloves from his possession under Sections 173 and 178 respectively of the Sea Customs Act, 1878.

2. The facts giving rise to this appeal are as follows. On 13 December, 1961, Inspectors Uma Shankar and Bisuddha Nand Jha and Constable Bishan Singh, all belonging to the Central Excise Department were on checking patrol duty on 330 Down Barauni passenger train proceeding from Barharwa to Pakur which are Railway Stations in Santhal Parganas in Bihar. The appellant Nazir Mian was travelling by Barauni passenger train. When the train stopped at Pakur the excise staff found Nazir Mian in the latrine of one of the compartments of the train with two bags of cloves weighing about 2 manuds 10 seers. The door of the latrine was closed. Inspector Uma Shankar pushed the door when it was opened from inside. Uma Shankar disclosed his identity and asked if duty had been paid for the cloves. Nazir Mian answered in the negative. Inspector Uma Shankar thereupon seized the bags and arrested Nazir Mian. While this was being done, the train started. Shortly after the train had started, it stopped at a level crossing in consequence of one of the persons of the excise staff pulling the alarm chain. The excise staff got down with Nazir Mian. The two bags of cloves were also brought down.

Certain persons collected on the spot. Nazir Mian is alleged to have been rescued by other appellants and the bags of cloves were taken away. In the scuffle that ensued, one of the Inspectors received simple injuries and the other a grievous injury.

3. The three appellants Nazir Mian, Ram Kirpal Bhagat and Ganga Dayal Shah and two other persons Jhaman Mian and Raghunath Prasad Yadav were all charged under Sections 147, 149, 333 and 379 of the Indian Penal Code for forming an unlawful assembly in assaulting Inspectors Uma Shankar and B. N. Jha and in rescuing accused Nazir Mian from their lawful custody and in removing two bags of seized cloves from their possession. The accused persons with the exception of Raghunath Prasad Yadav were further charged under Section 332 of the Indian Penal Code for voluntarily causing hurt to Uma Shankar a public servant in the discharge of his public duties. The accused with the exception of Nazir Mian were charged under Section 225 of the Indian Penal Code for intentionally offering resistance to the lawful apprehension of accused Nazir Mian. Nazir Mian was also charged under Section 7 of the Land Customs Act, 1924 for contravention of Section 5 of the said Act and also under Section 167, Item 81 of the Sea Customs Act, 1878 for contravention of Section 19 of the said Act and also under Section 5 of the Imports and Exports (Control) Act, 1947 for contravention of Section 3 (1) of the Imports Control Order, 1955.

4. At the trial before the Assistant Sessions Judge, Dumka in Santhal Parganas, Raghunath Prasad Yadav was acquitted of all the charges and the appellants Nazir Mian, Ram Kirpal Bhagat and Ganga Dayal Shah along with Jhaman Mian were all convicted under Secs. 147 and 332 of the Indian Penal Code. Jhaman Mian, Ram Kirpal Bhagat and Ganga Dayal Shah were also convicted under Sections 223 and 333 of the Indian Penal Code. Ram Kirpal Bhagat and Nazir Mian were also convicted under Section 379 of the Indian Penal Code. The said four accused including the three appellants were sentenced to several terms of imprisonment and the said sentences were ordered to run concurrently.

5. The Assistant Sessions Judge, Dumka, however, acquitted the appellant Nazir Mian of the charges under the Land Customs Act, the Sea Customs Act, 1878 and the Imports and Exports (Control) Act.

The Assistant Sessions Judge, Dumka held that Section 6 of the Imports and Exports (Control) Act, 1947 raised a bar of taking cognizance by any Court except upon a complaint in writing made by an officer authorised in that behalf by the Central Government by general or special order and in the absence of any complaint in writing by the officer concerned, the Assistant Sessions Judge, Dumka found that he had no jurisdiction to take cognizance of the offence under this Act. The Assistant Sessions Judge, Dumka also held that Section 187A of the Sea Customs Act, 1878 laid down that cognizance as to offence was to be taken upon a complaint in writing made by the Chief Customs Officer or any other officers of Customs not lower in rank than an Assistant Collector of Customs authorised in this behalf by the Chief Customs Officer. The Assistant Sessions Judge, Dumka found that in the present case there was no such complaint, and, therefore, he did not take cognizance for the contravention of Section 19 of the Sea Customs Act, 1878.

6. The appellants and Jhaman Mian thereafter preferred an appeal to the High Court. In the High Court the appellant Nazir Mian contended that Inspector Uma Shankar had no power to arrest him and seize the cloves, and, therefore, the Inspector could not be held to have acted in the discharge of his public duties. In aid of that contention it was submitted first, that the Imports and Exports (Control) Act, 1947, the Land Customs Act, 1924, the Sea Customs Act, 1878 and the Indian Tariff Act, 1934 were not extended to Santhal Parganas and were not, therefore, applicable. The second contention was that cloves were not dutiable articles. The third contention was that Section 173 of the Sea Customs Act, 1878 had no application, because there was no evidence of reasonable suspicion that Nazir Mian was guilty of an offence under the Sea Customs Act, 1878. It was also contended that Inspector Uma Shankar was not an officer of the Customs.

7. The High Court came to the conclusion that the Sea Customs Act, 1878 and the Imports and Exports Control Act, 1947 applied to the Santhal Parganas with the result that the import of cloves was prohibited; duty was payable on cloves; the Inspectors were officers of Customs within their respective jurisdiction, and, therefore, they could exercise power under S. 173 of the Sea Customs

Act, 1878 and they could seize the goods under Section 178 of the Sea Customs Act, 1878. The High Court further held that under Sec. 178A of the Sea Customs Act, 1878, the burden was on the appellant Nazir Mian to prove that cloves seized were not smuggled goods and that the appellant Nazir Mian failed to do so.

8. The High Court held that the appellants had been rightly convicted for certain offences but the sentences under Section 332 of the Indian Penal Code against Nazir Mian, Ganga Dayal Shah were set aside to correct an error in the judgment of the Assistant Sessions Judge, Dumka who at one place convicted all the four accused under Section 332 of the Indian Penal Code and at another place found only Jhaman Mian and Ram Kirpal Bhagat guilty of the offences under Section 332 of the Indian Penal Code.

9. Counsel on behalf of the appellants contended first, that the Sea Customs Act, 1878 did not apply to the place of occurrence, and, therefore, the arrest and the seizure were unlawful. The second contention was that the Land Customs Act, 1924 did not apply to the place of occurrence, and, therefore, the Inspectors were not officers of Customs who could invoke the authority of the Land Customs Act, 1924 to arrest and seize the appellant Nazir Mian. The third contention was that the seizure of cloves was not authorised by Section 178 of the Sea Customs Act, 1878 nor was the arrest authorised under Section 173 of the Sea Customs Act, 1878. The arrest and the seizure under the Sea Customs Act, 1878 were impeached as illegal on the ground that the Sea Customs Act, 1878 did not apply to the place of occurrence, namely, Pakur in Santhal Parganas in Bihar. The fourth contention was that Sec. 178A of the Sea Customs Act, 1878 could not apply, because there was no notification to attract the application of the said section.

10. The first question which falls for decision is whether the Sea Customs Act, 1878 applies. In order to appreciate this contention it is necessary to refer to the statutes by virtue of which the Sea Customs Act, 1878 is said to apply to the place of occurrence. The Bihar Regulation 1 of 1951 enacted that the Import and Exports (Control) Act, 1947 was applicable to Santhal Parganas.

11. The relevant sections under the Imports and Exports (Control) Act, 1947 in the present case are the two sub-

sections in Section 3 which are as follows:—

“3. Power to prohibit or restrict imports and exports. (1) The Central Government may, by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order:—

(a) the import, export, carriage coast-wise or shipment as ships stores of goods of any specified description;

(b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

(2) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited under Section 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly”.

12. The first contention on behalf of the appellants is that sub-section (2) of Section 3 of the Imports and Exports (Control) Act, 1947 means that only Section 19 of the Sea Customs Act, 1878 is applicable and the other sections do not apply. The second contention on behalf of the appellants that the Bihar Regulation 1 of 1951 is in excess of the power of the Governor contained in the Fifth Schedule to the Constitution will be dealt with hereinafter. Counsel on behalf of the appellants contended that Section 3 (2) of the Imports and Exports (Control) Act, 1947 meant that goods to which sub-section (1) of Section 3 of the Act of 1947 applied were deemed to be goods of which the import or export had been prohibited under Section 19 of the Sea Customs Act, 1878, and, therefore, only Section 19 of that Act was to have effect for that restricted purpose. In aid of that contention reliance was placed on the decision of this Court in *The Collector of Customs, Madras v. Nathella Sampathu Chetty*, (1962) 3 SCR 786 = (AIR 1962 SC 316). The question for consideration in the Madras Customs case, (1962) 3 SCR 786 = (AIR 1962 SC 316) was whether Section 178A of the Sea Customs Act, 1878 applied. The Collector of Customs there seized gold because he was, *prima facie*, of the view that it had been smuggled and notice was issued to the res-

pondent to show cause why the gold should not be confiscated. Import of gold was dealt with by Section 8 of the Foreign Exchange Regulation Act, 1947 which provided that the Central Government might by notification order that no person except with the general or special permission of the Reserve Bank and on payment of prescribed fee bring or send into India any gold or silver. Section 23A of the Foreign Exchange Regulation Act which came into existence in the year 1952 was as follows:—

“23A. Without prejudice to the provisions of Section 23 or to any other provision contained in this Act the restrictions imposed by sub-sections (1) and (2) of Section 8, sub-section (1) of Section 12 and clause (a) of sub-section (1) of Section 13 shall be deemed to have been imposed under Section 19 of the Sea Customs Act, 1878 and all the provisions of that Act shall have effect accordingly, except that Section 183 thereof shall have effect as if for the word “shall” therein the word “may” were substituted”.

Section 178A of the Sea Customs Act, 1878 was introduced into the Act in the year 1955. It was, therefore, contended that when the Foreign Exchange Regulation Act, 1947 was enacted the provisions of the Sea Customs Act, 1878 were not at all attracted, and secondly, when Section 23A was introduced in 1952 as a part of the Foreign Exchange Regulation Act, 1947 it would have the effect of bringing into operation only those sections of the Sea Customs Act, 1878 which were part of the Sea Customs Act, 1878 in 1952.

13. Counsel for the appellants relied on the observations at page 834 of the Report in the Madras Customs case, (1962) 3 SCR 786 = (AIR 1962 SC 316 at p. 335) that

“the effect of Section 23A is to treat the text of the notification by the Central Government under Section 8 (1) as if it had been issued under Section 19 of the Sea Customs Act with the title and the recital of the source of power appropriate to it by the creation of legal fiction”.

Counsel for the appellants extracted from these observations the proposition that only Section 19 of the Sea Customs Act, 1878 would be attracted in the present case to make effective the notifications under the Imports and Exports Control Act, 1947 and the Imports Control Order, 1955 and no other section of the Sea Customs Act.

toms Act, 1878 would be attracted. The decision of this Court in the Madras Customs case, (1962) 3 SCR 788= (AIR 1962 SC 316) (supra) does not support that contention for the obvious reason that Section 178A of the Sea Customs Act, 1878 was held to be applicable there. If only Section 19 of the Sea Customs Act, 1878 were attracted for the purpose of giving sanction to notifications under the Foreign Exchange Regulation Act, Section 178A of the Sea Customs Act, 1878 could not have been held to be applicable in Madras Customs case, (1962) 3 SCR 788= (AIR 1962 SC 316) (supra).

14. Further this Court in the Madras Customs case, at page 799 of the Report (SCR)= (AIR 1962 SC 318 at p. 322) held first, that on the law as it stood upto 1952 before Section 23A of the Foreign Exchange Regulation Act was inserted, importation of gold in contravention of the notification of August, 1948 issued under Section 8 (1) of the Foreign Exchange Regulation Act would have been an importation contrary to Section 19 of the Sea Customs Act, with the result that any person concerned in the act of importation would have been liable to the penalties specified in the third column of Section 167 (8) of the Sea Customs Act and imported gold would have been liable to confiscation under the opening words of that column. This conclusion indicates that a restriction on the import of gold by a notification under the Foreign Exchange Regulation Act would be a prohibition or restriction on importation or exportation of gold under Section 19 of the Sea Customs Act, 1878 which occurs in Chapter IV of the Sea Customs Act, 1878.

15. The other conclusion of this Court in the Madras Customs case, (1962) 3 SCR 788= (AIR 1962 SC 316) (supra) was that though Section 178A of the Sea Customs Act, 1878 was introduced in the year 1955, Section 23A of the Foreign Exchange Regulation Act, 1947 which came into existence in 1952 would be operative to introduce the subsequent amendments of the Sea Customs Act, 1878 in dealing with contravention of the Foreign Exchange Regulation Act in relation to importation or exportation of gold.

16. In dealing with the contention in the Madras Customs case, (1962) 3 SCR 788= (AIR 1962 SC 316) (supra) that Section 178A of the Sea Customs Act, 1878 did not apply because it was not a part of the Sea Customs Act, 1878 when

Section 23A of the Foreign Exchange Regulation Act was enacted in 1952, the decision of the Judicial Committee in Secy. of State for India-in-Council v. Hindustan Co-operative Insurance Society Ltd., 58 Ind App 259= (AIR 1931 PC 149), was referred to by this Court for the purpose of showing that in the Hindustan Co-operative Insurance Society case, 58 Ind App 259= (AIR 1931 PC 149) (supra) the Calcutta Improvement Trust Act, 1911 referred to the provisions of the Land Acquisition Act by enacting that "the provisions of the Land Acquisition Act shall apply as if they were herein re-enacted" to mean that the Calcutta Improvement Trust Act, 1911 in adopting the provisions of the Land Acquisition Act did not intend to bind themselves to any future additions which might be made to the Land Acquisition Act. The other consideration which weighed with the Judicial Committee was that the Calcutta Improvement Trust Act did nothing more than incorporate certain provisions from an existing Act, and for convenience of drafting did so by reference to that Act instead of setting out for itself at length the provisions which it was desired to adopt. This Court said that there was no analogy between the manner in which the provisions of the Land Acquisition Act had been incorporated in the Calcutta Improvement Trust Act, 1911 and the operation of the Sea Customs Act, 1878 as a result of Section 23A of the Foreign Exchange Regulation Act. Section 23A of the Foreign Exchange Regulation Act was construed to mean that the restrictions imposed by Section 8 (1) of the Foreign Exchange Regulation Act shall be deemed to have been imposed under Section 19 of the Sea Customs Act and all the provisions of the Sea Customs Act, 1878 shall have effect accordingly. At page 837 of the Report (SCR)= (at p. 838 of AIR) this Court said that a notification issued under Section 8 (1) of the Foreign Exchange Regulation Act was deemed for all purposes to be a notification issued under Section 19 of the Sea Customs Act and the contravention of the notification attracted to it each and every provision of the Sea Customs Act which was in force at the date of the notification.

17. The ratio of the decision in the Madras Customs case, (1962) 3 SCR 788= (AIR 1962 SC 318) (supra) is that the provisions of the Sea Customs Act, 1878 were attracted by relation to the provisions of Section 19 of the Sea Customs Act, 1878

which deal with restrictions or prohibitions on import or export and the notifications under the Foreign Exchange Regulation Act prohibiting import of gold become an integral part of Section 19 of the Sea Customs Act, 1878, and, therefore, the contravention of such a notification would bring into effect each and every provision of the Sea Customs Act, 1878.

18. In the present case, sub-section (2) of Section 3 of the Imports and Exports Control Act, 1947 enacts that goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited under Section 19 of the Sea Customs Act, 1878 and the second limb of sub-section (2) of Section 3 is that all the provisions of that Act (meaning thereby the Sea Customs Act, 1878) shall have effect accordingly. To accede to the contention of counsel for the appellants that only Section 19 of the Sea Customs Act 1878 will apply and no other provision of the Sea Customs Act, 1878 will be effective or operative will be not only to render the words "and all the provisions of that Act shall have effect only" otiose but also nugatory. When the statute enacts that all the provisions of that Act shall have effect accordingly, it will be an error to hold in spite of the language of such legislation that the provisions of the Sea Customs Act shall not have effect. The effect of bringing into an Act the provisions of an earlier Act is to introduce the incorporated sections of the earlier Act into the subsequent Act as if those provisions have been enacted in it for the first time. The nature of such a piece of legislation was explained by Lord Esher, M. R. in *Re, Wood's Estate*, (1886) 31 Ch D 607 that

"if some clauses of a former Act were brought into the subsequent Act the legal effect was to write those sections into the new Act just as if they had been written in it with the pen".

19. This Court noticed in the *Madras Customs case*, (1962) 3 SCR 786= (AIR 1962 SC 316) (*supra*) the distinction between a mere reference to or a citation of one statute in another on the one hand and an incorporation on the other, for the purpose of showing as to what would be the effect of the repeal of the former statute on the latter statute. It is in that context that this Court observed that if Section 19 of the Sea Customs Act, 1878 would be repealed then there would

no longer be any legal foundation for invoking the penal provisions of the Sea Customs Act, 1878 to a contravention of a notification under Section 8 (1) of the Foreign Exchange Regulation Act. The ratio is that if the contravention of the notification under the Foreign Exchange Regulation Act is equated with a contravention of the notification under Section 19 of the Sea Customs Act, 1878, the effacement of Section 19 of the Sea Customs Act, 1878 from the statute book would naturally remove the substratum of the Sea Customs Act, 1878.

20. In the present case, the provisions of the Sea Customs Act, 1878 are attracted by reason of the provisions contained in Section 3 of the Imports and Exports Control Act, 1947 and on the authority of the decision of this Court in the *Madras Customs case*, (1962) 3 SCR 786= (AIR 1962 SC 316) all that can be said is that if Section 19 of the Sea Customs Act, 1878 were repealed then the Sea Customs Act, 1878 would not be attracted. Section 19 of the Sea Customs Act, 1878 has not been repealed and was extant and is now re-enacted as Section 11 in the Customs Act, 1962 and there has been corresponding change in the Imports and Exports Control Act, 1947 by reference to the Customs Act, 1962 and Section 11 thereof.

21. The second question which falls for consideration is whether the Bihar Regulation 1 of 1951 is in excess of the Governor's powers. The contentions were: first, that the Regulation 1 of 1951 could not at all have been made; secondly, that Regulation deals with the subject matter and did not mean power to apply law and thirdly, the power to extend a law passed by another legislature was said to be not a legislative function, but was a conditional legislation. The legislation, in the present case, is in relation to what is described as Scheduled Areas. The Scheduled Areas are dealt with by Article 244 of the Constitution and the Fifth Schedule to the Constitution. Prior to the Constitution, the excluded Areas were dealt with by Sections 91 and 92 of the Government of India Act, 1935. The excluded and the partially excluded areas were areas so declared by order in Council under Section 91 and under Section 92 no Act of the Federal Legislature or of the Provincial Legislature was to apply to an excluded or a partially excluded area unless the Governor by public notification so directed. Sub-section (2) of Section 92 of the Government of

India Act, 1935 conferred power on the Governor to make regulations for the peace and good government of any area in a Province which was an excluded or a partially excluded area and any regulations so made might repeal or amend any Act of the Federal Legislature or the Provincial Legislature or any existing Indian law which was for the time being applicable to the area in question. The extent of the legislative power of the Governor under Section 92 of the Government of India Act, 1935 in making regulations for the peace and good government of any area conferred on the Governor in the words of Lord Halsbury "an utmost discretion of enactment for the attainment of the objects pointed to". See *Riel v. The Queen*, (1885) 10 AC 675 at p. 678. In that case the words which fell for consideration by the Judicial Committee were "the power of the Parliament of Canada to make provisions for the administration, peace, order and good government of any territory not for the time being included in any province". It was contended that if any legislation differed from the provisions which in England had been made for the administration, peace, order and good government then the same could not be sustained as valid. That contention was not accepted. These words were held to embrace the widest power to legislate for the peace and good government for the area in question.

22. The Fifth Schedule to the Constitution consists of 7 paragraphs and consists of Parts, A, B, C and D. Paragraph 6 in Part C deals with Scheduled Areas as the President may by order declare and there is no dispute in the present case that the Santhal Parganas fall within the Scheduled Areas. Paragraph 5 in the Fifth Schedule deals with laws applicable to Scheduled Areas. Sub-paragraph (2) of paragraph 5 enacts that the Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area. Under sub-paragraph (3) of paragraph 5 the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question. It may be stated that a contention was advanced by counsel for the appellants that Section 92 of the Government of India Act, 1935 was still in operation and the Governor could only act under that section. This contention is utterly devoid

of any substance because Section 92 of the Government of India Act, 1935 ceased to exist after repeal of the Government of India Act, 1935 by Article 395 of the Constitution. It was contended that the power to make regulations did not confer power on the Governor to apply any law. It was said that under Section 92 of the Government of India Act, 1935 the Governor could do so but under the Fifth Schedule of the Constitution the Governor is not competent to apply laws. This argument is without any merit for the simple reason that the power to make regulations embraces the utmost power to make laws and to apply laws. Applying law to an area is making regulations which are laws. Further the power to apply laws is inherent when there is a power to repeal or amend any Act, or any existing law applicable to the area in question. The power to apply laws is really to bring into legal effect sections of an Act as if the same Act had been enacted in its entirety. Application of laws is one of the recognised forms of legislation. Law can be made by referring to a statute or by citing a statute or by incorporating a statute or provisions or parts thereof in a piece of legislation as the law which shall apply.

23. It was said by counsel for the appellants that the power to apply laws under the Fifth Schedule was synonymous with conditional legislation. In the present case, it cannot be said that the Bihar Regulation I of 1951 is either a piece of delegated legislation or a conditional legislation. The Governor had full power to make regulations which are laws and just as Parliament can enact that a piece of legislation will apply to a particular State, similarly, the Governor under Paragraph 5 of the Fifth Schedule can apply specified laws to a Scheduled area. The Bihar Regulation I of 1951 is an instance of a valid piece of legislation emanating from the legislative authority in the plenitude of power and there is no aspect of delegated or conditional legislation.

24. The question which next arises for consideration is whether the Land Customs Act, 1924 applied on the relevant date of occurrence namely 13 December, 1931 to the Santhal Parganas. The Land Customs Act was enacted in the year 1924 and it was not declared to apply to the Santhal Parganas. Prior to the Constitution the Central Acts or Federal Acts or Acts of the Dominion Legislature did not apply to an excluded or a

partially excluded area unless they were declared by the Governor to apply to those areas. After the enactment of the Constitution, Article 244 and the Fifth Schedule deal with excluded or partially excluded areas.

25. It was contended on behalf of the State that after the enactment of the Constitution the Land Customs Act, 1924 became applicable to excluded or partially excluded areas because first it was an existing law and secondly the restriction under Section 92 of the Government of India Act, 1935 which required a specific declaration of the Governor to apply any legislation to the areas in question was no longer operative. Article 372 (1) of the Constitution enacts that the law in force in the territory of India immediately before the commencement of the Constitution is to continue in force until altered or repealed or amended by a competent legislature or other competent authority. Explanation I to Article 372 is that law in force in the Article shall include a law passed or made by the legislature or other competent authority in the territory of India before the commencement of the Constitution notwithstanding that it or parts of it may not be then in operation either at all or in particular area or areas. The contention on behalf of the respondent that the Land Customs Act, 1924 would apply to the Santhal Parganas on the ground that it is an existing law is not acceptable. Article 372 in clause (1) thereof enacts that subject to the other provisions of this Constitution all the laws in force in the territory of India shall continue in force. The Fifth Schedule to the Constitution relates to excluded or partially excluded areas. The existing law in relation to the excluded areas is saved by Article 372 and Explanation I thereto in spite of operation of such laws in particular areas. Similarly, other laws which were applicable to territories other than the excluded or partially excluded areas are saved by Article 372, Explanation I. Therefore, laws which were existing law in territories other than excluded or partially excluded areas would not be existing law under Article 372 in relation to excluded or partially excluded areas. Nor would existing law for the rest of India be existing law to area in question within the meaning of paragraph 5 in the Fifth Schedule to the Constitution. The Land Customs Act, 1924 cannot therefore be said to apply to Santhal Parganas as an existing law.

26. The present day sources of law making in the Santhal Parganas which are included in the Scheduled Areas are Article 244 and the provisions in the Fifth Schedule to the Constitution. Clause 5 of the Fifth Schedule has two sub-clauses. Under sub-clause (1) the Governor is empowered notwithstanding anything in the Constitution to direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or shall apply to a Scheduled Area subject to such exceptions and modifications as the Governor may specify in the notification. Sub-clause (1) of Clause 5 of the Fifth Schedule to the Constitution speaks of Acts of Parliament or of the Legislature of the State and therefore Central Acts or Provincial Acts prior to the Constitution are not contemplated within sub-clause (1) of Clause 5. Sub-clause (2) of Clause 5 of the Fifth Schedule confers power on the Governor to make regulations for the peace and good Government of any area in a State which is a Scheduled Area. Under sub-clause (2) the Governor has power to make laws which will include the power to apply to Scheduled Areas Central laws or Provincial laws enacted prior to the Constitution.

27. Prior to the Constitution Section 92 of the Government of India Act, 1935 conferred power on the Governor to make regulations for excluded and partially excluded areas which included the Santhal Parganas. In making such regulation the Governor could repeal or amend any Central law or any Provincial Acts and the Regulations were to be submitted to the Governor-General for assent. The Central or the Provincial Acts under subsection (1) of Section 92 of the Government of India Act, 1935 however were not applied to excluded and partially excluded areas unless the Governor so directed.

28. Prior to the Government of India Act, 1935 the Governor-General-in-Council in 1872 promulgated the regulation known as "Santhal Parganas Settlement Regulation" and Section 3 of the said Regulation provided the enactments specified in the Schedule thereto which would be in force in the Santhal Parganas. Section 3 (2) of the Santhal Parganas Settlement Regulation of 1872 in so far as it seeks to affect future legislation would not have any force after 26 January, 1950.

29. In this background it appears that the Sea Customs Act, 1878 and the Land

Customs Act, 1924 were not made applicable to Santhal Parganas either under the Santhal Parganas Settlement Regulation of 1872 or under any notification issued under Section 92 of the Government of India Act, 1935. Neither the Sea Customs Act, 1878 nor the Land Customs Act, 1924 has been specifically made applicable to the Santhal Parganas by any notification under sub-clause (2) of Clause 5 of the Fifth Schedule. The Bihar Scheduled Laws Regulation being Regulation I of 1951 which was promulgated under sub-clause (2) of Clause 5 of the Fifth Schedule for the purpose of applying certain laws to Santhal Parganas however made the Imports and Exports (Control) Act, 1917 and the Imports and Exports (Amendment) Act, 1919 applicable to Santhal Parganas.

30. We have already stated as to how the Sea Customs Act is made applicable to Santhal Parganas by reason of the provisions contained in the Imports and Exports (Control) Act, 1917. Though the Land Customs Act, 1924 does not apply to Santhal Parganas we have indicated hereinafter as to how because of the application of Section 9 of the Sea Customs Act, Officers of Land Customs appointed under the Land Customs Act are treated as Customs Officers having jurisdiction in Santhal Parganas.

31. The Central Excises and Salt Act, 1914 was however made applicable to the Santhal Parganas by a notification dated 14 September, 1941 but the application of that Act is not in issue in the present appeal. One of the questions in the present appeal was whether the Indian Tariff Act, 1934 applied to the Santhal Parganas. The articles which were seized in the present appeal, viz., cloves, were dutiable articles being item 9 (3) in column 3 in the First Schedule to the Indian Tariff Act, 1934. We have already indicated as to how by reason of operation of Section 3 of the Imports and Exports (Control) Act, 1917 cloves became an article the import or export of which was prohibited under Section 19 of the Sea Customs Act. No notification of application of the Indian Tariff Act, 1934 to the Santhal Parganas was shown to the High Court. It will appear in volume 7 page 5792 of the Bihar Local Acts (1703 to 1963) published by Bharat Law House, Allahabad in the year 1968 that the Indian Tariff Act, 1934 is found to be one of the Acts mentioned in the Schedule to the Santhal Parganas Settlement

Regulation, 1872 and the Indian Tariff Act, 1894 which was repealed by the Indian Tariff Act, 1934 was similarly declared to be in force in the Santhal Parganas.

32. The Inspectors, Uma Shankar and B. N. Jha were Customs Officers engaged in public duty. They arrested the appellant Nazir Mian under Section 173 of the Sea Customs Act on a reasonable suspicion. The Inspectors further arrested the appellant Nazir Mian under Section 178 of the Sea Customs Act, 1878. Section 178 of the Sea Customs Act, 1878 empowered the Customs Officer to seize smuggled goods under the Act. The questions which have to be decided in the present case are; first, whether the Inspectors Uma Shankar and B. N. Jha were acting in the discharge of public duties, secondly, whether they could arrest the appellants, and thirdly, whether they could seize the cloves. The oral evidence of Inspector Uma Shankar is that he was an Inspector of Central Excise and Customs and he worked in the Preventive and Intelligence Section. He said that he was posted at Barharwa since the month of January, 1901 and his jurisdiction was Pakur, Dumka and Sahibganj. He also said that his duty was the prevention of smuggling of contraband commodities. Inspector B. N. Jha in his oral evidence said that he was an Inspector of Central Excise and Customs and he worked in the Preventive and Intelligence section and Pakur, Dumka and Sahibganj were within his jurisdiction of work.

33. The Imports and Exports (Control) Act, 1917 in sub-section (2) of Section 3 enacted that goods to which sub-section (1) applied would be deemed to be goods the import or export of which would be a restriction under Section 19 of the Sea Customs Act, 1878 and all the provisions of that Act shall have effect accordingly. The Imports and Exports (Control) Act, 1917 conferred power on the Central Government to make provisions prohibiting, restricting and controlling import and export. The Imports Control Order, 1935 was made by virtue of power conferred by Section 3 of the Imports and Exports (Control) Act, 1917. Schedule I Part IV Item 23 of the Imports Control Order, 1935 mentions cloves within the class of goods the import of which is prohibited. Therefore, cloves come under the prohibition of Section 3 of the Imports and Exports (Control) Act, 1917 read

with clause 3 of the Imports Control Order, 1955 and are goods which are prohibited from being imported. The Imports Control Order, 1955 mentions that each entry in column 2 of Schedule I to the said Order has the same meaning as specified against the said item in column 3 of the First Schedule to the Indian Tariff Act. Schedule I to the Imports Control Order, 1955 gives in a tabular form the names of articles as also the corresponding items to the Indian Tariff Act. Cloves which are mentioned as Item No. 23 of Schedule I of Part IV of the Imports Control Order, 1955 have the same meaning corresponding to Item No. 9 (3) in Column 3 in the First Schedule to the Indian Tariff Act, 1934. It, therefore, follows that cloves are goods the import of which is prohibited by the Imports and Exports Control Act, 1947 and they are dutiable goods by reason of the meaning of cloves in column 3 item No. 9 (3) of the First Schedule to the Indian Tariff Act, 1934 having been attracted by the Imports Control Order, 1955. Cloves are prohibited goods within the Imports and Exports Control Act, 1947 and are, therefore, deemed to be prohibited under Section 19 of the Sea Customs Act, 1878.

34. The Inspectors who arrested the appellant Nazir Mian and the other accused and seized the articles were Officers of Central Excise and Customs. In the present case, there are two notifications. The first is a notification No. 69 Cus. dated 28 September, 1951 under Section 6 of the Sea Customs Act, 1878 which is set out as follows:—

"In exercise of the powers conferred by Section 6 of the Sea Customs Act, 1878 (VIII of 1878) and in supersession of the Government of India in the Ministry of Finance (Revenue Division) Notification No. 71, dated the 12th August, 1950, the Central Government hereby appoints all the Land Customs Officers who have been appointed or may be appointed from time to time to be such under sub-section (1) of Section 3 of the Land Customs Act, 1924 (XIX of 1924) to be Officers of Customs for their respective jurisdiction and to exercise the powers conferred and to perform the duties imposed on such officers by the first named Act".

The second is a notification No. C. B. R. Notification 1 L. Cus. dated 25th January, 1958 as amended by No. 8-L. Cus. dated 17th May, 1958 under the Land Customs Act which is set out as follows:—

"In exercise of the powers conferred by sub-section (1) of Section 3 of the Land Customs Act, 1924 (19 of 1924) read with the notification of the Government of India in the late Finance Department (Central Revenue) No. 5944 dated the 13th December, 1924 and in supersession of its notification No. 56-Customs, dated the 24th July, 1951 as subsequently amended, the Central Board of Revenue hereby appoints all Deputy Collectors, Assistant Collectors, Head-quarters Assistant Collectors, Superintendents, Deputy Superintendents, Inspectors, Nakedars, Supervisors, Range Officers, Assistant Range Officers, Women Searchers, Jemadars, Petty Officers, Amaldars, Sepoys and Peons, including all the officers of Central Excise employed for the time being on the Central Excise or Customs Preventive Intelligence work and attached to the Headquarters and the Circle and Divisional Officers of the Collectorate of Central Excise, Delhi, Allahabad, Patna, Shillong, Madras, Bombay and Baroda, to be Land Customs Officers within the jurisdiction of the respective Collectors of Land Customs under whom they are working".

35. It will appear from the aforementioned notifications first that under Section 6 of the Sea Customs Act, 1878 Land Customs Officers are appointed Officers of Customs. It is manifest the provisions of the Sea Customs Act, 1878 apply, and, therefore, the Land Customs Officers are appointed Officers of Customs under the Sea Customs Act, 1878. Secondly, the notification under the Land Customs Act is that all the Officers mentioned therein including the Inspectors of the Central Excise employed on the Central Excise or Customs Preventive Intelligence work and attached to the Headquarters are Land Customs Officers. The combined effect of both the notifications is that the Land Customs Officers and Inspectors of Central Excise in the present case were Officers of Customs as a result of the application of the Sea Customs Act, 1878.

36. Counsel on behalf of the appellants contended that there was no evidence to warrant the Customs Officers to arrest the appellants under Section 173 of the Sea Customs Act, 1878 because such an arrest could be made only if there was a reasonable suspicion in existence. The evidence in the present case established the following facts. First, the appellant Nazir Mian had in possession two bags of cloves and no duty was paid on those cloves. Secondly, the appellant

Nazir Mian kept the cloves in two bags and concealed the same in the latrine of the railway compartment. Thirdly, the cloves were dutiable goods and there was prohibition on the import of those goods. Fourthly, Pakur was at a distance of only 11 and 12 miles from the East Pakistan border. Fifthly, cloves are not grown in India. These circumstances indicated a reasonable suspicion and, therefore, the Officers were justified in arresting the appellant Nazir Mian under Section 173 of the Sea Customs Act, 1878.

37. It was contended on behalf of the appellants that though under Section 178 of the Sea Customs Act, 1878, the Customs Officers could seize the goods there was no notification under Section 178A of the Sea Customs Act, 1878 imposing restrictions on import of cloves, and, therefore, the onus of proof could not be shifted to the appellants under Section 178A of the Sea Customs Act, 1878. The correct legal position is that in the absence of special notification under Section 178A specifying goods to which the section applies, the onus of proof under that section cannot be placed on persons whose goods are seized for violation of other provisions of the Sea Customs Act, 1878. In view of the fact that in the present case the seized articles were removed by the accused it is unnecessary to deal any further with this aspect of the case because if any order were passed for return of the bags the order could not be enforced.

38. For these reasons, the appeal fails and is dismissed. The appellants will surrender to the District Magistrate, Santhal Parganas to serve the sentences.

Appeal dismissed.

AIR 1970 SUPREME COURT 962

(V 57 C 195)

(From Bombay: 69 Bom LR 421)

J. C. SHAH, V. RAMASWAMI, C. K. MITTER, K. S. HEGDE AND A. N. GROVER, JJ.

The Assistant Collector of Customs, Bombay and another, Appellants v. L. R. Melwani and another, Respondents; and

Vice Versa

Behramji Mervanji Damania, (In Cr. A. No. 15 of 1967), Intervener.

Criminal Appeals Nos. 15 and 35 of 1967, D/- 16-10-1968.

CN/CN/F478/68/DVT/D

(A) Constitution of India, Article 20 (2) — Criminal P. C. (1898), Section 403 — Rule of autre fois acquit and issue estoppel rule — When can be invoked — Criminal prosecution of accused for smuggling — Not barred by earlier proceedings against him under Sea Customs Act — Sea Customs Act (1878), S. 167 (8).

In order to get the benefit of Sec. 403 Criminal P. C. or Article 20 (2), it is necessary for an accused person to establish that he had been tried by a Court of competent jurisdiction for an offence and he is convicted or acquitted of that offence and the said conviction or acquittal is in force. If that much is established then only the accused is not liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, Criminal P. C. or for which he might have been convicted under Section 273, Criminal P. C.

(Para 7)

Criminal prosecution of the accused for alleged smuggling is not barred merely because proceedings were earlier instituted against him before the Collector of Customs. Adjudication before a Collector of Customs is not a prosecution nor the Collector of Customs a 'Court'. Therefore, the rule of autre fois acquit cannot be invoked. Neither the issue estoppel rule is attracted. The issue estoppel rule is but a facet of the doctrine of autre fois acquit. Even though the accused was given benefit of doubt in earlier proceedings the decision of the Collector of Customs does not amount to a verdict of acquittal in favour of accused so as to attract the rule of issue estoppel. AIR 1953 SC 325 & AIR 1959 SC 375 & (1950) AC 458 & AIR 1956 SC 415 & AIR 1960 SC 239, Foll.

(Paras 7, 8)

(B) Constitution of India, Article 226 — Criminal prosecution — Delay in filing complaint — No ground by itself in dismissing complaint — Delay can be considered in arriving at final verdict — Criminal P. C. (1898), Section 190.

(Para 9)

(C) Criminal P. C. (1898), Sections 190 (1), 173, 94, 251A, 162 — Case instituted on private complaint — Documents referred in Section 173 (4) cannot be available to accused — 69 Bom LR 421, Reversed.

Where the criminal prosecution is instituted on private complaint the documents mentioned in sub-clause (4) of Sec-

tion 173 cannot be made available to the accused. Section 173 is attracted only in a case investigated by a police officer under Chapter XIV of the Criminal P. C., followed up by a final report under Section 173, Cr. P. C. Act 26 of 1955 made substantial changes in the procedure to be adopted in the matter of enquiry in cases instituted on police reports. That procedure is set out in Section 251A Criminal P. C. but in a case instituted on private complaint and governed by Sections 252 to 259, the right given to accused under Section 162 is sufficient to safeguard his interests. The copies of the documents cannot be made available to the accused by taking aid of Sec. 94 also. This section does not empower a Magistrate to direct the prosecution to give copies of any documents to an accused person. 69 Bom LR 421, Reversed.

(Paras 11, 12)

(D) Criminal P. C. (1898), Sections 439, 94 — Revision — Summoning of documents — Matter is within discretion of trial Court — Interference in revision — Propriety — 69 Bom LR 421, Reversed.

Whether a particular document should be summoned or not is essentially within the discretion of the trial Court. Except for very good reasons, the High Court should not interfere with the discretion conferred on the trial Courts in the matter of summoning documents.

(Para 13)

Where the High Court has not come to the conclusion that the documents in question, if not produced in Court are likely to be destroyed or tampered with or the same are not likely to be made available when required, the order of the Trial Court refusing the request of the accused to compel the prosecution to produce certain documents could not be interfered with in revision. 69 Bom LR 421, Reversed.

(Para 13)

Cases Referred: Chronological Paras

(1960) AIR 1960 SC 239 (V 47)=

(1960) 2 SCR 58= 1960 Cri LJ 289, N. R. Ghose v. State of West Bengal 8

(1959) AIR 1959 SC 375 (V 46)= 1959 Supp 1 SCR 274= 1959 Cri LJ 392, Thomas Dana v. State of Punjab 7

(1956) AIR 1956 SC 415 (V 43)= 1956 Cri LJ 805, Pritam Singh v. State of Punjab 8

(1953) AIR 1953 SC 325 (V 40)= 1953 SCR 730= 1953 Cri LJ 1432, Maqbool Hussain v. State of Bombay 7

(1950) 1950 AC 458= 66 TLR

(Pt. 2) 254, Sambasivan v. Public Prosecutor, Federation of Malaya 8
Mr. N. A. Bindra, Senior Advocate, (M/s. R. M. Parikh and S. P. Nayar, Advocates, with him), for Appellants (In Cr. A. No. 15 of 1967 and Respondent in Cr. A. No. 35 of 1967; Mr. N. N. Keswani, Advocate, for Appellants (In Cr. A. No. 35 of 1967 and Respondents in Cr. A. No. 15 of 1967); Mr. K. R. Chaudhuri, Advocate, for Intervener, (In Cr. A. No. 15 of 1967).

The Judgment of the Court was delivered by

HEGDE, J.:— These appeals by certificate arise from the decision of the High Court of Bombay in Criminal Revision Application No. 238 of 1966 wherein the following questions of law arise for decision:

(i) Whether the prosecution from which these Criminal Revision Petitions arose is barred under Article 20 (2) of the Constitution as against accused Nos. 1 and 2 in that case by reason of the decision of the Collector of Customs in the proceedings under the Sea Customs Act?

(ii) Whether under any circumstance the finding of the Collector of Customs that the 1st and 2nd accused are not proved to be guilty operated as an issue estoppel in the Criminal case against those accused?

(iii) Whether the present prosecution amounts to an abuse of the process of the Court in view of inordinate delay in launching the same and consequently whether it is liable to be quashed?

(iv) Whether Section 173 (4), Criminal Procedure Code is applicable to the facts of this case and

(v) Whether the documents mentioned in the petition filed by the 1st accused on August 3, 1965 are required to be summoned under Section 94, Criminal Procedure Code?

2. The aforementioned questions were raised before the trial Magistrate by the 1st accused by means of an application but the learned Magistrate found no substance in the pleas advanced in that application and accordingly he dismissed the same as per his order dated 25-1-1966. In revision, a Division Bench of the Bombay High Court agreeing with the trial Magistrate negatived all but one of the contentions advanced on behalf of accused Nos. 1 and 2. It did not agree with the learned Magistrate that there was no need, at that stage to summon the statements of witnesses recorded by

the Customs authorities in the enquiry under the Customs Act. It directed the learned Magistrate to summon those statements and curiously enough, it went further and directed him to see that the prosecution made available the copies of those statements to the accused before the commencement of the enquiry in the case. In so far as the other documents called for are concerned, the High Court after indicating, what according to it, is the law on the subject left the matter to the discretion of the learned Magistrate.

3 Criminal Appeal No. 15 of 1967 is filed by the Assistant Collector of Customs, Bombay and the State of Maharashtra and Criminal Appeal No. 35 of 1967 is the appeal filed by accused Nos. 1 and 2 in the case (Case No. 98 of 1965 in the Court of the Chief Presidency Magistrate, Bombay). The appellants in Criminal Appeal No. 15 of 1967 challenge the correctness of the decision of the Bombay High Court in so far as it went against them and the appellants in Criminal Appeal No. 35 of 1967 challenge that decision in other respects.

4. The prosecution case is that the accused persons and some other unknown persons had entered into a conspiracy at Bombay and other places in the beginning of October 1959 or thereabout for the purpose of smuggling goods into India and in pursuance of that conspiracy they had smuggled several items of foreign goods in the years 1959 and 1960.

5. In that connection an enquiry was held by the Customs authorities. In the course of the enquiry some of the goods said to have been smuggled were seized. After the close of the enquiry those goods were ordered to be confiscated. In addition penalty was imposed on some of the accused. Thereafter on February 19, 1965, the Assistant Collector of Customs, Bombay after obtaining the required sanction of the Government filed a complaint against five persons including the appellants in Criminal Appeal No. 35 of 1967 (accused Nos. 1 and 2 in the case) under Section 120-B, Indian Penal Code read with clauses (37), (75), (76) and (81) of Section 167 of the Sea Customs Act, 1878 (Act VIII of 1878) as well as under Section 5 of the Imports and Exports (Control) Act, 1947. Before the commencement of the enquiry in that complaint the 1st accused filed on August 3, 1965, the application mentioned above.

6. Now we shall proceed to examine the contentions set out earlier.

6A. Reliance on Article 20 (2) is placed under the following circumstances. In the enquiry held by the Collector of Customs, he gave the benefit of doubt to accused Nos. 1 and 2. This is what he stated therein:

"As regards M/s. Larmel Enterprises (of which accused No. 1 is the proprietor and accused No. 2 is the Manager) although it is apparent that they have directly assisted the importers in their illegal activities and are morally guilty, since there is no conclusive evidence against them to hold them as persons concerned in the act of unauthorised importation, they escape on a benefit of doubt."

7. Despite this finding the Assistant Collector in his complaint referred to earlier seeks to prosecute these accused persons. Hence the question is whether that prosecution is barred under Article 20 (2) of the Constitution which says that no person shall be prosecuted and punished for the same offence more than once. This Article has no direct bearing on the question at issue. Evidently those accused persons want to spell out from this Article the rule of *autre fois acquit* embodied in S. 403, Criminal Procedure Code. Assuming we can do that, still it is not possible to hold that a proceeding before the Collector of Customs is a prosecution for an offence. In order to get the benefit of Section 403, Criminal Procedure Code or Article 20 (2), it is necessary for an accused person to establish that he had been tried by a "Court of competent jurisdiction" for an offence and he is convicted or acquitted of that offence and the said conviction or acquittal is in force. If that much is established, it can be contended that he is not liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 230 or for which he might have been convicted under Section 273. It has been repeatedly held by this Court that adjudication before a Collector of Customs is not a "prosecution" nor the Collector of Customs a "Court". In *Maqbool Hussain v. State of Bombay*, 1953 SCR 730 = (AIR 1953 SC 325), this Court held that the wording of Article 20 of the Constitution and the words used therein show that the proceedings therein contemplated are proceedings of the nature of criminal proceedings before a Court of law or a judicial tribunal and "prosecution"

in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. This Court further held that where a person against whom proceedings had been taken by the Sea Customs authorities under Section 167 of the Sea Customs Act and an order for confiscation of goods had been passed, was subsequently prosecuted before a Criminal Court for an offence under Section 23 of the Foreign Exchange Regulation Act in respect of the same act, the proceeding before the Sea Customs authorities was not a "prosecution" and the order for confiscation was not a "punishment" inflicted by a Court or judicial tribunal within the meaning of Article 20 (2) of the Constitution and hence his subsequent prosecution was not barred. The said rule was reiterated in *Thomas Dana v. State of Punjab*, 1959 Supp 1 SCR 274= (AIR 1959 SC 375) and in several other cases.

8. We shall now take up the contention that the finding of the Collector of Customs referred to earlier operated as an issue estoppel in the present prosecution. The issue estoppel rule is but a facet of the doctrine of *autre fois acquit*. In *Sambasivan v. Public Prosecutor, Federation of Malaya*, 1950 AC 458 at p. 479, Lord MacDermott enunciated the said rule thus:

"The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "*Res judicata pro veritate accipitur*" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some

degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other."

The rule laid down in that decision was adopted by this Court in *Pritam Singh v. State of Punjab*, AIR 1956 SC 415 and again in *N. R. Ghose v. State of West Bengal*, (1960) 2 SCR 58= (AIR 1960 SC 239). But before an accused can call into aid the above rule, he must establish that in a previous lawful trial before a competent court, he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant case for the reasons already mentioned, we are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this it follows that the decision of the Collector does not amount to a verdict of acquittal in favour of accused Nos. 1 and 2.

9. This takes us to the contention whether the prosecution must be quashed because of the delay in instituting the same. It is urged on behalf of the accused that because of the delay in launching the same, the present prosecution amounts to an abuse of the process of the Court. The High Court has repelled that contention. It has come to the conclusion that the delay in filing the complaint is satisfactorily explained. That apart, it is not the case of the accused that any period of limitation is prescribed for filing the complaint. Hence the Court before which the complaint was filed could not have thrown out the same on the sole ground that there has been delay in filing it. The question of delay in filing a complaint may be a circumstance to be taken into consideration in arriving at the final verdict. But by itself it affords no ground for dismissing the complaint. Hence we see no substance in the contention that the prosecution should be quashed on the ground that there was delay in instituting the complaint.

10. We also see no merit in the contention that the accused in this case are entitled to the benefit of Section 173 (4), Criminal Procedure Code which provides that before the commencement of the enquiry or trial the officer-in-charge of the police station who forwards a report under Section 173, Criminal Procedure Code, should furnish or cause to be furnished to the accused, free of cost, a

copy of the report forwarded under Section 173 (1), Criminal Procedure Code of the first information report recorded under Section 154, Criminal Procedure Code and all other documents or relevant extracts thereof on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under Section 164, Criminal Procedure Code and the statements recorded under Sec. 161, Criminal Procedure Code of all the persons whom the prosecution proposes to examine as its witnesses.

11. On a plain reading of Section 173, Criminal Procedure Code, it is clear that the same is wholly inapplicable to the facts of the present case. In the instant case no report had been sent under Section 173, Criminal Procedure Code. Therefore that provision is not attracted. That provision is attracted only in a case investigated by a police officer under Chapter XIV of the Criminal Procedure Code, followed up by a final report under Section 173, Criminal Procedure Code. It may be remembered that sub-section (4) of Section 173, was incorporated into the Criminal Procedure Code for the first time by Central Act 26 of 1955, presumably because of the changes effected in the mode of trials in cases instituted on police reports. Before the Criminal Procedure Code was amended by Act 26 of 1955, there was no difference in the procedure to be adopted in the cases instituted on police reports and in other cases. Till then in all cases irrespective of the fact whether they were instituted on police reports or on private complaints, the procedure regarding enquiries or trials was identical. In both type of cases, there were two distinct stages i.e., 'the enquiry stage' and 'the trial stage'. When the prosecution witnesses were examined in a case before a charge is framed, it was open to the accused to cross-examine them. Hence there was no need for making available to the accused the documents mentioned in sub-section (4) of Section 173, Criminal Procedure Code. The right given to him under Section 162, Criminal Procedure Code was thought to be sufficient to safeguard his interest. But Act 26 of 1955 as mentioned earlier made substantial changes in the procedure to be adopted in the matter of enquiry in cases instituted on police reports. That procedure is now set out in Section 251 (A), Criminal Procedure Code. This new procedure truncated the enquiry stage. Section 251 (A), Criminal Procedure Code says that the Magistrate

if upon consideration of all the documents referred to in Section 173 and making such examination if any, of the accused as he thinks necessary and after giving the prosecution and the accused an opportunity of being heard considers the charge against the accused to be groundless, he shall discharge him but if he is of opinion that there is ground for presuming that the accused has committed an offence triable as a warrant case which he is competent to try and which in his opinion could be adequately punished by him, he shall frame in writing a charge against him. Under the procedure prescribed in Section 251 (A), Criminal Procedure Code but for the facility provided to him under Section 173 (4) of that Code an accused person would have been greatly handicapped in his defence. But in a case instituted on a complaint, like the one before us and governed by Sections 252 and 259 of the Criminal Procedure Code, no such difficulty arises. Therein the position is as it was before the amendment of the Criminal Procedure Code in 1955.

12. We are unable to agree with the learned Judges of the High Court that the legislature did not make available the benefit of Section 173 (4), Criminal Procedure Code in cases instituted otherwise than on police reports by oversight. The observation of the learned Judges in the course of their judgment that "Even the great Homer occasionally nods. There is nothing to show that the legislature has applied its mind to the question of the amendment of the procedure so far as the investigation of an offence under the Sea Customs Act is concerned at the time when it was considering amendments to the Criminal Procedure Code" is without any basis. In the first place, it is not proper to assume except on very good grounds that there is any lacuna in any statute or that the legislature has not done its duty properly. Secondly from the history of the legislation to which reference has been made earlier, the reason for introducing Section 173 (4) is clear. The learned Judges of the High Court were constrained to hold that Section 173 (4), Criminal Procedure Code in terms does not apply to the present case. But strangely enough that even after coming to the conclusion that provision is inapplicable to the facts of the present case, they have directed the learned Magistrate to require the prosecution to make available to the ac-

cused, the copies of the statements recorded from the prosecution witnesses during the enquiry under the Customs Act. They have purported to make that order under Section 94 (1), Criminal Procedure Code which to the extent material for our present purpose reads:

"Whenever any Court considers that production of any document or other thing is necessary or desirable for the purposes of any enquiry, trial or other proceeding under this Code by or before such Court such Court may issue a summons to the person in whose possession and power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order."

This section does not empower a Magistrate to direct the prosecution to give copies of any documents to an accused person. That much appears to be plain from the language of that section. It was impermissible for the High Court to read into Section 94, Criminal Procedure Code the requirements of Section 173 (4), Criminal Procedure Code. The High Court was not justified, in indirectly applying to cases instituted on private complaints the requirements of Section 173 (4), Criminal Procedure Code.

13. That apart we do not think that the High Court was justified in interfering with the discretion of the learned Magistrate. Whether a particular document should be summoned or not is essentially in the discretion of the trial Court. In the instant case the Special Public Prosecutor had assured the learned Trial Magistrate that he would keep in readiness the statements of witnesses recorded by the Customs authorities and shall make available to the defence Counsel the statement of the concerned witness as and when he is examined. In view of that assurance, the learned Magistrate observed in his order:

"The recording of the prosecution evidence is yet to commence in this case and at present there are no materials before me to decide whether or not the production of any of the statements and documents named by the accused in his application is desirable or necessary for the purpose of the enquiry or trial. As stated at the outset, the learned Special Prosecutor has given an undertaking that he would produce all the relevant statements and documents at the proper time in the course of the hearing of the case. The

request made for the issue of the summons under Section 94, Criminal Procedure Code is also omnibus."

The reasons given by the learned Magistrate in support of his order are good reasons. The High Court has not come to the conclusion that the documents in question, if not produced in Court are likely to be destroyed or tampered with or the same are not likely to be made available when required. It has proceeded on the erroneous basis that the accused will not have a fair trial unless they are supplied with the copies of those statements even before the enquiry commences. Except for very good reasons, the High Court should not interfere with the discretion conferred on the Trial Courts in the matter of summoning documents. Such interferences would unnecessarily impede the progress of cases and result in waste of public money and time as has happened in this case.

14. For the reasons mentioned above, we allow Criminal Appeal No. 15 of 1967 and dismiss Criminal Appeal No. 35 of 1967. In other words, we restore the order of the learned Magistrate.

Order accordingly.

AIR 1970 SUPREME COURT 967 (V 57 C 196)

J. C. SHAH AND K. S. HEGDE, JJ.

Dewan Singh, Appellant v. Champat Singh and others, Respondents.

Civil Appeal No. 1369 of 1965, D/- 17-10-1969.

(A) Limitation Act (1908), Article 158 — Setting aside of award — No proof that notice of filing of award into Court was given to defendant — Objection by defendant to the award cannot be rejected on ground of limitation. (Para 6)

(B) Arbitration Act (1940), Section 30 — Misconduct of arbitrators — Arbitrators deciding dispute on their personal knowledge — Agreement between parties not empowering them to do so — Award vitiated.

It is normally an implied term of an arbitration agreement that the arbitrators must decide the dispute in accordance with the ordinary law. That rule can be departed from only if specifically provided for in the submission.

The recital in the agreement between the parties that the arbitrators may de-

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cide the disputes referred to them in "whatever manner" they think does not mean that the arbitrators can decide those disputes on the basis of their personal knowledge. The proceedings before the arbitrators are quasi-judicial proceedings. They must be conducted in accordance with the principles of natural justice. The parties to the submission may be in the dark as regards the personal knowledge of the arbitrators. There may be misconceptions or wrong assumptions in the mind of the arbitrators. If the parties are not given opportunity to correct those misconceptions or wrong assumptions, grave injustice may result. (1951) 1 KB 240, Rel. on. (Para 9)

Cases Referred: Chronological Pars
(1951) 1951-1 KB 240 = 1950-2 All
ER 618, Chandris v. Ishrandtsen
Moller Co. 9

The following Judgment of the Court was delivered by

HEGDE, J.:— This appeal by special leave arises from an arbitration proceeding. The appellant, the 1st respondent and one Sukh Lal who died during the pendency of these proceedings referred their disputes to five arbitrators as per the written agreement executed by them on September 9, 1955. Arbitrators made their award on October 11, 1955. They duly served on the parties to the arbitration agreement, notice of making and signing the award. The award was thereafter registered. On November 1, 1955 the appellant filed a suit in the Court of Munsiff Hawali Meerut praying that the award in question be made a rule of the Court and decree passed in accordance with the same. It is said that the notices taken in that suit could not be personally served on the defendants as they refused to accept the same. That fact was reported to the Court by the process server as per his report dated 19-11-1955. Thereafter the defendants filed their written statement on February 3, 1956 wherein they challenged the validity of the award on various grounds. They contended that the award was vitiated because of misconduct on the part of the arbitrators inasmuch as the arbitrators decided the disputes referred to them primarily on the basis of their personal knowledge. They also contended that the arbitration agreement was obtained from them by exercise of undue influence. Their further contention was that the subject-matter of the dispute could not

under law be referred to arbitration in view of the provisions of U. P. Act 1 of 1951. It was also contended by them that the suit was barred by time.

2. The trial Court accepted the contention of the defendants that the arbitrators were guilty of misconduct. Dealing with the issue of undue influence, it came to the conclusion that the arbitration agreement was not executed by the defendants according to their free will. But it held that the plea of undue influence was not made out. It upheld the contention of the defendants that the subject-matter of the dispute could not have been referred to arbitration in view of the provisions of U. P. Act 1 of 1951.

3. In appeal the learned Civil Judge reversed the decree of the Trial Court. While agreeing with the Trial Court that the arbitrators had used their personal knowledge in deciding the disputes referred to them, that Court held that under the terms of the agreement, it was open to the arbitrators to decide the disputes in question on the basis of their personal knowledge. Dealing with the question of the arbitrators' competence to decide the dispute, that Court held that the question whether the dispute came within the scope of U. P. Act 1 of 1951 or not is a question of law and the same could have been referred to arbitration. It went further and held that as the defendants had not taken their objection to the award within the time prescribed, the same could not have been entertained by the trial Court.

4. The High Court in revision differed from the Appellate Court on all the points mentioned above. It came to the conclusion that the arbitration agreement did not specifically empower the arbitrators to decide the disputes referred to them on the basis of their personal knowledge; they having utilized their personal knowledge in deciding the disputes, they were guilty of legal misconduct and consequently the award made by them is vitiated. It also came to the conclusion that the disputes in question could not have been referred to arbitration in view of the provisions of U. P. Act 1 of 1951. It overruled the decision of the Appellate Court that the defendants had not taken their objections to the award within the prescribed time.

5. We may at this stage mention that the contention that the suit was barred by time was not pressed before the Trial Court or in any other Court.

6. There is no basis for the finding of the appellate Court that the objection taken by the defendants to the award was barred by time. As seen earlier, the suit to make the award a rule of the Court was brought by one of the parties to the arbitration agreement and not by any arbitrator. The plaint filed does not disclose that the award given had been produced along with it. There was some controversy as to whether that award was produced along with the plaint. There is no need to go into that question as we shall presently see. It is not said that along with the plaint copy, a copy of the award had been sent to the defendants. Nor is it said that notice of the suit sent to the defendants mentioned the fact that the award had been filed into Court along with the plaint. Article 158 of the Limitation Act, 1908 gives to party 30 days time for applying to set aside an award or get an award remitted for reconsideration from the date of the service of the notice of filing of the award. There is absolutely no proof in this case that a notice of the filing of the award into Court had ever been given to the defendants. Hence the objections taken by the defendants to the award could not have been rejected on the ground of limitation.

7. Now coming to the question of misconduct on the part of the arbitrators, that allegation is founded on the fact that the arbitrators decided the disputes referred to them on the basis of their personal knowledge. That allegation has been accepted as true both by the Trial Court as well the Appellate Court. In fact the award says:

"We gave our consideration to the entire dispute which is in full knowledge of us, the panchas".

Therefore there is hardly any room to contest the allegation that the arbitrators had decided the disputes referred to them primarily on the basis of their personal knowledge. Under these circumstances all that we have to see is whether the appellate Court was right in concluding that under the arbitration agreement, the arbitrators had been empowered to decide the disputes referred to them on the basis of their personal knowledge.

8. The material portion of the arbitration agreement which is in Hindi translated into English reads thus:

"All the panchas and Sarpanchas are residents of village Keli Pargana Sarawa.

The power is given to them that the said Panchas and Sarpanchas whatever decision in whatever manner will give in relation to our land described below, whatever land may be given to any party or whatever party may be decided to be the tenant of the entire land, whatever compensation they may decide to be given to any party, whatever decision they will give that will be final and acceptable and they will have the right to inform us of their decision, unanimous or of majority and get the same registered and we will fully comply with their decision."

9. This agreement does not empower the arbitrators either specifically or by necessary implication to decide the disputes referred to them on the basis of their personal knowledge. The recital in that agreement that the arbitrators may decide the disputes referred to them in "whatever manner" they think does not mean that they can decide those disputes on the basis of their personal knowledge. The proceedings before the arbitrators are quasi-judicial proceedings. They must be conducted in accordance with the principles of natural justice. The parties to the submission may be in the dark as regards the personal knowledge of the arbitrators. There may be misconceptions or wrong assumptions in the mind of the arbitrators. If the parties are not given opportunity to correct those misconceptions or wrong assumptions, grave injustice may result. It is nobody's case that the parties to the submission were informed about the nature of the personal knowledge, the arbitrators had and that they were given opportunity to correct any misconception or wrong assumption. Further in the present case there were as many as five arbitrators. It is not known whether the award was made on the basis of the personal knowledge of all of them or only some of them. Arbitration is a reference of a dispute for hearing in a judicial manner. It is true that parties to an agreement of reference may include in it such clauses as they think fit unless prohibited by law. It is normally an implied term of an arbitration agreement that the arbitrators must decide the dispute in accordance with the ordinary law: see *Chandris v. Isbrandtsen Moller Co.*, 1951-1 KB 240 that rule can be departed from only if specifically provided for in the submission.

10. The Appellate Court, in our opinion, has misread the arbitration agreement and hence it erroneously came to

the conclusion that the arbitrators had been empowered to decide the dispute on the basis of their personal knowledge.

11. It was contended on behalf of the appellant that in exercise of its powers under Section 115 of the Code of Civil Procedure, the High Court could not have corrected the erroneous interpretation placed by the Appellate Court as to the scope of the arbitration agreement. We have not thought it necessary to go into that question as, in our opinion, the decision reached by the High Court is an eminently just one. Hence we do not feel called upon in exercise of our discretionary power under Article 136 of the Constitution to interfere with the decision of the High Court. In view of our above conclusion, there is no need to go into the question whether the subject-matter of the disputes could have been referred to arbitration.

12. In the result this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 970

(V 37 C 197)

(From: Allahabad)

J. C. SHAH AND K. S. HEGDE, JJ.

Ram Gopal and another, Appellants v. Alladia and others, Respondents.

Civil Appeal No. 1642 of 1966, D/- 27-11-1969.

Constitution of India, Article 136 — Registered agreement between landlord and defendant entered in the year 1911 before amendment of Section 107, T. P. Act in 1929 and signed by defendant only — Landlord thereby permitting defendant to construct house on suit property — Recital not to evict defendant or his descendants so long as they pay rent regularly — Defendant constructing house on suit property accordingly and paying rent regularly — Suit for eviction by landlord — Breach of any terms of agreement not established — High Court holding that defendant being licensee could not be evicted — Appeal against — Interference under Article 136 being discretionary Supreme Court refused to interfere — Easements Act (1882), Section 60. (Paras 4, 5)

The Judgment of this Court was delivered by

HEGDE, J.:— This is an appeal by special leave. The plaintiff is the appel-

lant. He sued for the possession of the suit properties after issuing a notice purporting to terminate the tenancy of the defendants (respondents in this appeal). The case of the plaintiff is that the defendants are monthly tenants. The trial Court as well as the 1st appellate Court upheld the contention of the appellant and decreed the suit for possession. In Second Appeal, the High Court reversed the decree and judgment of the Courts below and dismissed the suit on two grounds. It firstly held that as the defendants have become Bhumidars under the provisions of the U. P. Urban Areas Zamindari Abolition and Land Reforms Act (U. P. Act 9 of 1957), they cannot be evicted. Secondly it came to the conclusion that the defendants are licensees and not lessees and as such they could not be evicted.

2. One Mst. Isa Bela and her children were the owners of the suit properties. They entered into a registered agreement with Masita, the father of the defendants under which they permitted Masita to construct a house on the suit properties. The agreement in question was entered into in the year 1911. It is marked as Exh. Ka-6 in the case. That document was signed only by Masita. Admittedly Isa Bela and her children agreed to the terms embodied in the document. Under that document Masita was to pay rent to Isa Bela and her children at the rate of Rs. 4/- per annum. The document further says:

"Firstly that I shall continue to pay the rent annually in the office of the proprietors, aforesaid, at mauza Mussorie or to their karinda. I shall take a receipt for the same from the Manager, duly signed by him. Without that receipt any objection regarding the payment of rent shall be invalid. If the rent, aforesaid, remains unpaid, I shall immediately be liable to be ejected. Secondly that I shall take away the entire material existing in the house, within one month after I vacate the same. I shall, thereafter, vacate the land. If during this period, I, the executant or my representative and successors do not remove the materials or do not vacate the land, the proprietors, aforesaid shall have the right to take the materials in their proprietary possession and occupation. I, the executant, my representatives or successors or the owner of the materials shall have no claim to

any cost or material against the proprietors, aforesaid. Thirdly, that I shall not sublet the house aforesaid to any other person on rent on my own behalf and on my own authority nor I shall allow any one to settle therein. If I do so, the proprietors aforesaid shall at all times, have the right to get their house vacated under these circumstances and eject us therefrom. I shall have no objection."

3. In pursuance of the afore-mentioned agreement the suit property was put in the possession of Masita. The house put up by Masita was reconstructed by the defendants. The defendants have been regularly paying Rs. 4/- per annum to the owners of the suit property. It is not said that they had contravened any of the terms in the agreement. The original owner sold the suit property to one Babu Ram who in turn sold the same to the plaintiffs. The plaintiffs have brought this suit on the basis of the agreement entered into in 1911.

4. The principal question debated before the High Court and the Courts below is whether Exh. Ka-6 evidences a lease or a license? It may be noted that the agreement was entered into in the year 1911 long before the third paragraph of Section 107 of the Transfer of Property Act was incorporated into that section. But for our present purpose, it is not necessary for us to go into the question whether under the law as it stood in 1911 Exh. Ka-6 can be considered as a valid lease as only Masita had signed that document. On that question some of the High Courts have differed. But what is clear is that right from 1911, the defendants are enjoying the suit property on the strength of the agreement entered into between them and the original owner. From that agreement it is clear that the original owner had agreed not to evict Masita and his descendants from the suit property so long as they conform to the terms of the agreement.

5. Under these circumstances we think that the claim made by the plaintiffs is a highly unjust one. Hence we do not think that we will be justified in exercising our discretionary power under Article 136 of the Constitution in interfering with the judgment of the High Court. In this view of the matter there is no need to go into the correctness of the decision of the High Court that the defendants have acquired Bhumidari rights in the suit property. That question is left open to be decided in future, if necessary.

6. In the result this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 971
(V 57 C 198)

(From: Allahabad)*

S. M. SIKRI, R. S. BACHAWAT
AND K. S. HEGDE, JJ.

Bhagwan Das, Appellant v. Paras Nath,
Respondent.

Civil Appeal No. 1617 of 1968, D/- 27-9-1968.

(A) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Sections 3 and 7-F — Restrictions on evictions — Permission to sue — Power to revoke, of Commissioner and State Government — Power of State Government is exhausted once suit for eviction is instituted.

When the Commissioner sets aside under Section 3 (3) the order passed by the District Magistrate granting permission to file a suit for ejecting a tenant, the order of the Commissioner prevails. If he cancels the permission granted by the District Magistrate there is no effective permission left and the suit instituted by the plaintiff without awaiting his decision must be treated as one filed without any valid permission by the District Magistrate. Decision of Upadhyaya, J., in 1958 All LJ 584, Approved. (Para 7)

From this it follows that the Full Bench decision in Bashi Ram's case, AIR 1965 All 498 to the extent it held that a suit filed by the landlord after obtaining the permission of the District Magistrate cannot become infructuous even if the Commissioner revokes the permission, is incorrect. But the Full Bench was right in holding that a suit validly instituted after obtaining a permission as required by Section 3 (1) does not cease to be maintainable even if the State Government revokes after the institution of the suit, the permission granted. If the State Government revokes the permission granted before the institution of the suit then there would be no valid permission to sue. In other words, the State Government's power to revoke the permission granted under Section 3 (1) gets exhausted once the suit is validly instituted.

(Para 7)

*(Second Appeal No. 2296 of 1961, D/- 19-3-1968 — All.)

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In this view, a decree for eviction obtained in a suit instituted after obtaining the permission of the Commissioner under sub-section (3) of Section 3 does not become unenforceable if the State Government acting under Section 7-F of that Act revokes the permission granted by the Commissioner after the decree is passed.

(Paras 1, 7)

(Desirability of amendment of the Act to remove ambiguities in drafting, pointed out.)

(Para 7)

(B) Civil P. C. (1908), Pre. — Interpretation of Statutes — Rent Control legislation — Defective drafting — Intention of legislature — Rule of construction — Grammatical construction to be preferred to all other rules of construction, to find out intention of legislature. (Para 7)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1767 (V 52) =

(1965) 3 SCR 218, Shri Bhagwan v. Ram Chand 6

(1965) AIR 1965 All 493 (V 52) =

ILR (1965) 1 All 545 (FB), Bashi Ram v. Mantri Lal 2, 4, 5, 7

(1964) AIR 1964 All 210 (V 51) =

1963 All LJ 620, Basant Lal Sah v. Bhagwati Prasad Sah 4

(1958) 1958 All LJ 584 = 1958 All

All WR 685, Munshi Lal v. Shambhu Nath Ram Kisban 7

(1958) 1958 All LJ 724 = 1958 All

WR (HC) 769, Dr. S. L. Khopari v. State Govt. of U. P. 4

M/s. J. P. Goyal and A. C. Ratnaparkhi, Advocates, for Appellant; Mr. C. B. Agarwala, Senior Advocate, (Mr. R. Mahalingier, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

HECDE, J.: The question of law that arises for decision in this appeal by special leave is not free from difficulty. That question is, whether a decree for eviction obtained in a suit instituted after obtaining the permission of the Commissioner under sub-section (3) of Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 (to be hereinafter referred to as the Act) becomes unenforceable if the State Government acting under Section 7-F of that Act revokes the permission granted by the Commissioner after the decree is passed?

2. The appellant was a tenant of the respondent in respect of a shop in Baluganj in Agra. On January 2, 1959, the respondent applied to the District Magistrate under Section 3 (1) of the Act for

permission to institute a suit against the appellant for evicting him from the shop in question. That application was rejected by the District Magistrate as per his order of July 9, 1959. The respondent took up the matter in revision to the Commissioner under sub-section (2) of Section 3. The Commissioner reversed the order of the District Magistrate and granted the permission asked for on October 18, 1959. As against that order the appellant moved the State Government under Section 7-F on November 17, 1959. On January 1, 1960, the respondent served on the appellant a notice under Section 106 of the Transfer of Property Act. The appellant replied to that notice on January 6, 1960. In that reply he informed the respondent that he had already moved the State Government to revoke the permission granted by the Commissioner. On February 13, 1960 the respondent instituted suit No. 115 of 1960 in the Court of Munsiff, Agra seeking for the eviction of the appellant from the suit premises. The appellant filed his written statement in that case on May 7, 1960. Therein again he took the plea that the permission granted by the Commissioner is not final as he had moved the Government to revoke the same. The suit was decreed by the learned Munsiff on November 2, 1960. The appellants went up in appeal as against that order to the Civil Judge, Agra. On January 27, 1961, the State Government revoked the permission granted by the Commissioner during the pendency of the appeal. Relying on this order the Civil Judge of Agra allowed the appeal of the appellant on February 9, 1961. As against that decision the respondent went up in second appeal to the High Court. The High Court allowed the second appeal on 19th March, 1968 following the Full Bench decision of that Court in Bashi Ram v. Mantri Lal, ILR (1965) 1 All 545 = (AIR 1965 All 498) (FB). This appeal is directed against that decision.

3. The Act was intended as a temporary measure as could be gathered from its title as well as the preamble. It is deemed to have come into force on the 1st day of October 1946 though it was passed in 1947. Under the Act as originally stood, the decision of the District Magistrate under Section 3 was neither appealable nor revisable. As per the amendments effected in 1952 a limited power of revision was conferred on the Commissioner. By the Amending Act 17 of 1954, the power conferred on the Com-

missioner was enlarged and Section 7-F was incorporated in the Act which says that:

"the State Government may call for the records of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in Section 3and make such order as appears to it necessary for the ends of justice."

The only sections in the Act material for the purpose of this appeal are Sections 3 and 7-F. Section 3 reads thus:

"Restrictions on evictions.—Subject to any order passed under sub-section (3), no suit shall, without the permission of the District Magistrate, be filed in any civil court against a tenant for his eviction from any accommodation, except on one or more of the following grounds:

(a) that the tenant is in arrears of rent for more than three months and has failed to pay the same to the landlord within one month of the service upon him of a notice of demand;

(b) that the tenant has wilfully caused or permitted to be caused substantial damage to the accommodation;

(c) that the tenant has, without the permission in writing of the landlord made or permitted to be made any such construction as, in the opinion of the court, has materially altered the accommodation or is likely substantially to diminish its value;

(d) that the tenant has created a nuisance or has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation, or which is likely to affect adversely and substantially the landlord's interest therein;

(e) that the tenant has on or after the 1st day of October, 1946, sub-let the whole or any portion of the accommodation without the permission of the landlord;

(f) that the tenant has renounced his character as such or denied the title of the landlord and the latter has not waived his right or condoned the conduct of the tenant;

(g) that the tenant was allowed to occupy the accommodation as a part of his contract of employment under the landlord and his employment has been determined.

Explanation. — For the purposes of sub-section (e) lodging a person in a hotel or a lodging-house shall not be deemed to be sub-letting.

(2) where any application has been made to the District Magistrate for permission to sue a tenant for eviction from any accommodation and the District Magistrate grants or refuses the permission, the party aggrieved by his order may, within 30 days from the date on which the order is communicated to him, apply to the Commissioner to revise the order.

(3) The Commissioner shall hear the application made under sub-section (2), as far as may be, within six weeks from the date of making it, and he may, if he is not satisfied as to the correctness, legality or propriety of the order passed by the District Magistrate or as to the regularity of proceedings held before him, alter or revise his order, or make such other order as may be just and proper.

(4) The order of the Commissioner under sub-section (3) shall, subject to any order passed by the State Government under Section 7 (F) be final.

We have earlier quoted the relevant portion of Section 7 (F).

4. Conflicting opinions were expressed by different Benches of the Allahabad High Court as to the scope of Section 3 till the decision of the Full Bench in *Bashi Ram's Case*, ILR (1965) 1 All 545 = (AIR 1965 All 498) (FB). The Full Bench held that a decree obtained in a suit for eviction instituted after obtaining the requisite permission will not become unenforceable even if the State Government revoked, after the decree is passed, the permission granted, in exercise of its powers under Section 7-F. Majority of the Judges in that case further held that once a suit is instituted after obtaining the permission of the District Magistrate, any further order made either by the Commissioner or the State Government cannot affect the course of that suit or the decree passed therein. Dwivedi, J., the other Judge, did not express any opinion on that question but even according to him in the appeal filed against the decree, the appellate court cannot receive in evidence the order made by the State Government which means that the decree cannot be reversed on the ground that the State Government had revoked the permission granted. The correctness of the Full Bench decision is challenged by the appellant in this appeal. In support of his interpretation of Ss. 3 and 7-F he placed reliance on the decision of a Division Bench of the High Court of Allahabad in *Dr. S. L. Khoparji v. State Govt. of U. P.*,

1958 All LJ 724. He also sought support from the decision of a Single Judge of that Court in *Basant Lal Sah v. Bhagwati Prasad Sah*, AIR 1964 All 210. It is not necessary to refer to the various decisions of the Allahabad High Court on this question. Suffice it to say that in that court there was serious cleavage of opinion on the question that we are considering in this appeal till the decision of the Full Bench in *Bashi Ram's case*, ILR (1965) 1 All 545 = (AIR 1965 All 498) (FB) (supra). We were given to understand that Dhavan, J., had doubted the correctness of the decision of the Full Bench and had requested the Chief Justice to constitute a larger Bench to consider the correctness of the decision in *Bashi Ram's case*, ILR (1965) 1 All 545 = (AIR 1965 All 498) (FB) but in view of the pendency of this appeal, the constitution of a larger bench was not considered necessary.

5. The contention of Mr. Goyal, the learned Counsel for the appellant was that the Act generally speaking, has restricted the right of the landlord to evict his tenant, to one or other of the grounds mentioned in Clauses (a) to (g) of Section 3 (1); but in order to meet any exceptional case, it is provided in Sec. 3 (1) that a suit for eviction may be instituted on any ground other than those mentioned in Clauses (a) to (g) if the permission of the District Magistrate is obtained; the order made by the District Magistrate is revisable both by the Commissioner as well as the State Government; the only order that is final is that made by the State Government. If a landlord chooses to institute a suit on the basis of the permission granted by the District Magistrate or the Commissioner without waiting for the decision of the State Government he takes the risk; if the State Government revokes the permission granted by the District Magistrate or the Commissioner then the suit must be deemed to have been instituted without permission and consequently not maintainable. Mr. Goyal urged that if the decision in *Bashi Ram's case*, ILR (1965) 1 All 545 = (AIR 1965 All 498) (FB) is accepted as correct then so far as the tenant is concerned, generally speaking, he cannot invoke the powers of the State Government under Section 7-F because immediately after the decision of the Commissioner, if the same is in his favour, the landlord is likely to institute a suit for eviction and thus nullify the power of the State Government under S. 7-F.

He urged that as Section 7-F empowers the State Government to revise the order made by the subordinate authorities whether the same is in favour of the landlord or the tenant we should not place an interpretation on Section 3 which would affect the power of the State Government to do justice to the tenants for whose benefit the Act has been enacted.

6. On the other hand it was urged by Mr. C. B. Aggarwal, learned Counsel for the respondent that the landlord has a right to sue for the eviction of his tenant under the provisions of the Transfer of Property Act subject to the restrictions stipulated therein. That is a statutory right. The provisions contained in the Act to the extent they encroach upon the rights of the landlord either specifically or by necessary implication control the rights of the landlord. In other respects the landlord's rights under the Transfer of Property Act remain unaffected. According to him the only restriction placed on the landlord in the matter of instituting a suit for eviction on grounds other than those mentioned in Clauses (a) to (g) in Section 3 (1) is to obtain the prior permission of the District Magistrate subject to the order made under sub-section (3) of Section 3 by the Commissioner; once a suit is validly instituted in accordance with those provisions, no order of the State Government can either interfere with the course of that suit or invalidate the decree obtained therein. He urged that if the position is as contended by the learned Counsel for the appellant, curious results are likely to follow. Section 7-F does not fix any period within which the State Government must act. It can exercise its power under that provision at any time it pleases—may be after 10 years or 20 years; the power conferred on the State Government is extremely wide as observed by this Court in *Shri Bbagwan v. Ram Chand*, (1965) 3 SCR 218 = (AIR 1965 SC 1767). Therefore it can revoke the permission granted after the decree for eviction is confirmed by the High Court or even, the Supreme Court and thus make a mockery of the judicial process; this could not have been the intention of the legislature. According to Mr. Aggarwal from the very scheme of the Act and from the very nature of the power conferred on the State Government, it cannot be exercised after a suit is instituted after complying with the

requirements of sub-section (1) of Section 3. His further contention was that on a proper construction of sub-section (1) of Section 3, it would be seen that the suit instituted after obtaining the required permission being a validly instituted suit, its progress cannot be interrupted; the permission required under Section 3 (1) is the permission of the District Magistrate subject to any order under Sec. 3 (3) by the Commissioner; in other words the permission given by the District Magistrate is not final till affirmed by the Commissioner; till then it remains tentative; once the Commissioner affirms the same or grants the permission asked for it becomes final and thus amounts to a valid permission to sue; hence a suit filed on the basis of that permission is a validly instituted suit unless the permission granted was revoked by the State Government before the institution of the suit. Proceeding further he stated that it is true that the order of the Commissioner though final yet it is subject to any order that may be passed by the State Government; but Section 3 (1), the provision dealing with the permission to file a suit for eviction, does not refer to the order under Section 7-F; it only speaks of the permission granted by the District Magistrate subject to the order of the Commissioner and not further subject to any orders made by the State Government. In this connection he invited our attention to the fact that as against the order passed by the District Magistrate under sub-section (1) of Section 3, a revision petition can be filed before the Commissioner within 30 days of that order and not thereafter. The Commissioner has not even the power to condone the delay in filing the revision petition. Further under sub-section (3) of Section 3, the Commissioner is required to hear the application made under sub-section (2) of Section 3, as far as may be, within six weeks from the date of making it. All these provisions indicate that the legislature was of the opinion that the proceedings under Section 3 should be carried on expeditiously and the decision of the Commissioner should be considered as final. According to Mr. Aggarwal, the question of granting or refusing to grant the permission under Section 3 are primarily to be dealt with only by the District Magistrate and the Commissioner. They are the only tribunals in the hierarchy of the tribunals constituted for that purpose. The power given to the Government under Section 7-F is merely a

supervisory power. That is why no limitation is imposed on the exercise of that power either in the matter of time within which it should be exercised or the circumstances under which it can be exercised. Such a power according to him is a reserve power and therefore has to be exercised before the Court's jurisdiction is invoked. He particularly laid emphasis on the fact that sub-section (1) of Section 3, the compliance of which is necessary before validly instituting the suit, does not at all refer to an order under Section 7-F.

7. After examining the provisions of this Act, we are constrained to observe that the drafting of this Act leaves considerable room for improvement despite the fact that it was amended twice over. Though it was intended to be a temporary measure when it was originally enacted, it has now remained in the statute book for over 20 years and there is no knowing how long the same will continue to be in force. Therefore it is but appropriate that the provisions of this Act should be clear and unambiguous. From sub-section (1) of Section 3 it is not possible to find out the contents of the powers of the District Magistrate. No guidelines are laid down therein to regulate the exercise of the powers of the District Magistrate. It is not possible to find out from that provision under what circumstances the District Magistrate can grant the permission asked for and under what circumstances he can refuse the same. It is likely that different District Magistrates are exercising that power in different ways. One consideration may appeal to one District Magistrate and a totally different consideration may influence another District Magistrate. It would have been appropriate if the legislature had defined the scope of the powers of the District Magistrate or at least laid down certain guide-lines for regulating his discretion. Sub-s. (3) of S. 3 says that if the Commissioner is not satisfied as to the correctness, legality or propriety of the order passed by the District Magistrate, he may alter or reverse the order of the District Magistrate or make such other order as may be just and proper. It is not possible to find out on what basis the Commissioner can determine the correctness, legality or propriety of the order made by the District Magistrate. As seen earlier no restrictions are placed on the powers of the District Magistrate in granting or refusing to

grant the permission asked for under Section 3 (1). Therefore the only thing the Commissioner can do is to exercise his discretion in preference to the discretion exercised by the District Magistrate. Now coming to the power conferred on the State Government under Section 7-F, it would be seen that it is a power of wide amplitude. It can be exercised by it in any way it pleases. No restriction either as to the time within which it can be exercised or as to the circumstances under which it can be exercised is placed on the State Government. Under these circumstances the anomalies pointed out by Mr. Goyal as well as by Mr. Aggarwal are inevitable. Therefore in construing this Act, no useful purpose will be served by taking into consideration the hardship to the parties. In whatever way we may construe Sections 3 and 7(F) hardship to one party or the other is inevitable. Neither Counsel suggested to us any interpretation which could steer clear of the anomalies pointed out at the bar. Therefore we have to fall back on the grammatical construction of sub-section (1) of Section 3 and leave out of consideration all other rules of construction for finding out the intention of the legislature. Section 3 (1) does not restrict the landlord's right to evict his tenant on any of the grounds mentioned in Cls. (a) to (g) of that sub-section. But if he wants to sue his tenant for eviction on any ground other than those mentioned in those clauses then he has to obtain the permission of the District Magistrate whose discretion is subject to any order passed under sub-section (3) of Section 3 by the Commissioner. These are the only restrictions placed on the power of a landlord to institute a suit for eviction of his tenant. If a landlord files a suit for the eviction of his tenant without obtaining the permission of the District Magistrate that suit is not maintainable but if he files a suit after obtaining the permission of the District Magistrate and if the Commissioner revokes the permission granted by the District Magistrate in a properly instituted application under Section 3 (2) then the suit instituted by him will be considered as having been filed without the permission of the District Magistrate because Section 3 (1) in specific terms says that the permission given by the District Magistrate is subject to any order passed under sub-section (3). In other words the permission given by the District Magistrate does not acquire any finality until either the period fixed

for filing an application under sub-section (2) of Section 3 expires and no application under that section was filed within that time or if an application had been filed within that time, the same had been disposed of by the Commissioner. The permission to file a suit for eviction assumes finality under Section 3 (1) once the Commissioner decides the revision petition pending before him. In fact sub-section (4) of Section 3 says that the order of the Commissioner is final. It is true that that order despite the fact that it is final is subject to any order passed by the State Government under Section 7-F. There is no provision in the Act providing that a suit validly instituted after getting the required permission under Section 3 (1) ceases to be maintainable because of any order made by the State Government under S. 7-F. Similarly there is no provision in the Act invalidating a decree passed after the Act came into force in a validly instituted suit. Section 14 provides:—

"no decree for the eviction of a tenant from any accommodation passed before the date of commencement of this Act shall, in so far as it relates to the eviction of such tenant, be executed against him as long as this Act remains in force except on any of the grounds mentioned in Section 3;

Provided that the tenant agrees to pay to the landlord "reasonable annual rent" or the rent payable by him before the passing of the decree whichever is higher."

This provision applies only to decrees passed before the date of the commencement of the Act. A decree of a Court in a suit validly instituted is binding on the parties to the same. It is true that the finality or the force of a decree can be taken away by a statute, but the Court will not readily infer that a decree passed by a competent Court has become unenforceable unless it is shown that a provision of law has specifically or by necessary implication made that decree unenforceable. No such provision was brought to our notice. On an examination of the relevant provisions of the Act our conclusion is that when the Commissioner sets aside the order passed by the District Magistrate granting permission to file a suit for ejecting a tenant, the order of the Commissioner prevails. If he cancels the permission granted by the District Magistrate there is no effective permission left and the suit instituted by

the plaintiff without awaiting his decision must be treated as one filed without any valid permission by the District Magistrate. To this extent we are in agreement with the decision of Upadhaya, J., in *Munshi Lal v. Shambhu Nath Ram Kishan*, 1958 All LJ 584. From this it follows that the Full Bench decision in *Bashi Ram's case*, ILR (1965) 1 All 545 = (AIR 1965 All 498) (FB) to the extent it held that a suit filed by the landlord after obtaining the permission of the District Magistrate cannot become infructuous even if the Commissioner revokes the permission, is incorrect. But we agree with the Full Bench that a suit validly instituted after obtaining a permission as required by Section 3 (1) does not cease to be maintainable even if the State Government revokes after the institution of the suit, the permission granted. If the State Government revokes the permission granted before the institution of the suit then there would be no valid permission to sue. In other words the State Government's power to revoke the permission granted under Section 3 (1) gets exhausted once the suit is validly instituted.

8. For the reasons mentioned above, this appeal fails and the same is dismissed. But in the circumstances of the case, we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 977 (V 57 C 199)

(From: Bombay)*

A. N. RAY AND I. D. DUA, JJ.

Siddanna Apparao Patil, Appellant v. State of Maharashtra, Respondent.

Criminal Appeal No. 180 of 1967, D/- 6-3-1970.

(A) Criminal P. C. (1898), Section 421 — Summary dismissal of appeal — Appeal under Section 410 from sentence of Court of session — Discretion of High Court — Principles — Substantial and arguable points — Illustrations.

Under S. 421, Cr. P. C. the Appellate Court undoubtedly has power of summary dismissal; but if the appeal raises arguable and substantial points the High Court should give reasons for rejection

*(Criminal Appeal No. 1444 of 1966, D/- 5-12-1966 — Bom.)

of appeal. The rejection of an appeal by using only one word of dismissal causes difficulties and embarrassment in finding out the reasons which weighed with the High Court in dismissal of the appeal in limine. The High Court should not summarily reject criminal appeals if they raise arguable and substantial points. AIR 1953 SC 282 and Criminal Appeal No. 188 of 1969, D/- 9-2-1970 (SC) and AIR 1963 SC 1696, Rel. on. (Para 6)

Where two accused are charged under Section 302/34 and one of them is acquitted, the question whether the conviction of the other under Section 302/34 is possible, is an arguable and substantial matter of law. (Para 12)

So also, the contention that it would be an error to hold that there was intimacy between the appellant and the wife of another person on the evidence of third parties when neither of them gave evidence would be an arguable and substantial point. Case law referred. (Para 12)

(B) Constitution of India, Article 136 — Appeal by special leave — Powers of Supreme Court — Dismissal of appeal under Section 410 in limine by High Court by using single word even though it raised substantial and arguable points — Dismissal is improper — Order set aside and appeal remanded for rehearing according to law. (Paras 13, 14)

Cases Referred: Chronological Paras

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| (1970) Criminal Appeal No. 188 of 1969, D/- 9-2-1970 = (1970) 1 SCWR 320, Govinda Kadtuji Kadam v. State of Maharashtra | 5 |
| (1969) Criminal Appeal No. 38 of 1969, D/- 17-9-1969 (SC), Bhanwar Singh v. State of Rajasthan | 9 |
| (1969) Criminal Appeal No. 95 of 1969, D/- 18-9-1969 (SC), Vishwanath Shankar Beldar v. State of Maharashtra | 10 |
| (1968) AIR 1968 SC 609 (V 55) = (1968) 2 SCR 88, Narayan Swami v. State of Maharashtra | 8 |
| (1968) Criminal Appeal No. 262 of 1968, D/- 20-12-1968 = (1969) 1 SCWR 374, Bashir Husain Peshmani v. State of Maharashtra | 11 |
| (1963) AIR 1963 SC 1413 (V 50) = 1963 (2) Cri LJ 351, Krishna Govinda Patil v. State of Maharashtra | 12 |
| (1963) AIR 1963 SC 1696 (V 50) = (1964) 3 SCR 237 = 1963 (2) Cri LJ 534, Chittaranjan Das v. State of West Bengal | 6 |

- (1956) AIR 1956 SC 51 (V 43)=
 1956 Cri LJ 147, Prabhu Navle
 v. State of Bombay 12
 (1953) AIR 1953 SC 282 (V 40)=
 1953 SCR 809= 1953 Cri LJ 1127,
 Mushtak Hussain v. State of Bom-
 bay 5

M. S. K. Sastri and S. P. Nayar, Advoca-
 cates, for Respondent.

The following Judgment of the Court
 was delivered by

RAY, J.:— This is an appeal by special
 leave against the judgment of the High
 Court of Bombay dated 5th December,
 1966 dismissing in limine the appeal pro-
 ferred against the judgment and order
 dated 16th August, 1966 passed by the
 Session Judge, Sholapur. The High Court
 by an order dated 3rd April, 1967 also re-
 fused leave to appeal to this Court.

2. The appellant was accused No. 1.
 He was convicted under Section 302 read
 with Section 34 of the Indian Penal Code
 and sentenced to imprisonment for life.

3. Broadly stated, the charge against
 the appellant was that he in conspiracy
 with his brother, accused No. 2, commit-
 ted murder of Ravansidhappa Shivappa
 Patil and Mahadeo Sidran Patil. The de-
 fence of both the appellant and his bro-
 ther was one of total denial.

4. The right to prefer an appeal from
 sentence of Court of Sessions is confer-
 red by Section 410 of the Criminal Proce-
 dure Code. The right to appeal is one
 both on a matter of fact and a matter of
 law. It is only in cases where there is a
 trial by jury that the right to appeal is
 under Section 416 confined only to a mat-
 ter of law.

5. This Court in several decisions dealt
 with Section 410 of the Criminal Proce-
 dure Code and the rights of the appel-
 lant thereunder. References may be
 made to one of the earlier decisions of
 this Court in Mushtak Hussain v. State
 of Bombay, 1953 SCR 809= (AIR 1953
 SC 282) and the recent unreported de-
 cision in Govinda Kadtuji Kadam v. State
 of Maharashtra, Criminal Appeal No. 188
 of 1969, D/- 9-2-1970 (SC) where several
 previous decisions of this Court have
 been noticed.

6. The following principles emerge
 from the decisions; first, the Appellate
 Court undoubtedly has power of sum-
 mary dismissal; secondly, if the appeal
 raises arguable and substantial points the
 High Court should give reasons for rejec-
 tion of appeal; thirdly, rejection of an ap-

peal by using only one word of dismissal
 causes difficulties and embarrassment in
 finding out the reasons which weighed
 with the High Court in dismissal of the
 appeal in limine; fourthly this Court in
 Chittaranjan Das v. State of West Ben-
 gal, (1964) 3 SCR 237= (AIR 1963 SC
 1696) held that the High Court should not
 summarily reject criminal appeals if they
 raise arguable and substantial points.

7. As to what is an arguable and a
 substantial point may be illustrated with
 reference to a few decisions.

8. In Narayan Swami v. State of
 Maharashtra, (1968) 2 SCR 88 = (AIR
 1968 SC 609) this Court stated that a
 ground in preferring an appeal from the
 judgment of the Sessions Court that a
 gross illegality was committed in relying
 upon the evidence given by a co-accused
 in a dacoity case and using the answers
 given by him as a co-accused against the
 accused appellant would be a substantial
 question. Again it was noticed that de-
 nial of an opportunity to an appellant in
 a dacoity case of being heard as requir-
 ed under Section 479A of the Criminal
 Procedure Code would be an arguable
 point.

9. In an unreported decision of this
 Court in Bhanwar Singh v. State of Rajas-
 than, Criminal Appeal No. 88 of 1969,
 D/- 17-9-1969 (SC), it was held that
 failure to consider the position in which
 the appellant was placed when his im-
 mediate superior admittedly ordered him to
 bring out the currency notes which were
 required not for the purpose of investiga-
 tion of any case but only for the purpose
 of being shown to a person whom the sub-
 inspector wanted to help in laying down
 a new trap would be a substantial ground
 in a conviction under Prevention of Cor-
 ruption Act and Section 409 of the Indian
 Penal Code.

10. In another unreported decision of
 this Court in Viswanath Shankar Beldar
 v. State of Maharashtra, Criminal Appeal
 No. 95 of 1969, D/- 18-9-1969 (SC) it was
 said that if the trial Judge did not ac-
 cept the witness as a wholly truthful wit-
 ness in the light of reports sent by police
 officers and his statement under Section
 162 of the Criminal Procedure Code and
 remarked that a portion of the evidence
 was clearly an improvement it was neces-
 sary for the High Court to consider the
 evidence afresh.

11. In another unreported earlier de-
 cision of this Court in Bashir Hussain
 Peshmani v. State of Maharashtra, Cri-
 minal Appeal No. 262 of 1968, D/- 20-12-

1968 (SC) the offences alleged were under the Indian Penal Code, the Sea Customs Act, 1878 and the Foreign Exchange Regulation Act, 1947 in respect of gold alleged to have been brought into India in pursuance of a conspiracy. There was oral testimony of accomplices. That evidence was held by the trial Court to have been corroborated by the actual finding of gold from the place of one of the accused. Another piece of evidence was the recovery of duplicate set of keys at the residence of accused No. 2. Reliance was placed by the trial Court on the confession of the appellant which had been retracted as corroborative evidence of the accomplice witnesses. In preferring appeal to the High Court the grounds urged were that there were serious infirmities in the evidence and the manner in which the keys were recovered was open to objection. The High Court dismissed the appeal in limine. This Court remitted the matter back to the High Court for disposal of the appeal in accordance with law by expressing the view that these were arguable points. In the same case it was said that it would be open to the appellant to canvass before the High Court in appeal every point even on a question of fact in his favour to demolish by reference to other material the evidence that had been used against him.

12. In the present case, one of the contentions of the appellant in the appeal preferred was that the appellant was charged under Section 302 read with Section 34 of the Indian Penal Code for committing murder of both the Patils in furtherance of the common intention of the appellant and accused No. 2 and on accused No. 2 being acquitted the appellant could not be convicted with the aid of Section 34. In aid of that contention reliance was placed on the decisions of this Court in Prabhu Navle v. State of Bombay, AIR 1956 SC 51 and Krishna G. Patil v. State of Maharashtra, AIR 1963 SC 1413. Another contention raised in the appeal was that it would be an error to hold that there was intimacy between the appellant and Nilava wife of Babanna on the evidence of third parties when neither Babanna nor Nilava gave evidence. We have only referred to two contentions amongst several others to illustrate both arguable and substantial matters of law and of fact.

13. In the present case the High Court dismissed the appeal by a single word and it is not possible to know the reasons

which persuaded the High Court to dismiss the appeal.

14. In the result the appeal is allowed. The order of dismissal of the appeal is set aside. The matter is sent back to the High Court for fresh consideration on hearing the parties.

Appeal allowed and
Case Remanded.

AIR 1970 SUPREME COURT 979
(V 57 C 200)

(From: Bombay)

A. N. RAY AND I. D. DUA, JJ.

Dnyanu Hariba Mali and others, Appellants v. The State of Maharashtra, Respondent.

Criminal Appeal No. 222 of 1967, D/- 10-3-1970.

(A) Criminal P. C. (1898), Section 410 — Appeals under, from sentence of Sessions Court — Substantial and arguable points raised — High Court should not dismiss appeal in limine — Right of self-defence is arguable and substantial point — (Penal Code (1860), Section 97) — Judgment of Bombay High Court, D/- 26-6-1967, Reversed.

In dealing with appeals under section 410 from sentences of Court of Sessions the High Court should give reasons for rejection of an appeal and if arguable and substantial points are raised, the High Court should not summarily reject the appeal. The point of the right of self-defence is a substantial and arguable point of law. It is desirable that the High Court should deal with it if raised by the appellants in the light of the principles laid down by the Supreme Court and not dismiss the appeal in limine. AIR 1970 SC 977, Ref.; Judgment of Bombay High Court, D/- 26-6-1967, Reversed. (Para 9)

(B) Penal Code (1860), Section 97 — Right of self-defence — Nature of.

The right of self-defence is an important one. The onus is on the accused. This right can be availed of by the accused only when circumstances fully justify the exercise of such a right. There is a right of appeal on fact as well as on law. (Para 9)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 977 (V 57) =
Criminal Appeal No. 180 of 1967
D/- 6-3-1970 Siddanna Apparao
Patil v. State of Maharashtra 9

The following judgment of the Court was delivered by

RAY, J.:— This is an appeal by special leave against the judgment of the High Court at Bombay dated 28th June, 1967 dismissing in limine the appeal filed by the appellants against the judgment of the Additional Sessions Judge, Sholapur dated 6th February, 1967.

2. The appellants Dnyanu, Tukaram and Hariba were convicted under Section 302 read with Section 34 of the Indian Penal Code and each of them was sentenced to undergo imprisonment for life. The appellants were also convicted under Section 320 read with Sec. 34 of the Indian Penal Code and each of them was sentenced to undergo rigorous imprisonment for a period of one year. The appellants were also convicted under Section 323 read with Section 34 of the Indian Penal Code and each of them was sentenced to undergo rigorous imprisonment for a period of one month only. All the sentences were to run concurrently.

3. The prosecution case in short is as follows. There were criminal prosecutions between the appellants and some members of the party of Dnyanuba Gadade. Dnyanuba and prosecution witness Panda Shingade appeared in those cases as witnesses against the appellants. On 3rd July, 1966 Dnyanuba went to the shop of one Gulab Kalawat at Taluka Sangda in Sholapur District for getting some grocery on credit. The shop-keeper declined to give him grocery and a quarrel ensued between the two. The prosecution case is that the complainant Narayan Baku, Panda Shingade, Yeshwant Patil, Gana Patil and Nana Gadade happened to be there casually and on the complainant's intervention the dispute was settled. Thereafter Hariba who is an old man of 75 arrived at the shop of Gulab and without any rhyme or reason started abusing Panda Shingade. Thereupon, Panda beat appellant Hariba with a chapal and Dnyanuba beat him with fists. Again the complainant intervened and pacified the parties whereupon appellant Hariba left the place and went towards his flour-mill.

4. Shortly thereafter appellants Tukaram and Hariba came to the shop of Gulab. Tukaram was armed with an iron pipe. Apprehending that the appellants might beat Dnyanuba and Panda, the complainant went ahead and entreat-

ed the appellants not to rake up the quarrel which was already settled. The appellants then went to their farm-house. Dnyanuba and his companions continued to sit at the shop of Gulab for more than an hour. Then the party of Dnyanuba thought that it would not be safe to allow Dnyanuba to go alone, they all started going towards the house by a foot track which passed through the land of one Narayan Mali. The appellants who were in their farm-house saw the party going along the foot track and they left the farm-house and went towards the approaching party. Appellant No. 1 carried two spears in his hand, one of which he handed over to appellant No. 2 on the way. Then the appellants and the party of the deceased came across each other on the foot track in Narayan's fields. Then Dnyanuba requested the appellants not to beat them since the quarrel was settled. Disregarding this request, at the instigation of appellant No. 3, appellant No. 2 stabbed Dnyanuba with a spear on his chest. Dnyanuba then collapsed. Thereupon Yeshwant Patil fell on his person to save him and appellant No. 1 stabbed Yeshwant Patil on his back. The complainant tried to snatch the spear from the hands of appellant No. 1. Injury was caused to the index-finger of the complainant's right hand. At the same time appellant No. 2 hit Nana Gadade with the handle of the spear. Then 5 members of the party of the deceased began to pelt stones at the appellants. The appellants sustained injuries.

5. The appellants denied the charge and pleaded a right of self-defence. This defence was that the party of the deceased Dnyanuba which consisted of about 15 to 20 persons were the aggressors and were beating the appellants Nos. 2 and 3 with sticks and stones. Appellant No. 1 and his wife were coming to the place of the incident. When they approached, the opposite party pelted stones at them and both of them sustained injuries. In the melee appellant No. 1 took out a knife and in self-defence started using it against the aggressors as a result of which some members from the opposite party might have received injuries.

6. It will appear from the judgment of the Sessions Court that two of the main points which fell for determination were; first, whether the accused in general, and accused No. 2, in particular, caused the injuries to Dnyanuba Gadade and three others in self-defence, and,

secondly, whether the accused in furtherance of common intention murdered Dnyanuba Gadade.

7. In the memorandum of appeal filed by the appellants before the High Court at Bombay, the principal questions raised by the appellants were these. First, that the trial Judge failed to appreciate that considering the situation of the shop of Gulab Kalawat from where the deceased and his companions proceeded to go to their houses towards the north they could not possibly have thought of going through Narayan's field when very close to Gulab's shop was a cart track which took them straight to their houses. Secondly, that the trial Judge should have proceeded to consider and appreciate the respective versions of the prosecution and the defence as against the background of this position and the expected natural course of conduct on the part of the other party in proceeding towards their house by the shorter and the more convenient way of cart-track. Thirdly, that the defence version that the party of the deceased actually chased appellants Nos. 2 and 3 through the field of Narayan and assaulted them with sticks and stones in the field appears to be more natural and more probable and therefore more acceptable and that the alleged foot track appears to have been invented by the prosecution to explain their meeting the appellants in the field of Narayan. Fourthly, that the deceased and his party were in an aggressive mood and that in view of the previous litigation they wanted to settle accounts with the appellants and with that view they chased appellants Nos. 2 and 3 and overtook them in the field of Narayan and assaulted them with sticks and stones and that the prosecution story put forward that stones were hurled at the appellants in self-defence by the party of the deceased was invented in self-defence by the prosecution. Fifthly, that if the only object of the opposite party was to scare away the appellants and prevent them from making a further assault, the appellants as soon as the opposite party started pelting stones at them would have run away and would not have sustained so many injuries as a result of stone throwing by the other party and that therefore in all probability the appellants sustained their injuries under the circumstances and in the manner alleged by them and not as alleged by the prosecution. Sixthly, that the trial Judge committed a serious error in referring to what

the defence witness did not state before the police thereby allowing the statement of a defence witness under Section 162 of the Criminal Procedure Code to be used at the trial. Finally, the conflict between the complainant's first information report and his evidence at the trial was not appreciated.

8. Some of the important points raised by the appellants have been referred to above only to illustrate the arguable and substantial points raised by the appellants both as to fact and law.

9. The High Court dismissed the appeal with a one word order of dismissal. It is, therefore, not possible to know the reasons which persuaded the High Court to do so. This Court has, from time to time, stated that in dealing with appeals under Section 410 of the Criminal Procedure Code from sentences of Court of Sessions the High Court should give reasons for rejection of an appeal and if arguable and substantial points are raised the High Court should not summarily reject the appeal. In *Siddanna Apparao Patil v. State of Maharashtra*, Criminal Appeal No. 180 of 1967, D/- 6-3-1970 = (reported in AIR 1970 SC 977) reference has been made to a few decisions of this Court which illustrate as to what substantial and arguable points of law are. The right of self-defence is an important one. The onus is on the accused. This right can be availed of by the accused only when circumstances fully justify the exercise of such a right. There is a right of appeal on fact as well as on law. It is desirable that if the appellants raise arguable and substantial points, the High Court should deal with it in the light of principles laid down by this Court.

10. The appeal is allowed. The matter is remitted to the High Court for fresh consideration on hearing the parties.

Appeal allowed.

AIR 1970 SUPREME COURT 981
(V 57 C 201)

(From: Madhya Pradesh)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

B. C. Kame, Appellant v Nemi Chand Jain, Respondent.

Civil Appeals Nos. 124 of 1967 and 433 and 434 of 1970, D/- 5-3-1970.

DN/DN/B183/70/CWM/A

Houses and Rents — M. P. Accommodation Control Act (41 of 1961), S. 13 (1), (5) and (6) — When tenant can get benefit of protection against eviction — Default in payment of rent — Suit for ejectment — Failure to deposit arrears of rent within one month from service of writ of summons — Subsequent payment can be of any avail only if on application made by tenant Court extends time.

It is clear from reading of S. 12 (1) (a) and (3) and Section 13 (1) and (5) and (6) that for non-payment of rent, the tenancy shall not be terminated and the Court shall not pass a decree in ejectment if within two months of the date on which a notice of demand for rent has been served on the tenant he makes payment of the amount or tenders the amount of rent due by him to the landlord. If he does so, no suit will lie against him on the ground of default in the payment of rent. Even if no such payment is made within two months as provided by Section 12 (1) the tenant may within one month from the service of the writ of summons deposit the amount in Court or pay to the landlord the amount due by him till then and continue to pay or deposit "month by month" the rent accruing due. Even if he does not pay the amount within one month he may on an application made by him ask for extension of time, and if the Court grants the extension the amount may be paid by him within such extended time. In such a case, by virtue of sub-s. (5) of S. 13 on the ground of default in the payment of rent, the Court will not proceed to pass a decree in ejectment. But it is clear that under sub-section (1) of Section 13 the normal period during which the amount has to be paid to the landlord or deposited in Court is one month from the service of the writ of summons. If the tenant pays the amount of rent in arrears within one month he is immune from liability to be evicted for default in that behalf. If, however, he does not pay the amount or deposit it in Court, any subsequent payment made by him will come to his aid only if on an application made by him the Court extends the time. (Para 5)

The following Judgment of the Court was delivered by

SHAH, J.: Nemi Chand Jain—hereinafter called 'the plaintiff'—is the owner of five tenements in the town of Jabalpur and B. C. Kame—hereinafter called 'the defendant' is the tenant of those tenements

under distinct tenancy agreements. After determining the tenancies by a notice, the plaintiff instituted five suits in the Court of the Civil Judge, Second Class, Jabalpur, for orders in ejectment against the defendant in respect of the five tenancies, on the plea that the defendant had failed and neglected to pay the rent for a period exceeding three years. The summonses in the suits were served upon the defendant on May 6, 1963. The Court re-opened after the summer recess on June 10, 1963, and the defendant deposited in Court on June 11, 1963 Rs. 1,841 being the amount of rent and other dues for 38 months. The deposit was not supported by an application by the defendant for extension of time or for condonation of delay in making the deposit. The defendant also did not continue thereafter to pay regularly the rent due by him every month according to law. Between the months of June, 1963 and May, 1965 except on two occasions, he did not pay within the prescribed time the rent accrued due.

2. By order of the Civil Judge the suits were consolidated for trial. After the evidence was recorded and during the course of the argument the defendant applied on July 26, 1965 for extension of time in making payment of rent due. This application was rejected and the Civil Court passed a decree against the defendant in respect of the five tenements. Against the orders passed by the Civil Judge, five appeals were preferred to the District Court at Jabalpur. The defendant contended that in respect of the two tenements Nos. 374 and 382 rent due was sent by money order, and the Trial Court had wrongly rejected his application for producing evidence to support the case that he was not in default in respect of those tenements, and be applied for permission to lead additional evidence. The learned District Judge was of the view that the Trial Court had "rather acted harshly in refusing to give an opportunity to the defendant for adducing evidence with regard to money-order coupons which he had sought to produce". In the view of the Court the "circumstances alleged and not denied by the plaintiff did point out that the fault in not getting the evidence regarding those coupons produced was not entirely due to the negligence of the defendant, and therefore the defendant should not have been solely blamed for that", and that the defendant should have been given the opportunity to lead that evi-

dence. The learned Judge further held that in respect of the three other premises there was default and no case was made out for extension of time. But on the assumption that by virtue of the order of consolidation there was only one trial and one judgment arising out of the suits pending before him and since the order of the Trial Court in respect of the suits arising out of the claim to premises Nos. 374 and 382 was set aside, the District Judge directed that the orders be set aside in all the five suits and the suits be remanded for trial according to law.

3. Against the order made by the District Court five revision applications were preferred to the High Court of Madhya Pradesh. Two revision applications, insofar as they related to the claim for possession in respect of tenements Nos. 374 and 382 were summarily rejected by the High Court. But in the other three revision applications Nos. 409, 410 and 412 of 1965 rule was issued to the defendant to show cause why the orders made by the District Court should not be set aside. The High Court confirmed the view of the District Court that no case was made out for extension of time for payment of the amount under Section 13 (1) of the Madhya Pradesh Accommodation Control Act, 1961. The High Court further held that the District Court was in error in setting aside the decree passed by the Trial Court which was the subject-matter of the three revision applications. The High Court accordingly reversed the order passed by the District Court and restored the decree passed by the Trial Court in respect of those three tenements. With special leave, the defendant has appealed to this Court.

4. The order passed by the District Court setting aside the judgment passed by the Court of First Instance in respect of those premises in respect of which there was default in payment of rent was plainly erroneous and the High Court was right in setting aside the order. But Mr. Patel appearing on behalf of the defendant contends that the Trial Court and the District Court had committed an error in holding that they had no jurisdiction to extend the time for payment of rent after the suit was instituted. Section 12 of the Madhya Pradesh Accommodation Control Act, 1961, provides by the first sub-section, insofar as it is material:

"Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil

Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely:—

(a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner;

X X X X X X "

By sub-section (3), insofar as it is material, it is provided:

"No order for the eviction of a tenant shall be made on the ground specified in clause (a) of sub-section (1), if the tenant makes payment or deposit as required by Section 13.

X X X X "

By Section 13 (1) it is provided:

"On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 12, the tenant shall, within one month of the service of the writ of summons on him or within such further time as the Court may, on an application made to it, allow in this behalf, deposit in the Court or pay to the landlord an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate."

By sub-sections (5) and (6) it is provided:

"(5) If a tenant makes deposit or payment as required by sub-section (1) or sub-section (2), no decree or order shall be made by the Court for the recovery of possession of the accommodation on the ground of default in the payment of rent by the tenant, but the Court may allow such cost as it may deem fit to the landlord.

(6) If a tenant fails to deposit or pay any amount as required by this section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit."

5. It is clearly intended thereby that for non-payment of rent, the tenancy shall not be terminated and the Court shall not pass a decree in ejectment if within two months of the date on which a notice of demand for rent has been served on the tenant he makes payment of the

amount or tenders the amount of rent due by him to the landlord. If he does so, no suit will lie against him on the ground of default in the payment of rent. Even if no such payment is made within two months as provided by Section 12 (1) (a) the tenant may within one month from the service of the writ of summons deposit the amount in Court or pay to the landlord the amount due by him till then and continue to pay or deposit "month by month" the rent accruing due. Even if he does not pay the amount within one month he may on an application made by him ask for extension of time, and if the Court grants the extension the amount may be paid by him within such extended time. In such a case by virtue of sub-section (5) of Section 13, on the ground of default in payment of rent, the Court will not proceed to pass a decree in ejectment. But it is clear that under sub-section (1) of Section 13 the normal period during which the amount has to be paid to the landlord or deposited in Court is one month from the service of the writ of summons. If the tenant pays the amount of rent in arrears within one month he is immune from liability to be evicted for default in that behalf. If, however, he does not pay the amount or deposit it in Court, any subsequent payment made by him will come to his aid only if on an application made by him the Court extends the time.

6. In the present case the defendant did not pay the rent due by him within one month from the date on which the amount of rent was payable by him. We need not consider the question, whether if the amount if paid on June 10, 1963, rent would have been deemed to be properly paid. The amount was deposited in Court on June 11, 1963. The deposit was clearly beyond time. The defendant made no application for extension of time and no order was made by the Court extending the time. Even after the first payment the defendant did not continue to pay regularly the amount of rent falling due by him during the pendency of the suit. It was only on July 23, 1965, that he applied for extension of time and the Court rejected the defendant's prayer for extension.

7. It is true that the learned District Judge in the course of his judgment mixed up the discussion on two different contentions, one with regard to striking out the defence of the defendant for non-payment of rent, and the other relating to extension of time for payment of rent.

But on a fair reading of the judgment it appears that he was of the view that on the facts before him no case was made out by the defendant for extension of time in exercise of the jurisdiction of the Court. The High Court declined to enter upon an enquiry whether the District Judge was right in so holding, because in the view of the High Court, in a revision application under Section 115 of the Code of Civil Procedure the decision of the District Court was binding.

8. We are unable to agree with Mr. Patel that the District Court held that it had no jurisdiction to extend the time. The Court held that it had jurisdiction to extend the time but on merits no case was made out for an order extending the time.

9. The appeals fail and are dismissed with costs. There will be one hearing fee.

Appeals dismissed.

AIR 1970 SUPREME COURT 984

(V 57 C 202)

(From: Gujarat)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Ratilal Shankarabhai and others, Appellants v. State of Gujarat and others, Respondents.

Civil Appeal No. 212 of 1967, D/- 11-3-1970.

(A) Land Acquisition Act (1894) Section 49 — Acquisition for housing scheme prepared by registered co-operative body — Acquisition is for "public purpose" — Substantial sum paid by State towards compensation. — There is sufficient compliance with Sections 40 to 42. AIR 1961 SC 343, Rel. on. (Para 5)

(B) Land Acquisition Act (1894), S. 6(3) — Declaration under S. 6 — Conclusive evidence that land in question is needed for a public purpose.

Where there is a declaration under S. 6 that the land proposed to be acquired is needed for a public purpose, the court cannot go into the question whether the need was genuine or not unless it is satisfied that the action taken by the Government was a fraudulent one. The conclusiveness in S. 6 (3) must necessarily attach not merely to a need but also to the question whether the

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purpose was a public purpose. AIR 1963 SC 151, Foll. (Para 7)

(C) Land Acquisition Act (1894), S. 3 (f) (Guj) — Housing scheme for section of public may also be for public purpose.

It cannot be contended that a housing scheme for a limited number of persons cannot be considered as a public purpose. The need of a section of the public may be a public purpose. Ordinarily the Government is the best authority to determine whether the purpose in question is a public purpose or not. (Para 7)

(D) Land Acquisition Act (1894), S. 6 — Notification under — Contention that Government acted blindly.

Before issuing the notification under S. 6, there was an enquiry under S. 5 (a). The Government had issued that notification after examining the report submitted by the concerned Officer.

Held that in the absence of any material on record, the Government could not be said to have acted blindly in issuing that notification. (Para 9)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 151 (V 50) =
(1963) 2 SCR 774, Smt. Somawanti v. State of Punjab 7
(1961) AIR 1961 SC 343 (V 48) =
(1961) 2 SCR 459, Jhandulal v. State of Punjab 6

The following Judgment of the Court was delivered by

HEGDE, J.: The only reason why this appeal had to be heard by this Court is that the appellants were entitled in law for a certificate under Article 133 (1) (b) of the Constitution as against the order of the High Court summarily dismissing their writ petition on the strength of which they had a right of appeal to this Court.

2. The appellants are the owners of certain lands in village Wadaj in Ahmedabad. Some areas out of those lands were notified for acquisition under Section 4 of the Land Acquisition Act, 1894 on March 19, 1964 for a housing scheme prepared by the 3rd respondent, a Co-operative Society registered under the Co-operative Societies Act. The notification under Section 4 was followed up by an enquiry under Section 5 (a). Thereafter a notification under Section 6 of that Act was issued on October 1, 1964. This was followed up by other proceedings under the Land Acquisition Act. During the pendency of those pro-

ceedings, the appellants moved the High Court of Gujarat under Article 226 of the Constitution challenging the validity of the acquisition proceedings. That petition was summarily dismissed by the High Court.

3. The acquisition proceedings were challenged before us on various grounds. We shall now proceed to deal with the grounds urged before us. It was urged by the learned Counsel for the appellant that the proposed acquisition was for a company and as no steps were taken under Ss. 40 to 42 of the Land Acquisition Act, the proceedings are vitiated. It is conceded on behalf of the State that the agreements contemplated by Ss. 40 to 42 were not entered into. But it was urged on behalf of the respondents that the acquisition in question was not for the purpose of a company but it was for a public purpose. Both the notifications under Ss. 4 and 6 say that the proposed acquisition was for a public purpose namely for a housing scheme undertaken by Shri Alapa Housing Co-operative Society Ltd., Ahmedabad with the sanction of the Government. Therefore, if the proposed acquisition is not for a company but for a public purpose then there was no need to comply with Ss. 40 to 42.

4. Gujarat legislature by Gujarat Unification and Amendment Act 30 of 1965 amended cl. (f) of S. 3 of the Land Acquisition Act, 1894 which defined the expression "public purpose". As per that amendment after sub-cl. (2) the following clause was added:

"and (3) a housing scheme which the State Government may from time to time undertake for the purpose of increasing accommodation for housing persons and shall include any such scheme undertaken from time to time with the previous sanction of the State Government by a local authority or company."

5. The expression "company" as defined in the Land Acquisition Act includes a co-operative society within the meaning of Co-operative Societies Act, 1912. The third respondent is one such Society. Therefore, it is clear that the proposed acquisition is one for "public purpose". It may also be noted that the State Government contributed a substantial sum towards the compensation payable for the acquisition in question. Therefore the contention of the appellant that the proposed acquisition is invalid inasmuch as there was no compliance with Ss. 40 to 42 must fail.

6. Our conclusion in this regard is supported by the decision of this Court in *Pt. Jhandulal v. State of Punjab*, (1961) 2 SCR 459 = (AIR 1961 SC 343).

7. We are unable to accede to the contention of the appellant that a housing scheme for a limited number of persons cannot be considered as a public purpose. It was said that there were hardly about 20 members in the co-operative society in question and therefore the housing scheme for their benefit cannot be considered as a public purpose. It was also urged that there was no need for acquiring any land for the scheme in question. Section 6 (3) of the Land Acquisition Act provides that a declaration under S. 6 shall be conclusive evidence that the land proposed to be acquired is needed for a public purpose. Therefore this Court cannot go into the question whether the deed was genuine or not unless we are satisfied that the action taken by the Government was a fraudulent one. We are also unable to concede to the proposition that the need of a section of the public cannot be considered as a public purpose. Ordinarily, the Government is the best authority to determine whether the purpose in question is a public purpose or not and further the declaration made by it under S. 6 is a conclusive evidence of the fact that the land in question is needed for a public purpose — see *Smt. Somavanti v. State of Punjab*, (1963) 2 SCR 774 = (AIR 1963 SC 151). That decision lays down that conclusiveness in S. 6 (3) must necessarily attach not merely to a 'need' but also to the question whether the purpose was a public purpose.

8. There is no substance in the contention that the notifications under Sections 4 and 6 were vague. They are similar to notifications usually issued under Ss. 4 and 6. Therein it is clearly mentioned that the proposed acquisition was for a public purpose. The public purpose in question was also stated therein.

9. We are also unable to accept the contention of the learned Counsel for the appellant that the Government did not apply its mind before issuing the notification under Section 6. Before issuing that notification, there was an enquiry under Section 5 (A). The Government had issued that notification after examining the report submitted by the concerned officer. There is no material on record from which we can rea-

sonably come to the conclusion that the Government had acted blindly in issuing that notification.

10. For the reasons mentioned above this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 986 (V 57 C 263)

J. C. SHAH AND K. S. HEGDE, JJ.

Bhagwan Dass and another, Appellants v. S. Rajdev Singh and another, Respondents.

Civil Appeal No. 2320 of 1969, D/- 2-4-1970.

Houses and Rents — Delhi Rent Control Act (59 of 1958), S. 39 (2) — Second appeal — Substantial question of law — Rent Controller and Rent Control Tribunal holding, on consideration of relevant terms of agreement between the tenant and third party and on oral evidence that there was sub-letting by the tenant in favour of the third party — On that finding no question of law much less a substantial question of law, arose.

(Para. 7)

The following judgment of the Court was delivered by

SHAH, J.: The respondent applied to the Rent Controller, Delhi, for an order evicting the appellant and Usha Sales (P) Ltd., from certain premises described as 55-G, Connaught Circus, New Delhi (let to the appellant) on the ground, amongst others, that the appellant had sublet the premises to Usha Sales (P) Ltd. The Rent Controller held sub-letting by the appellant of the premises proved and made an order evicting the appellant from the premises. The order was confirmed in appeal by the Rent Control Tribunal.

2. In the view of the Rent Controller and the Rent Control Tribunal the premises were occupied by Usha Sales exclusively under an authority conferred by the appellant and that the appellant was receiving Rs. 2,000/- per month as rent, and had no control over the premises.

3. The order of the Rent Control Tribunal was confirmed in second appeal by the High Court. With special leave, the appellant appeals to this Court.

4. Mr. A. K. Sen contends that under the terms of the agreement between the

appellant and Usha Sales the former was appointed an agent for displaying and selling the products of Usha Sales, and the appellant was in occupation of the premises on his own behalf for the purpose of his business as an agent.

5. We have carefully read the terms of the agreement between Usha Sales and the appellant. The agreement is a curious mixture of inconsistencies. It is plainly a clumsy attempt to camouflage the sub-tenancy which was intended to be created thereby. The principal provisions of the agreement are—

(1) that the premises were to be used for carrying on the business of Usha Sales;

(2) that the goods to be sold in the premises were to belong to Usha Sales and the appellant was to have no interest therein. Neon signs and sign-boards displayed were to be of Usha Sales;

(3) that control over the sale of goods and premises was to be of Usha Sales and the staff employed was also of Usha Sales;

(4) that price of the goods sold was to be recovered by Usha Sales and it was expressly agreed that it was not to be collected by the appellant. Sales were to be made by the employees of Usha Sales appointed by them;

(5) that a portion of the premises set apart for conducting a sewing school was to be in the control of Usha Sales: profits made therein were to enure to Usha Sales: all reports and accounts were to be submitted to the Usha Sales in respect of the sewing school;

(6) that Usha Sales were to maintain the accounts of the business; and

(7) that no remuneration was fixed for payment to the appellant: it was to depend upon the "discretion" of Usha Sales. These covenants *prima facie* show that Usha Sales carried on the business of selling sewing machines and accessories, and the sewing school conducted in the premises and that the appellant did not carry on business or conduct the sewing school as agent of Usha Sales. The High Court has found that on the evidence it was clear that the keys of the padlock applied to the premises remained with Usha Sales and their employees used to open the premises every morning and to lock up every evening. It is true that there are covenants in the agreement which provide that Usha Sales had to hand over the machines for sale to the appellant; that the appellant was to have supervision over the staff of Usha Sales;

that the appellant was to "remain in complete control and supervision of the premises"; and that the appellant was not to sublet, assign or part with possession of the premises. But on a consideration of all the terms, the oral evidence, and the circumstances, the Rent Courts and the High Court have come to the conclusion that an attempt was made to camouflage the real agreement between the parties to give it the form of an agreement of agency, whereas in truth it was intended to be an agreement of sub-letting.

6. Reliance was placed upon a somewhat obscure statement made by the High Court that the relationship between the appellant and Usha Sales was

"more analogous to a partnership than to an agency; and that the appellant was in the nature of a sleeping partner, who provided the premises to the partnership, while Usha Sales was the active partner who carried on the business in the premises".

But the High Court has clearly found that by the agreement the Usha Sales had the right of exclusive use of the premises for its own business.

7. A second appeal lies to the High Court against the decision of the Rent Control Tribunal under Section 39 (2) of the Delhi Rent Control Act, 1958, only if the appeal involves some substantial question of law. The Rent Controller and the Rent Control Tribunal, on a consideration of the relevant terms of the agreement and oral evidence and the circumstances found that a clear case of sub-letting was established. On that finding no question of law, much less a substantial question of law, arose.

8. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 987

(V 57 C 204)

(From: Bombay)*

J. C. SHAH AND K. S. HEGDE, JJ.

Vallabh Das, Appellant v. Dr. Madanlal and others, Respondents.

Civil Appeal No. 615 of 1966, D/- 2-4-1970.

(A) Constitution of India, Article 136 — Practice — Finding of fact — Supreme Court ordinarily does not interfere with concurrent findings of fact arrived at by

* (Appeal No. 191 of 1956, D/- 25-6-1962 — Bom at Nag.)

DN/EN/B664/70/VBB/A

Trial Court and High Court — (Civil P. C. (1908), Section 112). (Paras 2, 3)

(B) Civil P. C. (1908), Order 23, R. 1 — "Same subject matter" — Meaning — Cause of action and relief claimed in the two suits must be same.

"Subject-matter" in Order 23, Rule 1 means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit. AIR 1917 Bom 10 (1) & AIR 1917 Mad 512 (2) (FB), Rel. on.

(Para 5)
Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits.

(Para 5)
Where in the first suit the plaintiff sought to enforce his right to partition and separate possession and in the second suit, he sought to get possession of the suit properties from a trespasser on the basis of his title;

Held that the subject-matter in the two suits was not the same although the factum and validity of adoption of the plaintiff in both the suits came up for decision.

(Para 5)
Cases Referred: Chronological Paras
(1917) AIR 1917 Bom 10 (1) (V 4) =
ILR 42 Bom 155, Rukhmabai v. Mahadeo 5

(1917) AIR 1917 Mad 512 (2) (V 4) =
ILR 39 Mad 887 (FB), Singha Reddy v. Subba Reddy 5

Mr. B. R. L. Iyengar, Sr. Advocate (Mr. S. K. Mehta, Advocate of M/s. K. L. Mehta and Co. with him), for Appellant; M/s. S. N. Kherdekar, G. L. Sanghi and A. G. Ratnaparkhi, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

HEGDE, J.— One Prem Sukh was the owner of the suit properties. Parvatibai was his wife. They had no children. Prem Sukh gifted some of his properties to his wife on June 14, 1943. Dr. Madan Lal's (1st respondent in this appeal) case is that Prem Sukh adopted him on July 12, 1943. Thereafter it is said that Prem Sukh adopted on April 10, 1946, the appellant Vallabh Das. On April 29, 1946, Dr. Madan Lal instituted a suit for a declaration that he is the adopted son of Prem

Sukh and for partition and possession of his share in the family properties. Prem Sukh denied the adoption pleaded by Dr. Madan Lal. On the other hand he alleged that Vallabh Das was his adopted son. In view of that allegation, Vallabh Das was added as a supplemental defendant in that suit. No relief was claimed against him. During the pendency of that suit Prem Sukh died. Thereafter Dr. Madan Lal moved the Court to withdraw the suit. He was permitted to withdraw the same with liberty to file a fresh suit on the same cause of action on condition that he pays the defendants' costs of that suit before instituting a fresh suit. Thereafter Parvatibai bequeathed her properties to Dr. Madan Lal and died soon after. The suit from which this appeal arises was brought on November 29, 1951 even before the costs of Vallabh Das (the appellant herein) in the previous suit had been paid. Vallabh Das resisted the suit on various grounds. He contended that Dr. Madan Lal was not adopted by Prem Sukh; even if he had been adopted, that adoption was not valid under the Benaras School of Hindu law by which the parties were governed as Madan Lal was a married man on July 12, 1943 and lastly the suit as brought is not maintainable as Dr. Madan Lal had not paid the costs due to him under the order in the previous suit before instituting the present suit. Both the trial Court as well as the High Court in appeal rejected every one of the contentions taken by Vallabh Das and decreed the suit as prayed for. Thereafter this appeal was brought after obtaining special leave from this Court.

2. The factum of the adoption has been upheld both by the Trial Court as well as by the High Court. There is evidence to support that finding. No convincing circumstances was brought to our notice requiring us to review the evidence over again. This Court ordinarily does not interfere with concurrent findings of fact. We see no justification to disturb the concurrent finding of fact arrived at by the Trial Court and the High Court.

3. As regards the validity of the adoption, the contention of Vallabh Das that the adoption was invalid rests on the plea that on July 12, 1943, Dr. Madan Lal was a married man. This plea has been negatived by the Trial Court as well as by the High Court. They have come to the conclusion that Dr. Madan Lal was not a married man on that date and that he was married subsequently. Here again there is no good ground for us to inter-

here with the finding of fact reached by those Courts.

4. The only contention that was seriously pressed before us on behalf of the appellant was that the suit under appeal is not maintainable as the condition precedent imposed by the Court in the earlier suit, namely the payment of defendants' costs by the plaintiff before bringing a fresh suit on the same cause of action has not been complied with. We do not think that this contention is well founded.

5. Rule 1, Order 23, Code of Civil Procedure entitles Courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr. Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr. Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the

previous suit as well as in the present suit the factum and validity of adoption of Dr. Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in *Rukma Bai v. Mahadeo Narayan*, ILR 42 Bom 155= (AIR 1917 Bom 10 (1)) the expression "subject-matter" in Order 23, Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject-matter" means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C. J., in *Singa Reddi v. Subba Reddi*, ILR 39 Mad 987= (AIR 1917 Mad 512 (2)) (FB) that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit.

6. For the reasons mentioned above this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 989

(V 57 C 205)

(From: Patna)

M. HIDAYATULLAH, C. J., G. K. MITTER AND A. N. GROVER, JJ.

Ganga Prasad and others, Appellants v. The State of Bihar, Respondents.

Criminal Appeal No. 90 of 1967, D/-2-4-1970.

Essential Commodities Act (1955), Section 7 — Conviction under — Propriety — Dealer charged for storing foodgrains without entering in stock register — Seizure of stock-book and other registers — Delay in filing complaint — Conviction of accused mainly on ground of tampering with record while in possession of Supply Officer — Failure to prove that tampering was in interest of dealer or made at his instance — Other records not proving prosecution case — Held, conviction was improper — Decision of Patna High Court, Reversed. (Paras 4, 6)

DN/EN/B670/70/DVT/B

The following Judgment of the Court was delivered by

MITTER, J.—This is an appeal by special leave from an order of the High Court of Patna dismissing in limine the appellants' application for revision challenging their conviction under Section 7 of the Essential Commodities Act and sentence of a fine of Rs. 500/- on each or in default simple imprisonment of six months.

2. The facts are as follows. On 9th August 1965, the District Supply Officer of Arrah noticed a cart loaded with six bags of rice being taken out of a godown belonging to the firm of Ganga Prasad Sitaram whereof the appellants were partners. Not satisfied with the explanation given by the cartman in answer to his query as to the destination of the rice he entered the godown and checked the stock register and other relevant papers. He obtained a statement in writing Ex. 1 from the appellant Ganga Prasad of the food-grains received by him on August 9, 1965. He had the transactions verified by his supply inspector. At his direction Ganga Prasad also made out another list giving full details of all the food grains of different kinds held in stock on that day. This was marked as Ex. 1/1 in the proceedings before the Magistrate. He had the entire stock weighed and verified. He took away the books of account of the appellants including the stock register, Cariwani Bahi (register of carts bringing food grains), cash and credit memo books. The stock of food grains in the godown was seized on August 12, 1965. More than a month thereafter a complaint was lodged by the District Supply Officer in the Court of the Sub-Divisional Officer Arrah, Sadar, charging the appellants and three other persons with contravention of Clause 7 of the Bihar Food Grains Licensing Order 1963 promulgated under Section 3 of the Essential Commodities Act, 1955 and triable summarily under Section 12-A of the Essential Commodities Act. Leaving out of account certain minor irregularities alleged to have been committed by them the gravamen of the charge was that the appellants had on the date of inspection of the godown by the said officer stored 72 bags of rice not entered in their stock register.

3. Even before the lodging of the complaint and subsequent thereto the appellants filed in the Court of the Sub-Divisional Magistrate a number of petitions for release of the food grains seiz-

ed. The order sheet shows that the Magistrate directed the District Supply Officer to submit his report dealing with each paragraph of the petition presented on the 1st September 1965. Little heed appears to have been paid to this requisition. The complaint filed on September 16, 1965 shows that nine items of food grains had been seized by the District Supply Officer including 1021 bags of rice. The District Supply Officer however did not file a copy of the seizure list nor the books of account seized nor the original statement in writing of Ganga Prasad dated the 9th August showing the arrival of food grains at the godown on that day. As the complaint was limited to the item of 72 bags of rice alleged to have been found in the stock in excess of the quantity shown on the register, the appellants filed a petition before the Magistrate for release of all the other food grains. The order sheet under date October 13 records that the District Supply Officer did not want to reply to the query made by the Court. The Magistrate passed an order of release of all the food grains including 949 bags of rice but excluding the above mentioned 72 bags.

4. Several witnesses were examined before the Magistrate hearing the case in 1966. The defence did not call any evidence but relied on their books of account to show that the complaint was not justified. The Magistrate found against the appellants mainly on the case made by the prosecution that there had been tampering with Ex. 1 while in the custody of the Supply Department. According to the prosecution Ex. 1 before it was tampered with had sixteen figures under the column "rice" of which the first was 10 and the fourth 81 and the total of the figures in the column in the handwriting of Ganga Prasad was 1137. The document as it stands now shows the first item as the figure 100 and the fourth 81. If these were the figures originally entered by the appellant, the total should not have been 1137 as recorded by Ganga Prasad but 1207. The case of the appellants was that the figure under the column for rice had been wrongly totalled as 1137 and should have been recorded as 1207 and that the figure in the first column was 100 and the fourth 81 as originally entered but that someone had done some over-writing not only on these but on several other figures as well. It was their further case that two bags of rice had been wrongly recorded under the column for "peas" and

that the correct figure with regard to the arrival of bags of rice in the godown on 9th August was 1209. The learned Magistrate accepted the prosecution case which was based on the copies of Exs. 1 and 1/1 attested by a Magistrate and marked as Exs. 15/3 and 15/2. The Magistrate does not appear to have looked at the other documents including the stock book and the cart register to see whether there were any discrepancies between the figures as recorded therein and those made out by the appellant in Exs. 1 and 1/1 under the instructions of the District Supply Officer. He held that the prosecution had proved its case with regard to the 72 bags and convicted the appellants as stated above.

5. As the High Court dismissed the revision petition summarily we have not had the benefit of its judgment or the reasons which impelled the High Court to turn down the contention of the appellants. Before us counsel for the appellants contended that although Ex. 1 and the attested copy thereof Ex. 15/2 appear to contain manipulations these could not have been done by the appellants or for their benefit. Ex. 1/1 which shows the total stock of food grains in the godown contains various figures in three columns under the head "rice". The figures in these three columns add up to 1330. There is no suggestion of any interpolation, so far as these figures are concerned. Ex. 10 the cart register which records the different quantities of food grains received at the godown by truck or cart on 9-8-1965 contains 16 items, the total whereof comes to 1207. There is no dispute that on 8th August there were in stock 121 bags of rice. If the appellants' case with regard to two bags of rice wrongly recorded as peas be accepted, the total number of bags of rice in the godown on 9th August when the inspection was made by the Supply Officer comes to 1330. This fits in with the appellants' case as made in the petition presented to the Sub-Divisional Officer, Sadar, Arrah on 21st September 1965 showing that there were 1330 bags of rice in the godown on 9th August and that 309 bags of rice had been sold in between 9th August and 12th August when a stock of 1021 bags was seized. The appellants prayed for release of the entire stock of food grains with the exception of 72 bags of rice i.e., the subject-matter of the complaint. They expressly stated that 949 bags (1021-72) of rice should be released. Before us there was no challenge with regard to these

figures and counsel for the respondent was unable to point out any flaw in the argument advanced on behalf of the appellants that the books of account of the appellants disclosed that all the bags of rice stored in the godown had been duly accounted for and that the total of 1137 bags as recorded in Ex. 1 was only due to an error in adding up the different figures. The figures culled from the stock register, the cart register and the evidence adduced in the case leave no room for doubt that the appellants' version was the correct one and that they had not failed to account for the presence of any bags of rice in their godown on 9th August. It did however appear to us by a look at the original of Ex. 1 as compared with the attested copy Ex. 15/2 that there was some over-writing on the first four figures in the column headed "rice". The appellants could not explain how the figure 1137 was arrived at and counsel suggested that it had crept in through an error. The first four figures under the column "rice" in Ex. 1 excite suspicion and afford room for the contention that there was some interpolation or overwriting. But assuming that the document has been tampered with, it is not possible to hold the appellants responsible for it. The stock register and the cart register taken possession of by the District Supply Officer on August 9, about the genuineness of which no question was raised falsifies the document Ex. 1 if the first and the fourth figures be taken as 10 and 81. The appellants did not stand to benefit by over-writing or interpolation in Ex. 1 unless they could also make similar interpolations or over-writing in the stock register and the cart register.

6. We accept the case of the appellants that the stock of rice in the godown on August 8 was 121 bags and that 1209 bags were received by trucks or carts on 9th August including two bags of rice which were wrongly recorded as peas. We also accept the appellants' case that there were 1330 bags of rice in stock on 9th August and that 1021 bags constituted all the stock of rice in the godown when the seizure of the food grains took place on 12th August. These being the correct figures there was no need for the appellants to make any interpolations in Ex. 1. In our opinion, the evidence points to the manipulations having been made while the document was in the custody of the Supply Officer or his department and the filing of a copy of Ex. 1 as

interpolated before attestation by a Magistrate was with a sinister motive. We cannot also fail to record that the withholding of the books of account of the appellants for a space of more than two months was not justified on the facts of the case. It appears to us that a false case was deliberately launched against the appellants and that the manipulation in Ex. 1 accounts for the delay in the filing of the complaint after the seizure of the stock. The appeal is allowed. The fine, if paid, will be refunded. We hope that the authorities concerned will take note of our comments on the working of the Supply Department.

Appeal allowed.

AIR 1970 SUPREME COURT 992

(V 57 C 206)

(From: Madras)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Joint Registrar of Co-operative Societies, Madras and others. Appellants v. P. S. Rajagopal Naidu, Govindarajulu and others, Respondents.

Civil Appeals Nos. 2525 and 2526 of 1969, D/- 6-4-1970.

(A) Co-operative Societies — Madras Co-operative Societies Act (53 of 1961), Section 72 (1) — Supersession of society under Section 71 — Recourse to Sections 64 to 67 need not be taken — Madras High Court decision Reversed.

The Registrar before taking action under section 72 need not have an audit made u/s. 64 and inquiry held u/s. 65 and an inspection made u/s 68 of the Act and need not be given an opportunity for rectification of the defects which may come to light as a result of such audit, inquiry or inspection.

(Para 8)

All that is required by Section 72 (1) (a) is that the Registrar should form an opinion that the Committee of any Registered Society is not functioning properly or has wilfully disobeyed or failed to comply with any lawful order or direction issued by him. The requisite opinion has to be formed honestly and after applying his mind by the Registrar to the relevant materials before him. The only condition precedent for taking action under Section 72 (1) is that the Registrar must consult the financing bank to which the Society is indebted. So far as the question of the Society not functioning properly is concerned, that may depend

on what the Registrar discovers after a proper audit, enquiry and inspection. But he can form that opinion even on material aliunde and the language of the section does not warrant by necessary implication the taking of the view that he is bound to form that opinion after following the entire procedure prescribed by the Sections 64 to 69. It may be that when the Registrar acts under the second limb of Section 72 (1) (a) and proposes to supersede the committee for wilful disobedience or wilful failure to comply with any lawful order or direction issued by the Registrar under the Act or the rule that the provisions contained in Sections 64, 65 and 68 may become relevant. But that does not and cannot mean that the Registrar must as a condition precedent give a direction under those sections for the defects or the irregularities to be remedied and should take action only under the second limb when there is a wilful disobedience or wilful failure to comply with those orders or directions. An action taken under section 72 without giving an opportunity to the member, officer or the society to rectify the defects found after an audit, inquiry or inspection held under Ss. 64, 65 and 68 would not constitute an exercise of power without jurisdiction. Madras High Court decision Reversed.

(Para 8)

(B) Constitution of India, Article 226 — Writ jurisdiction — High Court will not act as Court of appeal.

The High Court cannot act as an Appellate Court and re-appraise and re-examine the relevant facts and circumstances which led to the making of the order of supersession under Section 72, Madras Co-operative Societies Act as if the matter before it had been brought by way of appeal.

(Para 10)

(C) Co-operative Societies — Madras Co-operative Societies Act (53 of 1961), Section 72 — Supersession of society — Writ against — High Court will not act as court of appeal and re-appraise facts.

(Para 10)

Mr. S. Govind Swaminathan, Advocate-General for the State of Tamil Nadu (M/s. S. Mohan and A. V. Rangam, Advocates with him), for Appellants (In both the Appeals); Mr. D. Munikanaiah Sr. Advocate (Mr. G. S. Rama Rao, Advocate with him), for Respondents (In Civil Appeal No. 2525 of 1969); Mr. D. Munikanaiah Sr. Advocate (Mr. G. Narasimulu, Advocate with him), for Respondents (In Civil Appeal No. 2526 of 1969).

The following Judgment of the Court was delivered by

GROVER, J.: These appeals from a judgment of the Madras High Court involve the true ambit, scope and content of Section 72 of the Madras Co-operative Societies Act, 1961 (hereinafter called the Act).

2. The facts may be briefly stated. On 4th January, 1969 the Joint Registrar of Co-operative Societies issued a Notice u/s 72 of the Act to the Committee of the North Arcot District Co-operative Supply and Marketing Society Ltd. It was stated in the notice that the Committee had not been functioning properly for some time past. Charges were mentioned in detail and the Committee was called upon to make a representation against the proposal to dissolve it in view of the defects and irregularities mentioned in the notice. After examining the representation which was quite lengthy and detailed, the joint Registrar recorded an Order on 11th April, 1969 dealing with each charge and holding that the Committee had not been functioning properly and had failed to perform its duties and discharge its responsibilities as required under the Act. The Committee was ordered to be suspended for a period of one year from 12th April, 1969 to 11th April, 1970. The Deputy Registrar of Co-operative Societies was appointed to work as a Special Officer and to manage its affairs for that period. The matter was taken in appeal to the Registrar by the Committee. The Registrar affirmed the Order of the Joint Registrar. Thereafter the President and the Director of the Co-operative Society moved the High Court under Article 226 of the Constitution. A number of points were taken in the writ petition but the main emphasis was laid on the proper procedure not having been followed under sections 64, 65 and 66 of the Act before taking action u/s 72.

3. The learned single Judge of the High Court allowed the writ petition which had been filed by the President and the Director of the Co-operative Society. The Learned Judge was not satisfied that there was any justification for the action taken by the Joint Registrar in the matter of supersession of the Committee. On appeals having been taken before a Division Bench under Clause 15 of the Letters Patent the case was referred to a Full Bench. The Full Bench based its decision largely on the

view that the procedure laid down in Sections 64, 65 and 66 must be followed before any order could be made by the Joint Registrar or the Registrar u/s. 72. We may refer to the following portion of the judgment;

"Sections 64, 65 and 66, which are the statutory procedural stems which interdict the apparently arbitrary course of action which a Registrar could undertake to interfere with the affairs of a society, its members or officers, provide a sufficient help to tighten up such indiscriminate and unguided exercise of the powers by the Registrar, when it becomes necessary. In each of those sections it is incumbent on the Registrar to give an opportunity to the member concerned, officer concerned or the Society to rectify the defects".....

"In our view and under the scheme of the Act, the condition precedent to the exercise of jurisdiction by the Registrar under one or the other of the sections considered above and in particular Section 72 is to secure an audit memorandum or a report of inspection or inquiry, so that he may be provided with the necessary material to act thereon. Unless such a fact finding authority has provided the Registrar with the hypothesis to act and ultimately supersede an elected body, the impugned order of supersession will undoubtedly be tainted with the absence of a jurisdictional basis. Whether such a basis exists, is subject to review by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India."

4. The Full Bench affirmed the decision of the Learned single Judge.

5. The points which have been argued before us and which have to be determined are:—

(i) Whether the Registrar before taking action u/s 72 must have an audit made u/s. 64 and inquiry held u/s 65 and an inspection made u/s 66 of the Act and must also give an opportunity for rectification of the defects which may come to light as a result of such audit, inquiry or inspection?

(ii) What is the scope of interference by the High Court with the Order of a Registrar made u/s 72 of the Act?

6. The Act was enacted to amend and consolidate the law relating to and to make better provision for the organisation of Co-operative Societies in the State of Madras. Section 2 (2) defines the expression "Committee" to mean the governing body of a registered society to

whom the management of its affairs is entrusted. By Section 2 (1) the "Registrar" is defined to mean a person appointed to perform the duties of a Registrar of Co-operative Societies under the Act, and includes a person on whom all or any of the powers of a Registrar under the Act have been conferred under Section 3. Section 4 provides for the societies which may be registered. Chapter III gives the sections relating to the qualifications of the members and their rights and liabilities. Chapter IV contains provisions in respect of management of registered societies. Under S. 26 (1) the ultimate authority of a registered society vests in the general body of its members. Under Section 27 the general body of a registered society has to constitute a Committee in accordance with the by-laws and entrust the management of the affairs of the registered society to such Committee. The term of office of an elected member of any Committee is 3 years but one-third of the members elected to the Committee at the first election have to retire at the end of the first year after such election and the other one-third of the members elected have to retire at the end of the second year after such election and so on. The members so to retire at the end of the first and second years have to be determined by lot by the Committee. According to Section 28 (4) no member of a Committee against whom an order under sub-section (1) of Section 71 has been passed, shall be eligible for election or appointment as a member of the Committee for a period of three years. Sub-section (5) of Section 28 provides that no member of a Committee which has been superseded shall be eligible for election or appointment to the Committee for a period of three years from the date of expiry of the period of supersession. Section 28 (A) is in the following terms:

"(1) Where in the course of an audit under Section 64 or an inquiry under Section 65 or an inspection under Section 66 or Section 67, it appears that a person who is, or was, a member of a Committee has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society or of gross or persistent negligence in connection with the conduct and management of, or of gross mismanagement of the affairs of the society or of misfeasance or default in carrying out his obligations and functions under the Law, the Registrar may,

without prejudice to any other action that may be taken against such member, by order in writing, remove such person from the office of member of committee if he holds such office, or disqualify him from holding in future the office of a member of the committee, if he has ceased to hold such office.

(2) No person shall be removed or disqualified under sub-section (1) without being given an opportunity of making his representations. A copy of the order removing or disqualifying him shall be communicated to him."

7. Chapter V relates to the duties and privileges of registered societies. Chapter VI relates to State aid to registered societies and Chapter VII relates to their property and funds. We are concerned primarily with the provisions of Chapter VIII which begins with Section 64. Sub-section (1) thereof makes it obligatory on the Registrar to audit or cause to be audited by some person authorised by him in writing the accounts of every registered society once at least in every year. Under sub-section (4) every person who is or has been an officer or employee of the society and every member and past member has to furnish such information in regard to the transactions and working of the society as the Registrar or the person authorised by him may require. Sub-section (5) says that the Registrar may, by order in writing, direct any officer of the society to take such action as may be specified in the order to remedy, within such time as may be specified, the defects if any, disclosed as a result of the audit. Section 65 authorises the Registrar on his own motion or on the application of a majority of the Committee or on the request of the Collector, to hold an inquiry, or direct some person authorised by him in writing to hold an inquiry into the constitution, working and financial condition of a registered society. Under sub-section (2) powers have been conferred inter alia to have free access to the books of accounts etc., summoning and examination of persons on oath having knowledge of the affairs of the society. When an inquiry is held u/s 65 the Registrar must communicate its result in the manner and to the persons and institutions set out in sub-section (3). Sub-section (4) lays down that Registrar may, by order in writing, direct any officer of the society or its financing bank to take such action as may be specified in the order to

remedy the defects, disclosed as a result of the enquiry. Section 66 empowers the Registrar on his own motion or on the application of a creditor of a registered society to inspect or direct any person to inspect the books of the society. After the inspection has been made the Registrar has to communicate the results of the inspection in the manner set out in sub-section (2). Sub-section (3) enables the Registrar to direct any officer of the society to take such action as may be specified in the order to remedy the defects, if any, disclosed as a result of the inspection. Section 67 gives the right to a financing bank to inspect the books of any registered society which is indebted to it. Section 70 (1) is reproduced below:

"70(1) Where in the course of an audit under section 64 or an inquiry under Section 65 or an inspection under Section 66 or Section 67, it is brought to the notice of the Registrar that a paid officer or servant of a registered society has committed or has been otherwise responsible for misappropriation, breach of trust or other offence, in relation to the society, the Registrar, may, if in his opinion, there is prima facie evidence against such paid officer or servant and the suspension of such paid officer or servant is necessary in the interests of the society, direct the committee of the society pending the investigation and disposal of the matter, to place or cause to be placed such paid officer or servant under suspension from such date and for such period as may be specified by him."

Section 71 contains provisions relating to surcharge and says that where in the course of an audit u/s 64 or an inquiry u/s 65 or an inspection u/s 66 or Section 67 or the winding up of a society, it appears that any person who is or was entrusted with the organization or management of the society or any past or present officer or servant of the society has misappropriated or fraudulently retained any money or other property or has been guilty of breach of trust in relation to the society or has caused any deficiency in the assets of the society by breach of trust or wilful negligence the Registrar may enquire into the conduct of such person, officer or servant and make an order requiring him to repay or restore the money or property or to contribute such sum to the assets of the society by way of compensation. Under the proviso, such an inquiry must be held within 6 years from

the date of any act or omission and an opportunity must be afforded to the person against whom the order is sought to be made. Section 72 (1) (a) which is material for our purposes reads:

"72 (1) (a) If, in the opinion of the Registrar, the committee of any registered society, is not functioning properly or wilfully disobeys or wilfully fails to comply with any lawful order or direction issued by the Registrar under this Act or the rules, he may, after giving the committee an opportunity of making its representations, by order in writing dissolve the committee and appoint either a person (hereinafter referred to as the special officer) or a committee of two or more persons (hereinafter referred to as the managing committee) to manage the affairs of the society for a specified period not exceeding two years."

Sub-section (6) makes it obligatory on the Registrar to consult the financing bank to which the society is indebted before taking any action under sub-section (1). It will be useful at this stage to reproduce Section 85 (1) which relates to winding up of registered societies:

"85 (1) If the Registrar, after an inquiry has been held under section 65 or an inspection has been made under Section 66 or section 67, or on receipt of an application made by not less than three-fourths of the members of a registered society, is of opinion that the society ought to be wound up, he may, after giving the society an opportunity of making its representations, by order in writing direct it to be wound up. A copy of the order shall forthwith be communicated to the society by registered post".

8. It is significant that Section 72 (1) does not contain any mention of Sections 64 to 67 which appear in Sec. 70 (1) and of Sections 65, 66 and 67 which are expressly mentioned in Section 85 (1). If the intention of the Legislature was that the supersession of the Committee under Section 72 can be ordered by the Registrar only after recourse to Sections 64, 65, 66 and 67, there is no reason why language analogous to Section 70 (1) or Sections 85 (1) containing an express mention of the aforesaid sections, should not have been employed. An audit under Section 64 has to be done every year in view of the mandatory form of the language of that Section 64. But as regards Sections 65 and 66 the Registrar has been given the discretionary powers to make an inquiry or an inspection in

accordance with those sections, there is no duty or obligation cast on him for doing so before he proceeds to take action u/s 72. All that is required by Section 72 (1) (a) is that the Registrar should form an opinion that the Committee of any Registered society is not functioning properly or has wilfully disobeyed or failed to comply with any lawful order or direction issued by him. So far as the question of the society not functioning properly is concerned, that may depend on what the Registrar discovers after a proper audit, enquiry and inspection. But he can form that opinion even on material aliunde and the language of the section does not warrant by necessary implication the taking of the view that he is bound to form that opinion after following the entire procedure prescribed by the other sections under discussion. At any rate it is not possible to read a requirement whilst taking action u/s 72 of satisfying the provisions in the aforesaid sections by making a direction in the first instance to remedy the defects disclosed as a result of the audit, inquiry or inspection. The functioning of the society may be so irregular and the defects disclosed so blatant and prejudicial to the society that no question can arise of any direction being made in the first instance for their being remedied by the persons or officers concerned. It may be that when the Registrar acts under the second limb of Section 72 (1) (a) and proposes to supersede the committee for wilful disobedience or wilful failure to comply with any lawful order or direction issued by the Registrar under the Act or the rule that the provisions contained in Sections 64, 65 and 66 may become relevant. But that does not and cannot mean that the Registrar must as a condition precedent give a direction under those sections for the defects or the irregularities to be remedied and should take action only under the second limb i.e. when there is a wilful disobedience or wilful failure to comply with those orders or directions. It may be that the opinion which the Registrar has to form must be based on some objective facts but those objective facts in the absence of any clear indication u/s 72 cannot be confined to what may be disclosed after the Registrar has exercised powers in the matter of audit, inquiry and inspection under the provisions of Sections 64, 65 and 66. Thus even though the opinion may be a purely subjective process, there

must be cogent material on which the Registrar has to form his opinion that the society is not functioning properly in order to sustain the issuance of a notice u/s 72 (1) (a) and subsequent supersession of the Committee after considering its representation on that ground. The requisite opinion has indisputably to be formed honestly and after applying his mind by the Registrar to the relevant materials before him the only condition precedent for taking action u/s 72 (1) is that the Registrar must consult the financing bank to which the society is indebted (vide sub-section (6)). There is no other requirement or condition precedent laid down by the Legislature which the Registrar must fulfil before he acts in the matter of supersession of the Committee. We are unable to concur in the view of the High Court that an action taken u/s 72 without giving an opportunity to the member, officer or the society to rectify the defects found after an audit, inquiry or inspection held under Sections 64, 65 and 66 would constitute an exercise of power without jurisdiction.

9. The single Judge laid a great deal of emphasis on the Committee being an elected body and the prejudice that would be caused to its members if they are visited with the consequences of supersession on account of irregularities and improper functioning of the previous members of the Committee. What was argued before the High Court was that one-third members of the Committee have to retire every year and fresh members have to be elected. If certain grave irregularities are committed, say in the years 1964, 1965, it would be unfair to the new members who have been elected to supersede the Committee in 1968. We do not consider that that would be the correct approach in construing Section 72 which is meant for superseding the Committee as a whole when its working discloses such irregularities or improprieties as would justify its supersession. Normally it would be expected that only that Committee would be superseded whose functioning has been found to be highly defective. The object of supersession apparently is to appoint a Special Officer or a managing committee in order to set the working of the society right. It is not difficult to envisage a situation where mal-administration by a committee has so adversely affected the functioning of the society that it is essential in the interests of the society itself to give temporarily the control of its affairs to a new

tral authority. At any rate if the operation of Section 72 in certain circumstances is likely to operate harshly so far as certain members of the committee are concerned, it is not possible to read into it other provisions of the Act which are not incorporated in the section expressly or by necessary implication.

10. We have been taken through the material parts of the orders of the Registrar and the Joint Registrar and we do not find any such infirmities in them which would justify interference by the High Court under Article 226 of the Constitution. The High Court could not act as an appellate Court and reappraise and re-examine the relevant facts and circumstances which led to the making of the orders of supersession as if the matter before it had been brought by way of appeal. The limits of the jurisdiction of the High Court under Art. 226 when a writ in the nature of certiorari is to be issued are well known and well settled by now and it is pointless to restate the grounds on which any such writ or direction can be issued. We are satisfied that there was no justification whatsoever for quashing the orders of the Joint Registrar and that of the Registrar in appeal. The appeals are consequently allowed with costs and the judgment of the High Court is set aside. The writ petitions are ordered to be dismissed. One hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 997
(V 57 C 207)

(From: Madhya Pradesh)

J. C. SHAH AND K. S. HEGDE, JJ.

Nainsingh, Appellant v. Koonwarjee and others, Respondents.

Civil Appeal No. 1460 of 1966, D/- 2-4-1970.

(A) Civil P. C. (1908), Order 41, R. 23 — Remand of case by Appellate Court — Order of remand is appealable under Order 43 — Order not appealed against — Its correctness is no more open to examination in view of Section 105 (2) — Review of remand order in exercise of inherent power is erroneous. Decision of Madhya Pradesh High Court Reversed. (Para 4)

(B) Civil P. C. (1908), Section 151 — Inherent powers — Court cannot make
DN/DN/B665/70/CWM/D.

use of Section where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same — Power cannot be exercised as an appellate power — Review of remand order, falling under Section 105 (2), in exercise of inherent power is erroneous. Decision of Madhya Pradesh High Court, Reversed. (Para 4)

(C) Tenancy Laws — M. B. Abolition of Jagirs Act (28 of 1951), Section 8 — Suit for declaration of title and for possession by Jagirdar — Commencement of Act during pendency of suit — Plaintiff does not lose his rights in suit properties — Although suit properties vest in State the plaintiff is entitled to compensation if he is proved to have been owner of suit properties on the day of commencement of the Act — (Case remanded to High Court with direction that State be impleaded and rights of all parties be decided in accordance with law.) Decision of Madhya Pradesh High Court, Reversed. AIR 1966 SC 1974, Applied. (Para 5)

(D) Civil P. C. (1908), Section 105 (2) — Review of remand order falling under Section 105 (2) in exercise of inherent power is erroneous. Decision of Madhya Pradesh High Court, Reversed. (Para 4)
Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1974 (V 53)=
1966-3 SCR 815, Himatrao v. Jai-
kishandas 5

The following Judgment of the Court was delivered by

HEGDE, J.:— The only question that falls for decision in this appeal by special leave is as to the application of Section 151, Civil Procedure Code to a remand order falling within Section 105 (2) of that Code.

2. The facts leading upto the point under consideration may now be stated. The appellant was the Jagirdar of the suit properties. One Bhagirath was his tenant. The said Bhagirath died in the year 1947 leaving behind no male issues. His wife had predeceased him. He had two daughters who were living at the time of his death. After his death, defendants Nos. 1 to 5 who are his distant relations took possession of the suit properties and got the revenue records changed in their names. Thereafter the appellant brought the suit under appeal seeking the following reliefs:—

(1) to declare that he is the owner of the suit properties; (2) to quash the order

of the Tehsildar dated November 8, 1949 transferring the khata relating to the suit properties to the names of Defendants 1 to 5; (3) to grant possession of those properties to him and (4) other usual incidental reliefs.

3. The defendants resisted the plaintiff's claim. They contended *inter alia* that (1) the Civil Court had no jurisdiction to entertain the suit; (2) the plaintiff had lost right over the suit properties in view of the Jagirs Abolition Act, 1951 which came into force on December 4, 1952 during the pendency of the suit and (3) the 1st defendant being the adopted son of Bhagrath is entitled to the possession of the suit properties. In the suit several issues were raised. It is not necessary to refer to them in view of the limited scope of this appeal. The trial Court dismissed the suit upholding the contention of the defendants on two issues viz., (1) that the Civil Court had no jurisdiction to entertain the suit and (2) that in view of the abolition of jagirs and the vesting of the suit properties in the State, the plaintiff can claim no relief. The first appellate Court reversed the findings of the trial Court on those issues. It came to the conclusion that the Civil Court had jurisdiction to entertain the suit. It further held that though in view of the abolition of the jagirs, the suit properties had vested in the State, it was for the State to get itself impleaded if it is interested in this litigation and as the State had not chosen to get itself impleaded, it was open to the plaintiff to press the suit. In view of those conclusions, the Appellate Court set aside the decree of the Trial Court and remanded the suit to the trial Court for deciding the other issues left undecided. After the remand, the trial Court negatived every one of the contentions taken by the defendants and decreed the suit as prayed for. In appeal that decree was confirmed. In second appeal the High Court of Madhya Pradesh agreed with the Trial Court and the Appellate Court on the findings given on all issues excepting the issue relating to the effect of abolition of the jagirs on the suit. On that issue, it came to the conclusion that in view of the abolition of jagirs under the Jagirs Abolition Act, the plaintiff had lost his title to the suit properties and therefore he could not get a decree for possession of the suit properties. It rejected the contention of the plaintiff that that issue is concluded by the decision of

the Appellate Court made before remand as the same had not been appealed against. It opined that the Court had inherent power to consider the correctness of that order. It accordingly allowed the appeal and dismissed the suit.

4. The High Court, in our opinion, erred in holding that the correctness of the remand order was open to review by it. The order in question was made under Rule 23, Order 41, Civil Procedure Code. That order was appealable under Order 43 of that Code. As the same was not appealed against, its correctness was no more open to examination in view of Section 105 (2) of the Code which lays down that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness. The High Court has misconceived the scope of its inherent powers. Under the inherent power of Courts recognised by S. 151, C. P. C., a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Further the power under Section 151 of the Code cannot be exercised as an appellate power.

5. We are also of the opinion that the High Court is not right in holding that in view of the abolition of the jagirs, the plaintiff had lost all rights in the suit properties. It is true that in view of the provisions of the Jagirs Abolition Act, the suit properties vested in the State. But it was conceded at the bar that if the plaintiff is proved to have been the owner of the suit properties on the day the Jagirs Abolition Act came into force, he is entitled to the compensation provided in that Act. Therefore the plaintiff is interested in establishing that on the date Jagirs Abolition Act came into force, he was the full owner of the suit properties. The facts of this case fall within the rule laid down by this Court in *Himatrao v. Jaikishandas*, 1966-3 SCR 815 = (AIR 1966 SC 1974). On the facts of this case the interests of justice would have been

better served if the High Court had ordered the impleading of the State of Madhya Pradesh in the appeal before it and determined the rights of all the parties finally. Hence we set aside the decree of the High Court and remand the case to that Court with a direction that the State of Madhya Pradesh should be impleaded and the rights of all the parties decided in accordance with law. In the circumstances of the case we make no order as to costs of this appeal.

Order accordingly.

AIR 1970 SUPREME COURT 999 (V 57 C 208)

(From Mysore: AIR 1962 Mys 269)

M. HIDAYATULLAH, C. J., J. C. SHAH,
A. N. GROVER, A. N. RAY AND
I. D. DUA, JJ.

The Second Gift Tax Officer, Mangalore, etc., Appellants v. D. H. Hazareth etc., Respondents.

Civil Appeals Nos. 664 to 669 of 1967,
D/- 2-4-1970.

(A) Constitution of India, Article 245 — Overlapping entries — Pith and substance rule to be applied.

The sovereignty of Parliament and the Legislatures is a sovereignty of enumerated entries, but within the ambit of an entry, the exercise of power is as plenary as any legislature can possess, subject, of course, to the limitations arising from the Fundamental Rights. Since the entries are likely to overlap occasionally, it is usual to examine the pith and substance of legislation with a view to determining to which entry they can be substantially related, a slight connection with another entry in another list notwithstanding. If, however, no entry in any of the three lists covers it, then it must be regarded as a matter not enumerated in any of the three lists. Then it belongs exclusively to Parliament under Entry 97 of the Union List as a topic of legislation, and Article 248. AIR 1959 SC 544, Relied on. (Para 5)

(B) Constitution of India, Article 248 and Sch. VII, List I, Entry 97 — Subject-matter not covered by any of the entries in any of the Lists — It belongs exclusively to Parliament. (Para 5)

(C) Gift Tax Act (1958), Preamble — Act is validly made by Parliament. AIR 1962 Mys 269, Reversed.

The Gift Tax Act was enacted by Parliament and no entry in the Union List or the Concurrent List mentions such a tax. Therefore, Parliament purported to use its powers derived from Entry 97 of the Union List read with Article 248 of the Constitution. The pith and substance of Gift Tax Act is to place the tax on the gift of property which may include land and buildings. It is not a tax imposed directly upon lands and buildings but is a tax upon the value of the total gifts made in any year which is above the exempted limit. Since Entry 49 of the State List contemplates a tax directly levied by reason of the general ownership of lands and buildings, it cannot include the gift tax as levied by Parliament. There being no other entry which covers a gift tax, the residuary powers of Parliament could be exercised to enact a law. AIR 1962 Mys 269, held impliedly Overruled by AIR 1969 SC 59; AIR 1962 Mys 269, Reversed; AIR 1969 SC 59, Applied. (Paras 6, 11)

(D) Constitution of India, Article 248, Sch. VII, List I, Entry 97 — Gift Tax Act (1958), is validly made by Parliament. AIR 1962 Mys 269, Reversed. (Paras 6, 11)

(E) Constitution of India, Sch. VII, List 2, Entry 49 — Gift Tax Act (1958) does not fall under Entry 49. AIR 1962 Mys 269, Reversed. (Paras 6, 11)

Cases Referred: Chronological Paras (1969) AIR 1969 SC 59 (V 56) =

1968-69 ITR 897, Sudhir Chandra Nawn v. Wealth Tax Officer Calcutta 9

(1967) AIR 1967 All 19 (V 54) = 1966 All LJ 622, Shyam Sunder v. Gift Tax Officer 8

(1963) AIR 1963 Mad 419 (V 50) = 1963-49 ITR 712, S. Dhandapani v. Addl. Gift Tax Officer, Cuddalore 8

(1962) AIR 1962 Ker 97 (V 49) = 1964-45 ITR 66, Joseph v. Gift Tax Officer 8

(1960) AIR 1960 Andh Pra 115 (V 47) = 1960-38 ITR 93, Jupadi Sesharatnam v. Gift Tax Officer Palacole 8

(1959) AIR 1959 SC 544 (V 46) = (1959) Supp 1 SCR 904, State of Rajasthan v. S. Chawla 5

Mr. Jagadish Swarup Solicitor-General of India (M/s. S. K. Aiyar and R. N. Sachthey, Advocates with him), for Appellants (In all the Appeals); Mr. S. V. Gupte Senior Advocate (Mrs. A. K. Varma, Advocate, and M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advo-

cates of M/s. J. B. Dadachanji & Co., with him), for Respondents (In Civil Appeals Nos. 664, and 668 of 1967); Mr. O. P. Rana, Advocate for the Advocate-General for the State of U. P.; Mr. M. R. K. Pillai, Advocate, for the Advocate-General for State of Kerala; Mr. B. Sen Senior Advocate (Mr. Santosh Chatterjee, Advocate, and Mr. G. S. Chatterjee, Advocate, for Mr. Sukumar Basu, Advocates with him), for the Advocate-General of West Bengal; S. Govind Swaminathan, Advocate-General Tamil Nadu (M/s. A. V. Rangam and M. Subramanian Advocates with him), for Advocate-General, Tamil Nadu; Mr. Lal Narayan Sinha, Advocate-General for State of Bihar (M/s. D. P. Singh and V. J. Francis, Advocates with him), for Advocate-General, Bihar; Mr. K. A. Chitale, Advocate-General for State of Madhya Pradesh (Mr. M. N. Shroff, Advocate for Mr. I. N. Shroff, Advocate with him), for Advocate-General Madhya Pradesh; Mr. E. S. Venkataramiah, Advocate-General for State of Mysore (Mr. S. P. Nayar, Advocate, with him), for Advocate-General of State of Mysore; Dr. J. G. Medhi, Advocate-General for State of Assam (Mr. Naimit Lal, Advocate, with him), for Advocate-General, State of Assam.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.—These six appeals by certificate under Article 132 (1) of the Constitution are filed against the decision of the High Court of Mysore, declaring that Parliament had no power to legislate with respect to taxes on gift of lands and buildings. The High Court passed a detailed judgment on two of the petitions by which the competence of Parliament was challenged and followed its own decisions in the other four cases. It is not necessary to give the facts of the six petitions in the High Court. As illustrative of the facts involved we may mention *W. P. No. 1077 of 1959*. In that case a certain D. H. Hazarethi, owner of a coffee plantation, made a gift by registered deed, January 22, 1958, of a coffee plantation and other properties in favour of his four sons. The market value of the property was Rs. 3,74,080 and the coffee plantation accounted for Rupees 3,24,700. Gift tax of Rs. 85,012/- was demanded. If the coffee plantation was left out of consideration the tax was liable to be reduced by Rs. 34,036. The authority to charge gift tax on the gift of the coffee plantation was challenged and the right of Parliament to impose a gift tax

on lands and buildings questioned. In some of the other cases agricultural or paddy lands or buildings were the subjects of gifts and they were similarly taxed and the tax questioned.

2. The High Court held that Entry 49 of the State List read with Entry 18 of the same list reserved the power to tax lands and buildings to the Legislature of the States and Parliament could not, therefore, use the residuary power conferred by Entry 97 of the Union List. This decision is challenged before us.

3. The Gift Tax Act was passed in 1958 and subjected gifts made in the year ending March 31, 1958 to tax. The Act contained the usual exempted limits and other exemptions. We need not concern ourselves with them here. We are only concerned with the validity of parliamentary legislation imposing gift tax at all.

4. To consider the objection to the Gift Tax Act which was sustained by the High Court a few general principles may be borne in mind. Under Article 245 Parliament makes laws for the whole or any part of the territory of India and the Legislatures of the States for the whole or part of their respective States. The subject-matters of laws are set out in three lists in the Seventh Schedule. List I (usually referred to as the Union List) enumerates topics of legislation in respect to which Parliament has exclusive power to make laws and List II (usually referred to as the State List) enumerates topics of legislation in respect to which the State Legislatures have exclusive power to make laws. List III (usually referred to as the Concurrent List) contains topics in respect to which both Parliament and Legislature of a State have power to make laws. Inconsistency between laws made by Parliament and those made by the Legislatures of the States, both acting under the Concurrent List, is resolved by making Parliamentary law to prevail over the law made by the State Legislature. So long as the Parliamentary law continues, the State law remains inoperative but becomes operative once the Parliamentary law, throwing it into shadow, is removed. Then there is the declaration in Article 248 of the residuary powers of legislation. Parliament has exclusive power to make any law in respect to any matter not enumerated in the Concurrent List or State List and this power includes the power of making any law imposing a tax not mentioned in either of those lists. For this purpose, and to avoid any doubts, an entry has also

been included in the Union List to the following effect:

"97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists."

5. It will, therefore, be seen that the sovereignty of Parliament and the Legislatures is a sovereignty of enumerated entries, but within the ambit of an entry, the exercise of power is as plenary as any legislature can possess, subject, of course, to the limitations arising from the Fundamental Rights. The entries themselves do not follow any logical classification or dichotomy. As was said in *State of Rajasthan v. S. Chawla*, (1959) Supp 1 SCR 904 = (AIR 1959 SC 544) the entries in the lists must be regarded as enumeration simplex of broad categories. Since they are likely to overlap occasionally, it is usual to examine the pith and substance of legislation with a view to determining to which entry they can be substantially related, a slight connection with another entry in another list notwithstanding. Therefore, to find out whether a piece of legislation falls within any entry, its true nature and character must be in respect to that particular entry. The entries must of course receive a large and liberal interpretation because the few words of the entry are intended to confer vast and plenary powers. If, however, no entry in any of the three lists covers it, then it must be regarded as a matter not enumerated in any of the three lists. Then it belongs exclusively to Parliament under Entry 97 of the Union List as a topic of legislation.

6. The Gift Tax Act was enacted by Parliament and it is admitted that no entry in the Union List or the Concurrent List mentions such a tax. Therefore, Parliament purported to use its powers derived from Entry 97 of the Union List read with Article 248 of the Constitution. This power admittedly could not be invoked if the subject of taxes on gifts could be said to be comprehended in any entry in the State List. The High Court has accepted the contention of the tax-payers that it is so comprehended in entries 18 and 49 of the State List. Those entries read:

"18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

"49. Taxes on lands and buildings."

7. The argument is that by Entry 18, 'land' of all description is made subject

to legislation in the States and by Entry 49 taxes of whatever description on lands in that large sense and buildings generally fall also in the jurisdiction of the State. Reference is made to Entries 45, 46, 47 and 48 of the State List in which certain taxes are to be imposed on land and agricultural land or income from agricultural land exclusively by the State in contrast with Entries 82, 86, 87 and 88 where the taxes are imposed on properties other than agricultural land or income from agriculture. It is submitted, therefore, that the general scheme of division of taxing and other entries by which land, particularly agricultural land, and income therefrom is reserved for the States shows that taxes on lands and buildings read liberally must also cover taxes in respect of gifts of land particularly agricultural land and buildings. If the entry so read can be reasonably said to include the tax, then there can be no question of recourse to the residuary powers of Parliament.

8. The matter is not *res integra* and however attractive the argument, it cannot be accepted. Many High Courts in India have considered this matter before the Supreme Court decided it. The Mysore view was not followed in *S. Dhandapani v. Addl. Gift Tax Officer, Cuddalore*, 1963-49 ITR 712 = (AIR 1963 Mad 419) (Madras High Court); *Shyam Sunder v. Gift Tax Officer*, AIR 1967 All 19 (disapproved on another point in the Supreme Court). A contrary view was earlier also expressed in *Jupadi Sesharatnam v. Gift Officer, Palacole*, 1960-38 ITR 93 = (AIR 1960 Andh Pra 115) (Andhra Pradesh High Court) and *Joseph v. Gift Tax Officer*, 1964-45 ITR 66 = (AIR 1962 Ker 97) (Kerala High Court). In fact the judgment under appeal stands alone.

9. The subject of Entry 49 of the State List in relation to imposition of Wealth Tax came up for consideration in *Sudhir Chandra Nawn v. Wealth Tax Officer, Calcutta*, 1968-69 ITR 897 = (AIR 1969 SC 59) and the view of the High Court on the construction of this entry was affirmed. Although the judgment under appeal was not referred to expressly the result is that it must be taken to be impliedly overruled. In view of the decision of this Court it is not necessary to deal with the matter except briefly.

10. The Constitution divides the topics of legislation into three broad categories: (a) entries enabling laws to be made, (b) entries enabling taxes to be imposed, and

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1201 (V 54)=
1967-2 SCR 100, Municipal Com-
mittee, Akot v. Manilal Manekji
Pvt. Ltd.(1966) AIR 1966 SC 249 (V 53)=
1965-3 SCR 499, Bharat Kala
Bhandar v. Municipal Committee
of Dhamangaon(1963) AIR 1963 SC 1547 (V 50)=
1964-2 SCR 273, Firm Seth
Radha Kishan v. Administrator,
Municipal Committee, LudhianaThe following Judgment of the Court
was delivered by

SHAH, J.—The Municipality of Mal-
kapur recovered from the appellants
Rs. 6,980/2/- as "Bale and Boja tax" for
three years 1950-51, 1951-52 and 1952-53
in respect of cotton ginned in their fac-
tory. The appellants filed a suit in the
Court of Civil Judge, Class I, Khamgaon,
for an order permanently restraining the
Municipality from recovering the "Bale
and Boja" tax for the season 1953-54 and
for subsequent seasons and for a decree
refunding the amount paid and interest
thereon.

2. The appellants contended that the
levy of the "Bale and Boja" tax was ultra
vires the Municipality. The Trial Court
decreed the claim for injunction and also
awarded the amount claimed less Rupees
750/-. In appeal, the District Court held
that the levy of tax at the rate prevailing
on March 31, 1939, was saved by the pro-
visions of Section 142-A (2) of the Gov-
ernment of India Act, 1935, and the Muni-
cipality was competent to levy tax at that
rate. The District Court on that view
modified the decree and held that the
Municipality was entitled to retain Rupees
1,867/4/-. In second appeal to the High
Court of Bombay at Nagpur, the follow-
ing question was referred to a Full
Bench:

"Whether in respect of the recoveries,
which are in contravention of the prohi-
bitions contained in sub-section (2) of
Section 142-A of the Government of India
Act, 1935, and clause (2) of Article 276
of the Constitution, the provisions of
Section 48 (2) of the C. P. and Berar
Municipalities Act, 1922 apply?"
The High Court, following the judgment
of this Court in Bharat Kala Bhandar v.
Municipal Committee of Dhamangaon,
1965-3 SCR 499 = (AIR 1966 SC
249) answered the question in the
negative. The appeal was thereafter
placed for hearing on questions not de-

cided by the Full Bench. The Court at
that stage entertained and upheld an ob-
jection that the suit against the Muni-
cipality for refund of tax paid by the ap-
pellants was not maintainable. The High
Court observed:

"We are bound to follow the decision
in Bharat Kala Bhandar v. Dhamangaon
Municipality, 1965-3 SCR 499 =
(AIR 1966 SC 249) but in view
of the fact that the relevant provisions
were not brought to the notice of the
Court and in view of the fact that the
decision in Firm Radha Kishan's case,
(AIR 1963 SC 1547) holds that the remedy
provided by similar provisions is adequate
and a suit does not lie, we are constrained
to hold that under the Act the suit is
incompetent."

The High Court accordingly set aside the
decree in favour of the appellants for re-
fund of tax and confirmed the injunction
restraining the Municipality from reco-
vering the tax. With certificate granted
by the High Court under Article 133 (1)
(c) of the Constitution this appeal has
been preferred.

3. Two questions fall to be deter-
mined in this appeal — (1) whether a suit
for refund of tax paid to the Municipa-
lity is maintainable; and (2) if the suit
is maintainable, whether the levy of tax
by the Municipality was valid in law.

4. The first question is concluded by
the judgment of this Court in Bharat Kala
Bhandar's case, 1965-3 SCR 499 =
(AIR 1966 SC 249). That case
arose under the C. P. & Berar Muni-
cipalities Act, 1922. The right of a Muni-
cipality governed by that Act to levy
under Section 66 (1) (b) a tax on bales
of cotton ginned at the prescribed rate
was challenged by a taxpayer. This
Court held that levy of tax on cotton
ginned by the taxpayer in excess of the
amount prescribed by Article 276 of the
Constitution was invalid, and since the
Municipality had no authority to levy the
tax in excess of the rate permitted by the
Constitution, the assessment proceedings
levying tax in excess of the permissible
limit were invalid, and a suit for refund
of tax in excess of the amount permitted
by Article 276 was maintainable. The
decision was binding on the High Court
and the High Court could not ignore it
because they thought that "relevant pro-
visions were not brought to the notice of
the Court".

5. We may also observe that the judg-
ment in Firm Seth Radha Kishan v. Ad-
ministrator Municipal Committee, Ludhi-

ana, 1964-2 SCR 273 = (AIR 1963 SC 1547) on which reliance was placed by the High Court has no relevance. In that case under the Rules of the Municipality of Ludhiana tax on common salt imported within the Municipal limits could be levied at a certain rate, and on all other kinds of salts at a higher rate. On the Sambhar salt imported by the appellants duty was levied at the higher rate. The appellants then filed a suit for decree for refund of excess tax levied, contending that Sambhar salt was common salt. This Court held that the Civil Court had no jurisdiction to entertain the suit, for the liability to pay terminal tax was created by the Act and a remedy was also provided against improper enforcement of the Act. In a case where the Municipality has undoubted power to levy a tax under a provision of the Act, in respect of any article, and it levies tax under another provision of the Act not applicable to it, the Municipality merely commits an error in collecting the tax at the rate collected, and no question of jurisdiction arises, the party aggrieved must seek remedy in the manner prescribed by the Act. In the present case, however, there is a bar against levy in excess of the amount specified in the Constitution, and not a mere question of levy of tax under an inapplicable entry.

6. Again it was implicit in the judgment of the Full Bench that the suit was maintainable. If the suit was not maintainable the question whether to the claim made under Section 48 of the Act had application could not arise. Section 48 lays down the conditions subject to which the suit may be filed. Whether Section 48 of the C. P. & Berar Municipalities Act is not applicable, because the tax contravened Section 142-A of the Government of India Act, 1935, or Article 276 of the Constitution, could only fall to be determined if a suit for refund lay. The High Court was, in our judgment, in error in setting aside the decree passed by the District Court on the ground that a suit for refund of tax was not maintainable.

7. On the second question the argument of the Municipality has also not much substance. The Municipality was constituted in 1905 under Section 41 (1) (a) (b) of the Berar Municipal Act, 1886, a tax called "the Bale and Boja tax" was levied by the Municipality with effect from October 1, 1912, on cotton ginned and pressed in Ginning and Pressing Factories at the rate of 8 pies per bale

of 10 maunds, and 10 pies per bale of 14 maunds. On October 2, 1939, the Municipality resolved to revise the rates and by notification dated January 2, 1940, under Section 67 (5) of the C. P. & Berar Municipalities Act, 1922, tax was permitted to be levied at the rate of four annas per bale with effect from October 1, 1939.

8. The Berar Municipal Act was promulgated by the Viceroy & Governor-General, Berar being then not a part of British India. By a notification of the Governor-General dated June 22, 1924, under the Indian (Foreign Jurisdiction) Order in Council the Berar Municipal Act was repealed, and the Central Provinces Municipalities Act 2 of 1922 was applied to the Berar Area. After the Government of India Act, 1935, the Berar Laws (Provincial) Act, 1941 was enacted, and Berar was under Section 47 of the Government of India Act to be administered together with the Central Provinces as one of the Provinces under that Act. Various Acts including the Central Provinces Municipalities Act 2 of 1922 were extended to the Berar with certain modifications under the Central Provinces and Berar Act 15 of 1941. By that Act the title of Act 2 of 1922 was altered: it read "Central Provinces and Berar Municipalities Act". By Section 8 of the Act it was provided that the Central Provinces Municipalities Act, 1922, which had been applied to Berar by order under the Indian (Foreign Jurisdiction) Order in Council, 1902, shall cease to have effect "provided that all appointments, delegations, notifications, orders, byelaws, rules and regulations which have been made or issued, or deemed to have been made or issued and all other things done or deemed to have been done under, or in pursuance of, any provision of any of the said Order in Council, and which are in force at the commencement of this Act, shall be deemed to have been made or issued or done under or in pursuance of the corresponding provision of that Act as now extended to, and in force in, Berar."

Notifications issued under the Berar Municipal Act and the Central Provinces Municipalities Act in force at the commencement of Act 15 of 1941 applied to the Municipalities in the former Berar area. In the meanwhile S. 142-A was incorporated in the Government of India Act, 1935, by India & Burma (Miscellaneous Amendment) Act, 1940, 3 & 4, Geo. 6,

Ch. 5, as from April 1, 1939, imposing limit upon taxes, professions, trades and callings. But by the proviso to sub-section (2) of Section 142-A levy by the Provinces or Municipal bodies of tax on profession, trade, calling or employment, at rates exceeding the rates prescribed by the Government of India Act were to remain in operation until provision to the contrary was made by the Parliament. To give effect to the limitation imposed by Section 142-A the Parliament enacted the Professions Tax Limitation Act XX of 1941. The relevant provisions of Act 20 of 1941 are as follows:

Section 2 — "Notwithstanding the provisions of any law for the time being in force, any taxes payable in respect of any one person to a Province, or to any one municipality, district board, local board, or other local authority in any Province, by way of tax on professions, trades, callings or employments, shall from and after the commencement of this Act cease to be levied to the extent in which such taxes exceed fifty rupees per annum."

Section 3 — "The provisions of Section 2 shall not apply to any tax specified in the Schedule."

The Schedule is as follows:

"THE SCHEDULE"

Taxes to which Section 2 does not apply.

1. The tax on professions, trades and callings, imposed through fees for annual licences, under Chapter XII of the Calcutta Municipal Act, 1923.

2. The tax on trades, professions and callings, imposed under clause (f) of sub-section (1) of Section 123 of the Bengal Municipal Act, 1932.

3. The tax on trades and callings carried on within the municipal limits and deriving special advantages from, or imposing special burdens on, municipal services, imposed under clause (ii) of sub-section (1) of Section 128 of the United Provinces Municipalities Act, 1916.

4. The tax on persons exercising any profession or art, or carrying on any trade or calling, within the limits of the Municipality, imposed under clause (b) of Section (1) of Section 66 of the Central Provinces Municipalities Act, 1922.

5. The tax on companies, imposed under Section 110 of the Madras City Municipal Act, 1919."

9. The Professions Tax Limitation Act, 1941, was repealed by the Adaptation of Laws Order, 1950, and limitations on the tax on professions, trades, callings and

employment were continued by Article 276 of the Constitution after the repeal of the Government of India Act.

10. It may be recalled that the notification enhancing the rate of "Bale and Boja tax" was issued after Section 142-A of the Government of India Act, 1935, was incorporated. The only notification in force was the notification issued in 1912. The notification of 1940 was not saved by the proviso to Section 142-A of the Government of India Act, 1935. But the Municipality collected tax at rates set out in the notification of 1940. It is clear, however, that if the notification of 1940 was ineffective under the Government of India Act, it could not be revived under the Constitution Article 276 (2) proviso. The notification relied upon by the Municipality was brought into operation after the constitutional prohibition under Section 142-A of the Government of India Act became effective on April 1, 1939. The modification of rates was plainly ineffective, for the rates prescribed thereby were not in operation in the financial year ending March 31, 1939.

11. No claim to recover the tax could therefore, be founded on that notification. But it was urged that the earlier notification of 1912 was in any case effective in the financial year ending March 31, 1939, and tax could be levied under that notification which was indisputably in operation in the financial year. This Court has however held in Municipal Committee, Akot v. Manilal Manekji Pvt. Ltd., 1967-2 SCR 100 = (AIR 1967 SC 1201) on interpretation of Sections 2 and 3 and Item 4 of the Schedule to the Professions Tax Limitation Act 20 of 1941 that the rate fixed by the earlier notification was also not saved from the operation of Section 2. This Court was of the view that by virtue of Item 4 of the Schedule only the tax on persons, exercising professions imposed under clause (b) of sub-section (1) of Section 66 of the Central Provinces Municipalities Act, 1922, was saved from the operation of Section 2 of Act 20 of 1941 and not the tax under Section 66 of the Central Provinces & Berar Municipalities Act, 1922, and the tax levied by the respondent Municipality was levied under the latter Act. That decision is binding upon us. It must therefore be held that the rate of tax prescribed by the notification of 1912 alone could be enforced, subject to the limit prescribed by Article 276 (2) of the Constitution. The Municipality was therefore incompetent to levy a tax at a

rate exceeding Rs. 250/- for the whole year.

12. The appeal is allowed and the decree passed by the Trial Court is restored. The Municipality will pay the costs in this Court and in the High Court.

Appeal allowed.

**AIR 1970 SUPREME COURT 1006
(V 57 C 210)**

(From: Punjab)

J. M. SHELAT AND G. K. MITTER, JJ.
Madan Mohan Lal, Appellant v. State of Punjab, Respondent.

Criminal Appeal No. 205 of 1969, D/- 1-4-1970.

Evidence Act (1872), Section 133 — Approver's testimony and its corroboration — Earlier statement of approver to police — Omission in such statement does not necessarily render his evidence unreliable.

When the accomplice gives his police statement he does not know that he would be granted pardon and possibly for that reason does not come out with all the facts known to him and he does so while he making his statement before the Magistrate as he knows by then that he would be tendered pardon on condition that he would disclose all the facts known to him. The omission in the police statement, therefore, by itself would not necessarily render his evidence unreliable. In considering whether the approver's evidence passed the test of reliability, the Court would have to consider whether taken as a whole and in the light of the facts and circumstances of the case it was a credible version or not: (Para 8)

Held on facts and circumstances that, even assuming that the Trial Court was in error in not permitting the omission in the statement made by the approver before the police to be brought on record, there was enough circumstantial evidence to corroborate the approver's version relating to the accused-appellant.

(Para 23)

Cases Referred: Chronological Paras
(1959) AIR 1959 SC 1012 (V 40) =
(1959) Supp 2 SCR 875 = 1959
Cri LJ 1231, Tehsildar Singh v.
State of U. P.

7

The following Judgment of the Court was delivered by

SHELAT, J.— In July-August 1963, the appellant, one Kamal Dev and Dancesh

Kumar, the two other original accused before the Additional Sessions Judge, Ferozepur, were working in different capacities in the Treasury in Ferozepur Cantonment. The appellant was the dealing clerk and amongst his other duties he had to scrutinise and pass contingent pay bills of the Central Jail at Ferozepur presented at the Treasury.

2. On July 18, 1963, Roshanlal (P. W. 19), the accountant in the said jail, prepared a contingent bill, (Ex. PB), for Rupees 8273.19 P. The drawing authority being the Superintendent of the Jail, the bill was placed before the Superintendent, Teja Singh (P. W. 18), for his signatures. The bill required an endorsement in the nature of a certificate by him, but as similar bills had in the past been objected to by the Treasury on the ground that the certificates therein were not properly worded, Teja Singh left the column blank and signed the bill leaving it to the appropriate clerk in the Treasury, who happened to be the appellant, to fill it in. He also left blank the space where the person carrying the bill, first to the Treasury and then to the State Bank, would sign as the person to whom payment was to be made. On July 19, 1963, Naunit Rai (P. W. 11), the accounts clerk in the jail, took the bill to the Treasury and approached the appellant so that the appellant may fill in the certificate on the bill over the signature of Teja Singh in suitable language. The appellant directed him to go first to Darbara Singh (P. W. 15), who was the token clerk, saying that the bill would come to him in routine and he would then fill in the certificate. Naunit Rai, therefore, handed over the bill to Darbara Singh and obtained a token in acknowledgment of his having handed over the bill in the Treasury. Naunit Rai then returned to the Jail with the token.

3. It was not in dispute that at the time the two blanks where the certificate and the endorsement, Exts. PB/1 & PB/3, would be filled in, were blank. Nor was it in dispute that the signatures purporting to be of one Ram Nath and the words "received payment" were not yet written on that bill. According to the procedure followed in the jail, it would be the person receiving the money under the bill who would pass such receipt in the bill and affix his signatures thereto.

4. On July 20, 1963, Makhu Ram (P. W. 13), the selection warder, went to the Treasury to collect the bill in exchange

for the token and cash it in the bank. He was told that the bill could not be traced and that efforts were being made to find it. The Jail authorities sent Makhu Ram on several successive days but on each day he was told in the Treasury that the bill had not yet been found. On August 6, 1963, the Deputy Superintendent of the Jail, B. D. Soni, personally went there when he learnt that the bill had been presented to the bank on July 20, 1963 and encashed.

5. On the matter being handed over to and investigated by the police, the appellant, the said Kamal Dev, Danesh Kumar and one Ram Lubhaya, an agent in the Life Insurance Corporation, were arrested on charges under Sections 409, 467, 471 and 411 of the Penal Code. The said Ram Lubhaya, on agreeing to make a full and true disclosure, was given a conditional pardon and made an approver. During the course of the investigation, the bill Ex. PB, which in due course would be returned by the bank to the Treasury after payment and would therefore be in the Treasury, was seized from the possession of accused Kamal Dev together with government currency notes of Rs. 2500/-. Similarly, government currency notes of Rs. 2000/- were produced by the appellant from among waste papers lying in the store room of which he was in charge. The appellant and the two clerks were charged as aforesaid on the basis of this evidence and brought to trial in the Court of the Additional Sessions Judge.

6. The evidence on which the prosecution relied on in the Trial Court comprised of the evidence of the approver who narrated how the appellant wrote out the certificate and the endorsement in the bill over the signature of Teja Singh, how the signature of the Treasury Officer was obtained thereon, how the signatures purporting to be those of Ram Nath and the receipt for payment were written out by the approver and how finally the bill was taken by them to the bank and payment received. The evidence of the approver thus clearly showed that all the four of them were involved in the fabrication of the bill, in receiving the money thereunder by using that document as genuine knowing it to be forged, the receipt of the money by them and its division between them. That evidence was sought to be corroborated by the evidence of the handwriting expert and the

recoveries or seizures made by the police at the instance of one or the other of the accused. The Trial Court considered the approver's evidence as reliable and finding also that it was sufficiently corroborated by other satisfactory evidence convicted and sentenced the three of them. On appeals filed by all the three, the High Court found the conviction and sentence justified by the evidence on record and accordingly dismissed their appeals. The appellant thereupon obtained special leave from this Court and that is how this appeal has come up before us for disposal.

7. The contention urged before us was that on May 14, 1965 when the approver was being cross-examined by the appellant's counsel in the Trial Court, a question was put to him to the effect that he had not mentioned in his statement before the police dated August 10, 1963 the names of the appellant and Danesh Kumar. The question was put with the object of bringing that omission on record and to show that the approver had made an improvement in his version with a view to falsely involve the appellant and Danesh Kumar and thus render his evidence uncreditworthy. But the Trial Judge disallowed that question presumably relying on the decision in *Tahsildar Singh v. State of Uttar Pradesh*, (1959) Supp 2 SCR 875 at p. 903 = (AIR 1959 SC 1012 at p. 1026) that a mere omission in the police statement would not constitute a contradiction, and therefore, observed that "a contradiction means two contra dictions" and "a contradiction crops up when there is conflict in two statements". The argument was that the Trial Judge was in error in disallowing the omission to be brought on record, which if allowed, would have rendered the approver's evidence unreliable. Assuming that the Trial Judge was in error and the omission had been brought out, considering the facts and circumstances proved in this case the result, in our opinion, would not be that which is contended for.

8. We may mention that the alleged error on the part of the Trial Judge was not relied on before the High Court. There was also nothing to show that the approver in his statement before the Magistrate, who passed the order granting him pardon, had not mentioned the names of the appellant and the said Danesh Kumar and had not referred to the roles played by them as deposed to by him in the Trial Court. It was possibly because

no such omission was found in his statement before the Magistrate that the refusal by the Trial Judge to bring on record the omission in the police statement was not relied on in the High Court. It may be that when the approver gave his police statement he did not know that he would be granted pardon and possibly for that reason had not come out with all the facts known to him and he did so while he was making his statement before the Magistrate as he knew by then that he would be tendered pardon on condition that he would disclose all the facts known to him. The omission in the police statement, therefore, by itself would not necessarily have rendered his evidence unreliable. In considering whether the approver's evidence passed the test of reliability, the Court would have to consider whether taken as a whole and in the light of the facts and circumstances of the case it was a credible version or not. Taking all the facts and circumstances of the case proved before the Trial Court, we think that despite the said omission, the approver's version was credible.

9. But, quite apart from that consideration, there is, in our judgment, over and above the evidence of the approver, sufficient material on record, by way of circumstantial evidence, to justify the conviction of the appellant.

10. There is no dispute that (a) the bill, Ex. PB, was prepared in the jail on July 19, 1963 and sent to the Treasury for its being passed before it could be presented for encashment in the bank; (b) the bill was encashed by some one on July 20, 1963 in the bank and Rupees 8273.80 P. were paid to a person calling himself Ram Nath; (c) Ram Nath was a fictitious person and no such person was in the employ either of the jail or the Treasury; (d) the bill had come to the appellant after it had been handed over to the token clerk who had issued the token to Naunit Rai; and (e) the appellant had admittedly written on it the certificate, Ex. PB/1. All these things took place in accordance with the practice followed in the Treasury. The question then would be; how did the Bill fall into the hands of the person calling himself Ram Nath and who encashed it in the bank? As a necessary corollary, the next question would be; how did the bill, after it had been returned by the bank to the Treasury on July 22, 1963, come into the possession of Danesh Kumar who produced it from his possession before the police?

11. These questions can be answered from the evidence as to the practice followed in the Treasury in relation to such bills, the evidence of the employees there who had dealt with the bill at one stage or the other and the conduct of the appellant as disclosed in the evidence.

12. According to Avtar Singh (P. W. 21), the Treasury Officer, the practice followed in the Treasury was as follows: (a) such a bill would be first presented to the token clerk, i.e., wit. Darbara Singh, who would accept it and issue a token to the person presenting it, in this case wit. Naunit Rai; (b) the token clerk would then pass the bill on to the dealing clerk, i.e., the appellant; (c) the appellant, after scrutinising the bill, would pass it on to the Assistant Superintendent, wit., Ramjidas; (d) the Assistant Superintendent then would pass it on to the Treasury Officer, Avtar Singh; (e) the Treasury Officer then would affix his signature and then pass it on back to the Assistant Superintendent who in his turn would pass it on to the appellant and from the appellant it would go to the token clerk, who would hand over the bill, after it had been passed as aforesaid, to the person who produces the token given earlier.

13. The fact that Darbara Singh has given the token in acknowledgment of its having been tendered to him coupled with the fact of the certificate, Ex. PB/1, having been endorsed on it and the passing of the bill by Ramjidas and by Avtar Singh clearly show that the bill had gone through all the onward stages described by Avtar Singh. From the practice, as deposed to by the Treasury Officer and the Assistant Superintendent, it is clear that the bill would come back to the dealing clerk, the appellant, for him to pass it on to the token clerk, Darbara Singh. But Darbara Singh's evidence was that he did not receive the bill from the appellant for the purpose of handing it over to the person who would come from the jail with the token. According to him, about 2 or 3 days later when a person from the jail came to him and inquired about the bill, he told him that he had not received it from the appellant after it had been passed and therefore directed him to the appellant. In this respect, he was corroborated by Makhu Ram (P. W. 13) who had been sent by the jail authorities to collect the bill from the Treasury. According to Makhu Ram, he went to Darbara Singh on July 20, 1963 when Dar-

bara Singh directed him to the appellant saying that the bill was still with the appellant. Thereupon he went to the appellant who told him that he was busy with pending bills, that the bill had not yet reached him and that as soon as it came to him he would do the needful. Makhu Ram again went to the appellant on July 22, 1963 when the appellant gave him the same answer assuring him that he would do the needful as soon as the bill came to him. The witness again went to the appellant on July 23 and 24 and as he got the same reply on those days also he complained to the Deputy Superintendent of the Jail that the appellant was delaying the bill and not giving it to him.

14. According to Jagannath (P. W. 16) the incorporation clerk in the Treasury, the bill had come back to him on July 22, 1963 from the bank as the practice was that the bank would return such bills to the Treasury after they had been encashed and paid by the bank. Evidently no one in the Treasury thought that the bill had been handed over to any one so that it could be encashed by such a person. Therefore, no one appears to have inquired from Jagannath whether it had come back to him from the bank. Every one concerned believed that the bill was still lying with the appellant after it had come back to him from Avatar Singh. That is clear from the evidence of Ramjidas, the Assistant Superintendent who stated that about a day or two after July 20, 1963 when an employee from the Jail, presumably Makhu Ram, came to him inquiring about the bill, he called the appellant and the appellant informed him that there was rush of work with him, and therefore, he had not been able to pass the bill. There can, therefore, be no doubt that the appellant was telling every one concerned that the bill was lying with him and that as he was busy with the old bills he had not yet dealt with and pass the bill.

15. When, despite Makhu Ram's repeated visits to the Treasury for the bill, it was not given to him, Teja Singh personally inquired about it on July 25, 1963. On July 27, 1963 he sent the Assistant Superintendent of the Jail to the Treasury to inquire about the bill. The evidence of Avatar Singh, the Treasury Officer, shows that thereupon he called Ramjidas, the Assistant Superintendent, and told him that he should see that the bill was passed by the appellant. This

part of the evidence again shows that every one in the Treasury was till July 27, 1963 under the impression that the bill was still lying with the appellant and he had been delaying it and had not yet passed it.

16. When it ultimately became known that the bill had been presented to the bank and encashed by some one but the Jail authorities had not received the money under it, enquiries were set up in the Treasury. On August 7, 1963, Avatar Singh by his order Ex. PY called upon the appellant, with whom the said bill was believed to be lying, to explain to whom he had handed over the bill. The reply of the appellant, Ex. PY/1, dated August 9, 1963, was significant, for, he then stated that the bill "was never checked and passed for payment by me" and that the officers in the Treasury, contrary to the practice, were "in (the) habit of passing the bills direct without getting the same checked and signed by me——". He added: "under the circumstances—— the bill was never passed by me nor handed over to any other person." According to this explanation, therefore, Darbara Singh had not handed over the bill to the appellant nor had the appellant dealt with it or passed it on to the Assistant Superintendent and then to the Treasury Officer. This explanation was obviously false because the bill itself shown the appellant's endorsement and certificate on it which means that he had passed it before it went to Avatar Singh who on the faith of the appellant's certificate passed it for payment. There is no reason to disbelieve Avatar Singh that after he had signed the bill it went, according to the practice, to the appellant through the Assistant Superintendent, Ramjidas.

17. An enquiry similar to the one made from the appellant was also made from Darbara Singh, who reported on August 9, 1963, that he had passed on the bill to the appellant and that thereafter it had not come back to him as it should on its return journey. These facts clearly show that after Avatar Singh had signed the bill, the bill went back to the appellant on its return journey to be passed on to Darbara Singh but that the appellant did not pass it on pretending all the time that it was lying pending with him.

18. When, however, he realised that it had become known that the bill had been encashed, he changed his front, thinking that the bill would not be found out and

therefore his endorsement on it showing that he had dealt with it would not be discovered. In that belief he came out with the false allegation that the bill had been directly passed without its having been sent to him for checking or for his certificate.

19. But having realised that the bill, Ex. PB, had been recovered by the police and produced in the Court, he took up a third stand in his statement under Section 342 of the Criminal Procedure Code inconsistent with the stands so far taken up by him. He now admitted that the bill had been sent to him by Darbara Singh and that he had written thereon the payment order but he denied the next step in the prosecution case that it had again come back to him after it had been passed by the Assistant Superintendent and signed by the Treasury Officer. That denial was not accepted by the Trial Court and the High Court and in our view rightly as the evidence of both these Officers clearly was that after they had passed the bill it would go back to the appellant in the normal course for him to return to Darbara Singh who would hand it over to the person who surrendered the token earlier given to him.

20. The three contradictory stands taken by the appellant at three different stages indicate that it was he who had been responsible for the bill having gone to the approver on its coming to him after it had been passed by Avatar Singh instead of its being passed on to Darbara Singh. The bill could not have got into the hands of the approver and the other accused except through and with the active assistance of the appellant. It cannot, therefore, be gainsaid that the appellant was actively involved with the approver and the other accused in the bill going into their hands, their having dishonestly encashed it at the bank and its proceeds misappropriated.

21. As earlier stated, the Bill had been returned by the bank to the Treasury after it had been encashed. It had, in accordance with the practice followed at the Treasury and the bank, gone to the clerk Jagannath, from whom, if an inquiry had been at once made, could have been traced. Such an enquiry was evidently not made because, on account of the false statements made by the appellant to every one concerned, all believed that it was still lying pending with the appellant and had not gone out of the

Treasury and encashed. But for those false statements which hoodwinked every one, the first enquiry would have been made with the bank and the bank would have disclosed that the bill had been encashed by some one calling himself Ram Nath and returned as usual to the Treasury, and thereupon Jagannath, would have been the person from whom the bill could have been recovered. That, as we have said, was not done because the appellant by his false statements to Makhu Ram and others that the bill was still pending with him and had not yet been passed by him had kept every one under an apprehension that the bill was still in the Treasury and had not yet gone out of it for being encashed.

22. Besides the evidence of the approver, there was thus the evidence as to the conduct of the appellant which directly connected him with the conspiracy for fabrication of the bill and its dishonest encashment. That link was further strengthened by the evidence that in July-August 1963 he was in charge of the store room from which he had produced before the police government currency notes of Rs. 2000, presumably his share out of the booty, hidden amongst the waste papers lying in that store room. The pivotal position occupied by him as the dealing clerk, his subsequent conduct in knowingly making false and contradictory statements and thereby creating a false belief that the bill was still with him, his attempts to throw the blame on his other colleagues, and lastly, production by him of the notes of Rs. 2000, all cumulatively condemn him not only as one of the conspirators but also as an indispensable participator in the successful misappropriation of the moneys.

23. Therefore, even if we were to accept the contention that the Trial Court was in error in not permitting the omission in the statement made by the approver before the police to be brought on record, such an omission at best could have been used for challenging the veracity of the approver's evidence. But there was enough evidence to corroborate the approver's version relating to the appellant. The Trial Court and the High Court, therefore, could not be said to have committed any error in relying on the approver's evidence for convicting the appellant.

24. In our view, the appellant was rightly convicted and we find no reason, therefore, to interfere with the order of

conviction and sentence passed against him. The appeal, therefore, must be dismissed and we accordingly order it to be so dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1011

(V 57 C 211)

(From: Bombay)

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

Madhya Pradesh Industries Ltd., Appellant v. The Income-tax Officer, Nagpur, Respondent.

Civil Appeals Nos. 2419-2421 and 2423-2425 of 1966, D/- 16-4-1970.

(A) Constitution of India, Article 226 — Writ petition challenging jurisdiction of Income-tax Officer to issue notice under Section 34 (1) (a) Income-tax Act on ground that officer had no reason to believe — Assertion not controverted by filing affidavit or production of relevant material by Income-tax Officer — Proceedings quashed as being without jurisdiction — Order of Bombay High Court (Nag. Bench), Reversed.

Where the petitioner Company against whom proceedings under Section 34 (1) (a) Income-tax Act had been initiated, had repudiated in its writ petition the assertion of the Income-tax Officer that he had reason to believe that due to the omission or failure on the part of the Company to give material facts, some income had escaped assessment, one would have expected the Officer who issued the notice under Section 34 (1) (a) to file an affidavit setting out the circumstances under which he formed the necessary belief. But if the Income-tax Officer had not filed any such affidavit nor produced in the writ proceedings either the proceedings recorded by him before issuing the notice or his report to the Commissioner or even the Commissioner's sanction, it cannot be said that the Income-tax Officer had any reason to form the belief in question or the reasons before him were relevant for the purpose. Therefore, it must be held that the Income-tax Officer had no jurisdiction to issue the notice and the proceedings taken by him have to be quashed. AIR 1961 SC 372 & AIR 1967 SC 523 & AIR 1967 SC 587, Followed & Applied. Order of Bombay High Court (Nag. Bench), Reversed. (Para 15)

(B) Income-tax Act (1922), Section 34 (1) (a) — No proceeding by Income-tax Officer before issuing notice under, to enable him to form the necessary belief — No jurisdiction to proceed under Section 34 (1) (a). (Para 15)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 523 (V 54)=

(1967) 63 ITR 219, S. Narayanappa v. Commr. of Income-tax, Bangalore

13

(1967) AIR 1967 SC 587 (V 54)=

(1967) 63 ITR 638, Kantamani Venkata Narayana and Sons v. First Additional Income-tax Officer, Rajahmundry

14

(1961) AIR 1961 SC 372 (V 48)=

(1961) 2 SCR 241, Calcutta Discount Co. Ltd. v. Income-tax Officer

11

The following Judgment of the Court was delivered by

HEGDE, J.:— In these appeals by special leave, the only question of law that arises for decision is whether the respondent was competent to initiate proceedings under Section 34 of the Indian Income-tax Act, 1922 (which will hereinafter be referred to as the Act).

2. The respondent initiated proceedings under Section 34 of the Act against the appellant by issuing notices under that section on December 26, 1960 in respect of the assessment years 1953-54, 1954-55 and 1955-56. The appellant challenged the validity of those proceedings by means of writ petitions under Articles 226 and 227 of the Constitution in the High Court of Judicature at Bombay (Nagpur Bench). Those petitions were summarily dismissed. The appellant thereafter appealed to this Court after obtaining special leave from this Court. This Court allowed those appeals on April 8, 1965 holding that the High Court was not justified in summarily dismissing the writ petitions as the allegations made therein merited examination. Thereafter the High Court issued rule nisi in those petitions. The respondent opposed those petitions. After hearing the parties, the High Court again dismissed those writ petitions. Hence these appeals.

3. The facts of the case material for deciding these appeals have been set out in detail in this Court's order dated April 8, 1965. We shall briefly refer to them.

4. The above appeals relate to proceedings under Section 34 of the Act in respect of three assessment periods. It

would be sufficient if we set out the facts relating to the assessment year 1953-54. There is no dispute that if the proceedings relating to that year are held to be invalid, similar would be the position regarding the proceedings relating to the other two assessment periods. On the other hand, if they are held to be valid, the same would be true in respect of the other assessment periods.

5. The appellant, Madhya Pradesh Industries Ltd. (hereinafter referred to as the company), is engaged in the business of mining manganese ore. On March 18, 1952, the company appointed M/s. J. K. Alloys Ltd., (hereinafter called 'Alloys') as its selling agents. In the account year relating to the assessment year 1953-54, the company paid as commission, Rupees 1,13,052/8/9 to the selling agents and claimed that amount as a revenue outgoing in the computation of its profits for that year. The Income-tax Officer made the order of assessment without expressly referring to the said deduction but proceeding on the basis that it is a permissible deduction. On December 26, 1960, the Income-tax Officer issued a notice to the company in exercise of his powers under Section 34 of the Act reciting therein that he having "reason to believe that" the income of the company assessable to income-tax for the assessment year 1953-54 had (a) escaped assessment and (b) under-assessed, he proposes to reassess the income that had escaped assessment or had been under-assessed. He called upon the company to deliver a return of the total income of the company assessable for the said assessment year 1953-54. In response to a letter sent by the company, the Income-tax Officer informed the company that the notice issued by him was under Section 34 (1) (a). Thereafter there was some correspondence between the Income-tax Officer and the company. The Income-tax Officer required the company to give him the information called for in the questionnaire issued by him. The company did not send any reply to the said questionnaire. On December 21, 1961, the Income-tax Officer informed the company that since the questions asked were not replied to, he presumed that no correspondence with Alloys existed and the payment of commission had been made without any justification, Alloys having rendered no service as selling agents.

6. On April 2, 1962, the company moved the High Court of Judicature of Bombay (Nagpur Bench) praying for the

issue of a writ of certiorari under Article 226 of the Constitution or an appropriate direction or order under Article 227 of the Constitution calling for the record of the case and for the issue of writs in the nature of Prohibition or Mandamus restraining the Income-tax Officer from taking any action or proceeding in enforcement or implementation of the notice dated December 26, 1960. This petition, as mentioned earlier, was rejected in limine.

7. In the writ petition, the plea taken by the company was that in issuing the notice under Section 34 (1) (a) of the Act, the Income-tax Officer acted without jurisdiction and for a colourable purpose. Its case as set out in the writ petition is as follows:

8. In its return the company disclosed for the year ending March 31, 1953 Rs. 15,70,587/- as its total profits according to its books of account. In the statement under Section 38 (3) of the Act filed with the return, the company disclosed that it had paid Rs. 1,13,052/8/9 as "commission sales" "on different dates" by cheques to Alloys and Rs. 6,091/4/- to J. S. Williams on October 4, 1952 by cheque as commission on sales. In the profit and loss account of the company filed with the return, the amount of Rs. 29,76,067/19/8 was disclosed as received by "sales less commission". On December 7, 1953, R. K. Gupta, a Director of the company made a statement before the Income-tax Officer stating that the commission was paid to Williams on the sales accounted for during the year ended March 31, 1953 and that the same should be allowed as deduction and that "similar was the case with the commission payable to J. K. Alloys Ltd., which had already been paid subsequently." On February 21, 1954, the Income-tax Officer called upon the company to produce amongst other documents, certificates showing whether any receipt included in the income, profits or gains had been credited or transferred to any assets, capital account, or any other liability account, a similar certificate regarding any credit for important expenses claimed under the head "Profit & Loss A/c", a list of buyers with full addresses along with quantity, number and net proceeds of export business as well as Indian sales, a statement setting out full details of various items of indirect expenses debited to profit and loss account and a statement of expenses grouped and sorted out under the heads, wages, salary and other emoluments. On

June 21, 1954, the company filed the certificates and the statements demanded together with the statement showing that out of the sale proceeds, commission paid to Alloys and J. S. Williams was deducted. In the course of the assessment proceedings, R. S. Agarwal, a representative of the company appeared before the Income-tax Officer and agreed that the commission "debited as paid to Williams may be added back" and about Alloys he said that the commission "had already been paid". Thereafter on February 14, 1955, the assessment of the company was completed by the Income-tax Officer. The Income-tax Officer rejected the commission said to have been paid to Williams and added back that amount to the gross profits of the company. He took no objection to the commission paid to the Alloys.

9. The case pleaded by the company in the writ petition is that it had placed before the Income-tax Officer all the material facts; the Income-tax Officer before making the assessment had examined those facts and was satisfied with the explanation given by the company. The company denied that the Income-tax Officer had any reason to believe that by reason of the omission or failure on the part of the company to disclose fully and truly all material facts necessary for his assessment for the year in question income, profits or gains chargeable to income-tax have escaped assessment for that year or have been under-assessed. The company disputed that the Income-tax Officer had any reason before him to have the required belief. It also denied the fact that it had omitted or failed to disclose fully and truly all material facts necessary for the assessment in question or that any income, profits or gains chargeable to income-tax have escaped assessment in that year.

10. Section 34 (1) of the Act as at the relevant time read:

"If—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have been under-assessed or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee or if the assessee is a company, on the principal officer, thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 and may proceed to assess or re-assess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that—

(i) the Income-tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under Section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

Explanation.— Production before the Income-tax Officer of account-books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section."

11. In *Calcutta Discount Co. Ltd. v. Income-tax Officer*, (1961) 2 SCR 241= (AIR 1961 SC 372); this Court ruled that before an Income-tax Officer could issue a notice under Section 34 (1) (a) of the Act, two conditions must co-exist, namely, that he must have reason to believe

(1) that income, profits or gains had been under-assessed and (2) that such under-assessment was due to non-disclosure of material facts by the assessee. It was observed therein that where, however, the Income-tax Officer has *prima facie* reasonable grounds for believing that there has been a non-disclosure of a primary material fact, that by itself gives him the jurisdiction to issue a notice under Section 34 of the Act and the adequacy or otherwise of the grounds of such belief is not open to investigation by the Court. It is for the assessee who wants to challenge such jurisdiction to establish that the Income-tax Officer had no material for such belief. Speaking for the majority Das Gupta, J., observed therein:

"To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year two conditions have therefore to be satisfied. The first is that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income-tax have been under-assessed. The second is that he must have also reason to believe that such "under-assessment" has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under Section 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or re-assessment beyond the period of four years but within the period of eight years, from the end of the year in question."

Proceeding further the learned Judge observed:

"The position therefore is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "under-assessment" that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notices under Section 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts would not be open for the Court's investigation. In other words, all that is necessary to give this special jurisdiction is that the Income-tax Officer

had when he assumed jurisdiction some *prima facie* grounds for thinking that there had been some non-disclosure of material facts".

12. Shah, J., (one of us) in his dissenting judgment has observed that the expression "has reason to believe" in Section 34 (1) (a) of the Indian Income-tax Act does not mean a purely subjective satisfaction of the Income-tax Officer but predicates the existence of reasons on which such belief has to be founded. That belief, therefore, cannot be founded on mere suspicion and must be based on evidence and any question as to the adequacy of such evidence is wholly immaterial at that stage. He further observed that where the existence of reasonable belief that there had been under-assessment due to non-disclosure by the assessee, which is a condition precedent to exercise of the power under Sec. 34 (1) (a) is asserted by the assessing authority and the record *prima facie* supports its existence, any enquiry as to whether the authority could reasonably hold the belief that the under-assessment was due to non-disclosure by the assessee of material facts necessary for the assessment must, be barred.

13. In *S. Narayanappa v. Commr. of Income-tax, Bangalore*, (1967) 63 ITR 219= (AIR 1967 SC 523) this Court held that the two conditions must be satisfied in order to confer jurisdiction on the Officer to issue the notice under Section 34 of the Income-tax Act in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year, viz., (i) the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income-tax had been under-assessed and (ii) he must have reason to believe that such "under-assessment" had occurred by reason of either (a) omission or failure on the part of the assessee to make a return of his income under Section 22 or (b) omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer acquires jurisdiction to issue a notice under the section. If there are in fact some reasonable grounds for the Income-tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment, that would be sufficient to give

jurisdiction to the Income-tax Officer to issue the notice under Section 34. Whether these grounds are adequate or not is not a matter for the Court to investigate. In other words, the sufficiency of the grounds which induced the Income-tax Officer to act is not a justiciable issue. It is of course open for the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. Therein it was observed that the expression "reason to believe" in Section 34 does not mean purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith: it cannot be merely a pretence. It is open to the Court to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings under Section 34 of the Act is open to challenge in a Court of law.

14. The same view was again expressed by this Court in *Kantamani Venkata Narayana and Sons v. First Additional Income-tax Officer, Rajahmundry*, (1967) 63 ITR 638 = (AIR 1967 SC 587).

15. In these cases, the company in its writ petitions had repudiated the assertion of the Income-tax Officer that he had reason to believe that due to the omission or failure on the part of the company to give material facts, some income had escaped assessment. Under those circumstances one would have expected the officer who issued the notices under Section 34 (1) (a) to file an affidavit setting out the circumstances under which he formed the necessary belief. We were told that one Mr. Pandey had issued the notices in question. That officer had not filed any affidavit in these proceedings. The proceedings recorded by him before issuing the notices have not been produced nor his report to the Commissioner or even the Commissioner's sanction has not been produced. Hence it is not possible to hold that the Income-tax Officer had any reason to form the belief in question or the reasons before him were relevant for the purpose. We have no basis before us to hold that the Income-tax Officer had jurisdiction to issue the impugned notices. Hence the proceedings taken by him have to be quashed.

16. For the reasons mentioned above, we allow these appeals, set aside the order of the High Court and quash the proceedings taken under Section 34 (1) (a) of the Act. The respondent shall pay the costs of these appeals — hearing fee one set.

Appeals allowed.

AIR 1970 SUPREME COURT 1015
(V 57 C 212)

(From: Allahabad)

J. M. SHELAT AND I. D. DUA, JJ.

Rajpal Singh and others, Appellants v. Jai Singh and another, Respondents.

Criminal Appeal No. 224 of 1966, D/- 16-4-1970.

Criminal P. C. (1898), Section 209 — Duty of Magistrate in committal proceeding — He should sift the evidence only to see if prima facie case is made out — He should not himself assume jurisdiction of Sessions Court.

In a case under Section 209 the Magistrate holding the preliminary enquiry has to be satisfied that a prima facie case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit and if he is not so satisfied, he is not to commit. Where, however, much can be said on both the sides, it would be for the Sessions Court and not for the Magistrate to decide which of the two conflicting versions will find acceptance at its hands. If there is some evidence on which a conviction may reasonably be based he must commit the case. But the Magistrate at that stage has no power to evaluate the evidence for satisfying himself of the guilt of the accused. The question before him at that stage would be whether there is some credible evidence which would sustain a conviction. Though, the language of Section 209 differs from that in Section 207A, under neither of them has the Magistrate the jurisdiction to assess and evaluate the evidence before him for the purpose of seeing whether there is sufficient evidence for conviction, for if he were to do that he would be trying the case himself instead of levying it to be done by the Sessions Court, which alone has under the Code the jurisdiction to try it. Where the Magistrate had examined witnesses and held an on-the-spot inspection and did not stop to find out if there was evidence which, if believed, would

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establish at least a prima facie case, but went on further to disbelieve that evidence by an elaborate and painstaking process of examination, in aid of which he brought to bear his own appraisal of inconsistencies, improbabilities etc., and thus in fact tried the whole case thereby forestalling the decision of the Court of Session which alone had the jurisdiction to try such a case, his order of discharge must be set aside as being one in excess of jurisdiction. AIR 1958 SC 97 & AIR 1970 SC 863, Ref.; AIR 1962 SC 1195, Rel. on. (Paras 7, 8)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 863 (V 57)=
1969-2 SCR 520, Alamohan Das
v. State of West Bengal 7

(1962) AIR 1962 SC 1195 (V 49)=
1962 Supp (2) SCR 948, Bipat
Gope v. State of Bihar 6, 7, 8

(1958) AIR 1958 SC 97 (V 45)=
1956 SCR 618, Ramgopal Ganpat-
rai Ruia v. State of Bombay 7

The following judgment of the Court was delivered by

SHELAT, J.—This appeal, by certificate granted by the High Court of Allahabad, is against its order dismissing the criminal revision filed by the appellants and refusing to interfere with the order passed by the Sessions Judge setting aside the order of discharge passed by the committing Magistrate.

2. The facts leading to the appeal may briefly be stated. One Naubat Singh of village Nagla Shekhoo, who owned certain lands, died in August 1963. Some three years prior thereto he had sold part of his land to complainant Jai Singh who was married to Raj Kali, who, according to the prosecution, was the only heir and legal representative of the said Naubat Singh. On the death of Naubat Singh, Raj Kali entered into possession of the rest of the land as his sole heir. The appellants (the original accused), however, put up a claim that Kasturi, the wife of the appellant Sardar Singh, was also the daughter of Naubat Singh, and therefore, entitled to a half share in the property left by Naubat Singh. Legal proceedings ensued as a result of these rival claims and February 13, 1964 was the date of the bearing.

3. According to the complainant Jai Singh, at about 11.30 P.M. on that date he heard some sound in consequence of which he woke up and saw with the aid of his torch the four appellants setting fire to the thatch of his Bangli. On his

raising an alarm, his wife, his brother, Atar Singh, and several neighbours came to the scene of the offence and the appellants on seeing them ran away. This was the gist of his case as incorporated in his complaint. The appellants' defence was twofold; that the place which was said to have been burnt down was a cattle-shed and not a residential house, and that they had been falsely implicated on account of the previous hostility between them and the complainant and the members of his party.

4. During the committal proceedings both the sides examined a number of witnesses. At the instance of the appellants the Magistrate also made a local inspection and placed his report thereof on record. The complaint against the appellant being under Section 436 of the Penal Code, the case was triable by the Sessions Court, if the Magistrate were to commit the case on being satisfied that there were sufficient grounds to do so.

5. The Magistrate considered the evidence led before him in great details and in an elaborate judgment observed: (1) that of the six witnesses examined by the complainant, three, namely, the complainant, his wife and his brother, belonged to the same family, (2) that the remaining three eye-witnesses were chance witnesses, (3) that the complainant had failed to examine any witness from his immediate neighbourhood, (4) that his inspection revealed that the Cher, which was set fire to, was a cattle-shed and that the complainant actually resided in a house at a distance of about 50 paces from that place, (5) that the houses of two of the prosecution witnesses, Badri Prasad and Gokul Singh, were at a distance of 304 and 179 paces away, while that of the third witness, Mantri, was situated at a distance of one and a half furlong from the scene of the offence, (6) that Badri Prasad and Gokul had given evidence against the appellants in an earlier litigation and were, therefore, interested witnesses, (7) that the name of Mantri did not figure either in the F. I. R. or in the complaint filed by the complainant, nor in the list of witnesses filed in the inquiry under Section 202 of the Code of Criminal Procedure, and that therefore, he was made a witness as an after-thought, (8) that the defence witnesses, on the other hand, had their houses near the place of the alleged offence, (9) that the defence witnesses were independent witnesses, (10) that though the complainant's Cher had admittedly

caught fire, none of his witnesses claimed that he saw the appellants actually setting fire to it, that their version that they saw them near the place or running away therefrom was unnatural, particularly the version of Badri Prasad that he saw the appellants not only near the place but actually talking to the complainant, (11) that the version of Badri Prasad was not only unnatural but his denial that he had previously figured as a witness on the side of the complainant was false, (12) that the evidence of Mantri that he saw the appellants jumping over a wall was improbable as the wall was about 5 to 5½ feet in height, and lastly, that the version of the prosecution witnesses that they had flashed their torches in the light of which they saw the appellants running away was also unnatural. On this analysis of the evidence, the Magistrate came to the conclusion that none of the prosecution witnesses had seen the appellants or any of them either setting fire to the Cher or being near it, that the statements of the defence witnesses, who were the near neighbours and therefore could have arrived at the scene of the offence earlier than the others, that none of the prosecution witnesses was present when they came there, were true, that the case was first investigated by the police and was found to be false and it was then only that a complaint had been filed, and lastly, that looking to all the facts and circumstances of the case, the complaint was baseless, and therefore, no order of commitment could be made.

6. Aggrieved by the said order of discharge, the complainant filed a criminal revision before the Sessions Court. The Sessions Judge observed that the Magistrate had assessed the evidence led by the parties, made an on the spot inspection of the scene of the offence, disbelieved the prosecution witnesses and had thus virtually tried the case instead of leaving it to be tried by the Sessions Court. Relying on *Bipat Gope v. State of Bihar*, 1962 Supp (2) SCR 948 = (AIR 1962 SC 1195) he held that the Magistrate had gone beyond his jurisdiction, that there was evidence which established a prima facie case, and therefore, remitted the case to the Magistrate directing him to commit the appellants for trial to the Sessions Court. In a further revision by the appellants to the High Court, the High Court noted that though there may not be eye-witnesses, there may in some cases be circumstantial evidence cogent

enough to establish the case against an accused person, that though the prosecution witnesses did not claim that they had seen the appellants setting fire to the house, they had claimed to have seen the appellants near about when they came there in response to the complainant's alarm and had also seen them running away. The High Court observed that this evidence constituted circumstantial evidence to make out a prima facie case. It also observed that the reasoning of the Magistrate that the appellants could not have jumped over a 5 feet wall was misconceived and, relying on the observations in *Bipat Gope's case*, 1962 Supp (2) SCR 948 = (AIR 1962 SC 1195) dismissed the revision holding that on the evidence recorded by the Magistrate it was his duty to commit the appellants to the Sessions Court and the Magistrate could not himself decide the case as he in fact had done.

7. The scope of the inquiry under Chapter XVIII of the Code, as also the powers of the committing Magistrate under Section 209 therein have by now been well settled. As a result of the amendment of the original Section 207 and substitution of that section by the new Sections 207 and 207A by the Code of Criminal Procedure (Amendment) Act, XXVI of 1955, a distinction has now been made between proceedings instituted on a police report and those otherwise than on a police report. In the case of the former, the provisions of the new Section 207A apply, while the latter are governed by the provisions of Sections 208 and onwards. It is fairly clear that the procedure which applies to the proceedings instituted otherwise than on a police report is more elaborate than that under Section 207A. Further, whereas Section 207A (6) lays down that, the committing Magistrate shall discharge an accused person if he is of opinion that the evidence and documents before him disclose "no grounds for committing him for trial". Section 209 uses the words "not sufficient grounds for committing an accused person for trial". The difference in the language in these two sections has already been the subject matter of consideration by this Court, and therefore, we do not consider it necessary once again to go into any detailed examination of them. In *Ramgopal Ganpatrai Ruja v. The State of Bombay*, 1958 SCR 618 = (AIR 1958 SC 97) this Court examined in detail the previous case law and held

that the law in India, as incorporated in Section 209, is the same as in England, and cited with approval the statement in that connection in "Halsbury's Laws of England", (3rd Ed.), Vol. 10, p. 365, namely;

"When all the evidence has been heard, the examining justices then present who have heard all the evidence must decide whether the accused is or is not to be committed for trial. Before determining this matter they must take into consideration the evidence and any statement of the accused. If the justices are of opinion that there is sufficient evidence to put the accused upon trial by jury for any indictable offence they must commit him for trial in custody or on bail."

This Court added that in each case the Magistrate holding the preliminary enquiry has to be satisfied that a prima facie case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit and if he is not so satisfied, he is not to commit. Where, however, much can be said on both the sides, it would be for the Sessions Court and not for the Magistrate to decide which of the two conflicting versions will find acceptance at its hands. In *Alamoban Das v. State of West Bengal*, (1969) 2 SCR 520 at p. 525 = (AIR 1970 SC 863 at p. 866) commenting on S. 209 of the Code this Court observed that though a Magistrate holding an inquiry under Chapter XVIII is not intended to act merely as a recording machine and is entitled to sift and weigh the materials on record, he is to do so only for the purpose of seeing whether there is sufficient evidence for commitment and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit it is his duty to discharge the accused. But, if there is some evidence on which a conviction may reasonably be based he must commit the case. But the Magistrate at that stage has no power to evaluate the evidence for satisfying himself of the guilt of the accused. The question before him at that stage would be whether there is some credible evidence which would sustain a conviction. In *Bipat Gope's case*, 1962 Supp (2) SCR 948 = (AIR 1962 SC 1195) the Magistrate had examined witnesses, and as in the present case, held an on the spot inspection. It was found that the Magistrate did not stop to find out if there was evidence which, if believed, would esta-

blish at least a prima facie case, but had gone on further to disbelieve that evidence by an elaborate and painstaking process of examination, in aid of which he brought to bear his own appraisal of inconsistencies, improbabilities etc. The Court held that in doing so the Magistrate in fact tried the whole case thereby forestalling the decision of the Court of Session which alone had the jurisdiction to try such a case. The Court, therefore, set aside the Magistrate's order of discharge as being one in excess of jurisdiction. Though the proceedings there were under Section 207A, the Court took into consideration the language used both in that section and S. 209 and stated that though the words used in the two sections differed in a certain extent, under neither of them can the Magistrate decide the case as if the trial was before him.

8. In the present case, the Magistrate has done precisely what was held in *Bipat Gope's case*, 1962 Supp (2) SCR 948 = (AIR 1962 SC 1195) to be contrary to the principle governing Sec. 209. The Sessions Judge, in our view, therefore, was right in setting aside the order of discharge passed by the Magistrate and the High Court also rightly refused in the revision before it to interfere with that order. Though, as pointed out earlier, the language of Section 209 differs from that in Section 207A, it is well settled that under neither of them has the Magistrate the jurisdiction to assess and evaluate the evidence before him for the purpose of seeing whether there is sufficient evidence for conviction. The reason obviously is that if he were to do that he would be trying the case himself instead of leaving it to be done by the Sessions Court, which alone has under the Code the jurisdiction to try it. As stated earlier, both the parties led evidence. Instead of finding out whether there was sufficient evidence to make out a prima facie case, what the Magistrate did was to evaluate the evidence by an elaborate assessment of it and held, as if he was trying the case, that between the two versions the evidence of witnesses examined by the appellants was preferable to that led by the complainant, that the defence evidence was more probable and that there were inconsistencies and improbabilities in the prosecution evidence, and finally that that evidence was interested and liable, therefore, to be discarded. There

may perhaps be some force in what the Magistrate has said about the evidence, but it is clear that there was something which could be said on both the sides. The Magistrate, therefore, ought to have left the case for the Sessions Court to decide and come to its conclusion which of the two rival versions was acceptable on the facts and circumstances of the case. In our view the Magistrate transgressed the bounds permissible to him under Section 209, and therefore, his order of discharge was liable to be set aside by the Sessions Court and the High Court, therefore, rightly refused to interfere with it.

9. The appeal fails and is dismissed.
Appeal dismissed.

AIR 1970 SUPREME COURT 1019
(V 57 C 213)

(From: Madhya Pradesh)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Dindayal and another, Appellants v.
Rajaram, Respondent.

Civil Appeal No. 404 of 1967, D/- 17-4-1970.

(A) Hindu Succession Act (1956), Section 14 (1) — Widow in possession as trespasser — She cannot be said to be “possessed of” property.

When a widow succeeds to property of her deceased husband after his death and thereafter validly gifts away the property to her daughter and after the daughter's death, takes possession of the property, her possession is that of a trespasser and continues to be so when later on the Hindu Succession Act comes into force and even thereafter till her death. She cannot be held to have acquired any right under the Hindu Succession Act because before, any property can be said to be “possessed” by a Hindu woman, as provided in Section 14 (1) of the Act, two things are necessary, (a) she must have had a right to the possession of that property and (b) she must have been in possession of that property either actually or constructively. AIR 1962 SC 1493 and 1968 SCD 881, Ref. (Para 7)

(B) Limitation Act (1908), Section 28 — Applies also to suits to which limitation is provided in other Acts.

*(Second Appeal No. 938 of 1965—Madh Pra.)

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The principle underlying Section 28 of the Limitation Act, 1908 (same as Section 27 of the Limitation Act, 1963) is of general application. It is not confined to suits and applications for which a period of limitation is prescribed under the Limitation Act. (Para 10)

(C) Tenancy Laws — C. P. Tenancy Act (1 of 1920 since repealed) Sch. 2, Art. 1 — Suit not as tenant but as reversioner — Article 1 does not apply.

Where the plaintiffs who also were at one time the tenants of the suit holding have not brought the suit for possession of the holding as tenants of that holding, but brought it on the strength of their title as the nearest reversioners to the late holder nor was their dispossession a part of the cause of action for the suit, the suit for possession is not one on the ground that the plaintiffs had been earlier dispossessed. This is a suit for possession on the strength of the new title acquired by the plaintiffs after the death of the widow of the late holder.

Therefore Article 1 of the Second Schedule to the C. P. Tenancy Act 1920 does not apply to the suit. The limitation for the suit is governed by the provisions of the Limitation Act, 1908. (Para 12)

(D) Limitation Act (1908), Article 142 — C. P. Tenancy Act (1 of 1920 since repealed), Section 104, Sch. II, Art. 1 — Widow in possession of property of deceased protected tenant as trespasser — Claim by plaintiffs after her death as reversioners is not barred though their claim as dispossessed tenants is barred under Tenancy Act. (Paras 13, 14)

Cases Referred: Chronological Paras
(1967) Civil Appeal 138 of 1964,

D/- 1-5-1967 = 1968 SCD 881,

Kuldip Singh v. Suraj Singh 7

(1962) AIR 1962 SC 1493 (V 49) =

1962 Supp (2) SCR 418, S. S.

Munnalal v. S. S. Rajkumar 7

The following Judgment of the Court was delivered by

HEGDE, J.: This appeal by special leave arises from the decision of Madhya Pradesh High Court in second appeal No. 938 of 1965 on its file.

2. The facts found which are no more in dispute, and relevant for the purpose of deciding the questions of law arising for decision in this appeal may now be briefly stated. One Gulli Gotamia had two sons by name Girdharilal and Nandoo. From the material on record, it is not possible to find out the date of death of Gulli Gotamia but admittedly

he died leaving behind him his aforementioned two sons, Girdharilal and Nandoo were divided. Girdharilal died on May 17, 1920. His first wife had predeceased him. But at the time of his death, his second wife Ladli Bahu was alive. On his death his widow took possession of his properties. Girdharilal's brother Nandoo had two children, Gajadhar and Lachhi. Lachhi died issueless. Gajadhar also is dead. He has two children Dindayal (1st defendant) and Prameshwar Dayal (second defendant). Girdharilal had a daughter from his predeceased wife by name Kousa Bai. She died in 1943. Ladli Bahu had a daughter by name Nanni Bai who died in 1941. The children of Nanni Bai, Narbada Bai, Raja Ram, Ram Narain and Gaya Prasad are the plaintiffs in the suit.

3. Ever since the death of Girdharilal, Ladli Bahu was in possession of the suit properties. She gifted those properties to her daughter Nanni Bai on July 30, 1936 and put the donee in possession of the same. Thereupon Kousa Bai filed a suit in 1937 seeking a declaration that the gift deed in question is not binding on her and that it cannot come in her way in inheriting the suit properties on the death of Ladli Bahu. That suit was decreed on May 3, 1937. As mentioned earlier, Nanni Bai died in 1941. On her death, the plaintiffs came into possession of the suit properties. Ladli Bahu took wrongful possession of the suit properties from the plaintiffs on June 1, 1951 under the guise of enforcing the decree in the suit filed by Kousa Bai. Thereafter she continued to be in exclusive possession of the suit properties. On May 27, 1952, she gifted some of those properties to one Rameshwar Prasad and the remaining properties she gifted to the appellants on March 21, 1957. She died on April 9, 1960. The Hindu Succession Act came into force on June 17, 1956.

4. Two questions namely (1) what is the effect of the possession taken by Ladli Bahu on June 1, 1951, and (2) Did Ladli Bahu become the full owner of those properties in view of Section 14(2) of the Hindu Succession Act, 1956, were presented to the High Court as well as to the Courts below for decision.

5. The High Court came to the conclusion that Ladli Bahu's possession of the suit properties after June 1, 1951, was that of a trespasser and as such she did not become an absolute owner of

those properties on the coming into force of the Hindu Succession Act. It also held that the plaintiffs became entitled to the suit properties on the death of Ladli Bahu as the nearest reversioners of Girdharilal.

6. It was urged on behalf of the appellants that as soon as Ladli Bahu took possession of the suit properties from the plaintiffs, her previous possession as the widow of Girdharilal sprang up again and thereafter she was holding the properties in her capacity as the widow of Girdharilal and hence she became the absolute owner of those properties when the Hindu Succession Act came into force. On the other hand, it was urged on behalf of the respondents, that as soon as Ladli Bahu parted with the possession of the suit properties, in favour of her daughter under a gift deed, she lost all rights in those properties. Therefore when she acquired possession in 1951, she did so as a trespasser. As she had no right to possess those properties when the Hindu Succession Act came into force, she acquired no rights under Section 14(2) of the Hindu Succession Act.

7. The High Court and the courts below have come to the conclusion that the gift made by Ladli Bahu in favour of Nanni Bai is a valid gift and that Nanni Bai came into possession of the suit properties on the strength of that gift. Hence she must be held to have had no interest in those properties thereafter. Therefore when Ladli Bahu took possession of those properties in 1951, she did so as a trespasser. This conclusion, in our opinion, is unassailable. If we come to the conclusion that she continued as a trespasser on the date the Hindu Succession Act came into force, and even thereafter till her death then she cannot be held to have acquired any right under the Hindu Succession Act because before, any property can be said to be "possessed" by a Hindu woman, as provided in Section 14(1) of the Hindu Succession Act, two things are necessary (a) she must have had a right to the possession of that property and (b) she must have been in possession of that property either actually or constructively — See S. S. Munna Lal v. S. S. Rajkumar, 1962 Supp (2) SCR 418 = (AIR 1962 SC 1493); Kuldip Singh v. Surain Singh, Civil Appeal No. 133 of 1964 D/- 1-5-1967 (SC).

8. The next question is whether in view of Section 104 (1) read with Art. I

of the second Sch. of the C. P. Tenancy Act, 1920 (to be hereinafter referred to as the Act) it can be held that Ladli Bahu had acquired a title to possess the suit properties.

9. Section 104 (1) of the Act provides that the suits and applications spe-

cified in the Second Schedule therein shall be instituted or made within the time prescribed in that Schedule for them respectively; and every such suit instituted and application made after the period of limitation so prescribed shall be dismissed. Article 1 of the Second Schedule is as follows:

Description of suit or application.	Period of limitation.	Time from which period begins to run.
For possession of a holding by a person claiming to be a tenant from which he has been dispossessed or excluded from possession by any person.	Three years.	The date of dispossession or exclusion.

10. Admittedly the suit properties were held on tenancy right. Girdharilal was the protected tenant of those properties. Under the gift mentioned earlier, the plaintiffs became the tenants of those properties. In view of Article 1 of the Second Schedule read with Section 104(1) of the Act, the plaintiffs as tenants could not have sued for possession of the suit properties after June 1, 1954. It was urged on behalf of the appellants that in view of the principle underlying Section 28 of the Indian Limitation Act, 1908, which principle is not confined to suits and applications for which limitation is prescribed under that Act but is of general application, the plaintiffs' right to the suit properties must be held to have been extinguished. In other words, the contention was that in view of the aforementioned provisions, the plaintiffs had not merely lost their right to sue for possession of the suit properties, their right in the properties itself had been extinguished. It is well settled that the principle underlying Section 28 of the Indian Limitation Act, 1908 (same as Section 27 of the Indian Limitation Act, 1963) is of general application. It is not confined to suits and applications for which a period of limitation is prescribed under the Limitation Act.

11. Article 1 of the second schedule to the Act applies only to suits brought by a person claiming to be a tenant for possession of a holding from which he has been dispossessed or excluded from possession by any person. In other words before this Article can apply, the following conditions must be fulfilled.

(1) The plaintiff must claim to be the tenant of the holding which is the subject matter of the suit;

(2) The suit must be one for possession and

(3) The suit must be on the ground that he had been dispossessed or excluded from possession by any person.

12. Though the plaintiffs in this suit were at one time the tenants in the suit holding in view of the gift in favour of their mother, they have not brought the present suit as tenants of that holding. They have brought it on the strength of their title as the nearest reversioners to Girdharilal. Nor is their dispossession in 1951 a part of the cause of action for the present suit. This is not a suit for possession on the ground that the plaintiffs had been earlier dispossessed. This is a suit for possession on the strength of the new title acquired by the plaintiffs after the death of Ladli Bahu. Therefore Article 1 of the second schedule does not apply to the present suit. The limitation for this suit is governed by the provisions of the Limitation Act, 1908.

13. Further it is one thing to say that a tenant who was in possession of the tenancy holding at the time of dispossession had lost his rights in the holding but it is another thing to say that a trespasser had become the tenant of that holding at the end of the prescribed period. It must be remembered that C. P. Tenancy Act is a special Act. It only governs those matters for which provision is made therein. In other respects the general law continues to apply. The Act does say that a tenant's right in respect of any property can be acquired by adverse possession. We do not think that the provisions of the Act enabled (The Act has been repealed) a trespasser to impose himself as a tenant on the landlord by means of adverse possession of the holding as against the tenant for a period of three years. Similarly, it is not possible to hold that a tenancy right could have been acquired in a holding

so as to affect the rights of third parties by being in wrongful possession of that holding for a period of three years. If it is otherwise, valuable rights of third parties could have been jeopardised for no fault of theirs. Take the case of a widow, who was in possession of a tenancy holding. The prospective reversioners to her husband's estate would have had no right in that holding during her life time. Is it reasonable to hold that the reversioner would have lost his rights in the holding even before he acquired them because some one was in possession of that holding adversely to the widow for a period of three years? That would not have been the position even under Article 144 of the Limitation Act, 1908. It could not be different under the Act. A right cannot be barred even before it accrues. The fact that the tenant dispossessed happened to become the reversioner on the death of the widow cannot make any difference in law.

14. In 1951, the plaintiffs had two different rights over the suit properties—one under the gift referred to earlier and the other as reversioner. One was an existing right, the other was a prospective one. Their right under the gift must be held to have been extinguished under Article 1, Sch. II read with Section 104 of the Act. But their right to those properties, as reversioners arose only after the death of Ladli Bahu. That right could not have been barred even before it accrued. As against the prospective reversioners Ladli Bahu was holding the suit properties as a trespasser. She had acquired no rights in those properties as against them. Till her death, it was not possible under law to predicate who would have been her husband's nearest reversioner on the date of her death.

15. In the result this appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1022
(V 57 C 214)

(From: Himachal Pradesh)

J. M. SHELAT AND G. K. MITTER, JJ.
Mohan Lal, Appellant v. Mohum Ram,
Respondent.

Civil Appeal No. 2212 of 1968, D/- 7-4-1970.

EN/EN/B675/70/CWM/D

(A) Tenancy Laws — Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act (15 of 1954), Section 11 (2) — Right of tenant of acquisition of proprietary rights in the Land — Protection to minor landlord under Section 11 (2) — Held on facts, as not available.

The tenant applied under Section 11 (1) for the proprietary rights of landholders. The minor landlord resisted the application on the ground that he had no other means of livelihood except the land in question within Section 11 (2). It was established that the father of the minor held considerable ancestral property in which the minor had interest as coparcener.

Held that the land in question was not the only means of the minor's livelihood and even when he was deprived of the proprietary rights therein there would be other properties, in which he had an interest. The protection under Section 11 (2) could not be availed of by the landlord without any regard being had to minor's right of maintenance under the Hindu Adoptions and Maintenance Act.

(Para 8)

(B) Tenancy Laws — Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act (15 of 1954), Section 11 (2) — Protection to minor landlord having no other means of livelihood against right of tenant of acquisition of proprietary rights in the land — Whether the statutory right of maintenance of a minor under Hindu Adoptions and Maintenance Act (1956) can or cannot be treated as a means of livelihood — (Quaere).

(Para 8)

The following Judgment of the Court was delivered by

SHELAT, J.:— This appeal, by special leave, concerns a piece of land, measuring 27 highas and 17 hiswas, situate in village Chethla, District Mahasu in Himachal Pradesh. The land stood in the names of one Kubja and Subda, the minor daughters of Smt. Radhu, as the owners thereof. It can no longer be disputed that Radhu, as the guardian of her minor daughters, had leased the land to the respondent for a term of five years. The period of the lease expired in Rabi 1960. The said Subda died; in the result Kubja became the sole owner of the said land. On December 6, 1960, Radhu, as the guardian of the minor Kubja, sold the said land to the appellant for Rs. 4000. In March 1961, the respondent, claiming to be still the tenant, applied for the proprietary rights of the landholders in the

said land under Section 11 (1) of the Himachal Pradesh Abolition of Big Land-
ed Estates and Land Reforms Act, XV of
1954 (hereinafter referred to as the Act).

2. The application of the respondent was resisted by both Kubja and the appellant on the grounds that the respondent was never the tenant of the said land but had taken forcible possession thereof, that he had thereafter relinquished its possession in a Panchayat and further that as the appellant was a minor, having no other means of livelihood except the said land, he was entitled to the protection of sub-section (2) of Section 11.

3. The compensation officer under the Act dismissed the respondent's application holding that Radhu, as the guardian of her minor daughters, had leased the said land to the respondent for a period of five years, but that the lease expired in 1960 and thereupon the respondent had relinquished possession. Consequently, he was in March 1961 no longer a tenant who could apply under Section 11 (1). He also held that the appellant was a minor without any other means of livelihood except the land in question, and therefore, was in any event entitled to the protection provided under Section 11 (2). The District Judge, in the appeal filed by the respondent, held that the respondent had not relinquished possession nor had he ceased to be the tenant of the land in spite of the expiry of the lease period. He also held that the trees and the buildings standing on the said land would not be covered under the proceedings under Section 11 (1), the first because they did not constitute land under the Act, and the second because the tenant did not wish to include the buildings in his said application. The District Judge, however, omitted to decide the question as to whether the respondent was a minor without any other means of livelihood, and therefore, entitled to the protection under Section 11 (2). He, nevertheless, set aside the order of the compensation officer and allowed the appeal awarding proprietary rights in the land to the respondent save in respect of the trees and the buildings. The appellant filed a second appeal before the learned Judicial Commissioner who remanded the case to the District Judge directing him to give his finding on the question left undecided by him, namely, the question as to the applicability of Section 11 (2). On such remand the District Judge gave his finding to the effect that except for the land in question the

appellant-minor had no other means of livelihood, and therefore, during his minority the respondent-tenant was not entitled to acquire the proprietary rights in the said land. He also got a plan prepared of the buildings and the lands appertaining thereto which would be excluded from the purview of the application.

4. On the matter again coming up before the Judicial Commissioner, the Judicial Commissioner found that (1) the respondent was inducted on the land as a tenant by Radhu, (2) that the respondent had not relinquished possession on expiry of the period of five years under the said lease, and (3) that he did not cease to be the tenant even on expiry of the said period by reason of Sections 48 to 55 and 62 of the Act. Observing that the real point of controversy before him, therefore, was as regards the applicability of Section 11 (2), he held that though the statutory right of a minor son to be maintained by his father under Section 20 of the Hindu Adoptions and Maintenance Act, 78 of 1956 cannot invariably and in all cases be regarded as a means of livelihood of a minor, it could be taken into account on the facts and circumstances of the present case. These facts, according to him were: (1) the fact that the appellant was residing with and was being maintained by his father, (2) the admission made by the father that he had acquired other lands by purchasing them and had thus augmented the ancestral property held by him, (3) the price of Rs. 4000 for the land in question was in fact paid by him, and (4) it comprised of Rs. 2000 advanced earlier and the balance of Rs. 2000 paid by him at the time of the execution of the sale. Basing his conclusion on these facts, the Judicial Commissioner held that the appellant could not be said to be a minor, who had no means of livelihood except the land in question, that therefore, Section 11 (2) did not apply and the respondent-tenant was entitled under Section 11 (1) to acquire the proprietary rights in the land excluding the buildings and the trees standing thereon.

5. Section 11 reads as follows:

"(1) Notwithstanding any law, custom or contract to the contrary a tenant other than a sub-tenant shall, on application made to the compensation officer at any time after the commencement of this Act, be entitled to acquire, on payment of compensation, the right, title and interest of the landowner in the land of the tenancy held by him under the landowner—

(2) Nothing contained in sub-section (1) shall apply to a landlord, if he has no other means of livelihood, and is a minor — In the case of a minor, sub-section (1) shall not apply during his minority —

6. Counsel for the appellant did not contest the finding of the Judicial Commissioner that the respondent was inducted on the land as a tenant, and that though the lease period expired in 1960 he was still a tenant until he was evicted by a decree of a Court or had abandoned or otherwise relinquished the tenancy. That being so, there can be no doubt that the respondent was entitled to maintain the application under Section 11 (1). The only question, therefore, which he pressed before us was that the Judicial Commissioner was in error in holding that the obligation of a father to maintain his minor son under the Hindu Adoptions and Maintenance Act can be regarded as a means of livelihood of such a son other than the land in question as contemplated by Section 11 (2).

7. Reading the judgment of the Judicial Commissioner as a whole, it is clear that that was not what the Judicial Commissioner held. What he held was that the expression "means of livelihood" in Section 11 (2) had not been used in any artificial sense but in its ordinary meaning, that the said expression would mean resources of livelihood, that in ascertaining such resources each case would depend on its own facts and circumstances, that the statutory right of a minor to be maintained by his father cannot invariably and always be regarded as a means of livelihood of the minor, but that there may be facts on which such a right may be taken into consideration while deciding the question whether protection under sub-section (2) can be invoked. The Judicial Commissioner then considered the aforesaid four facts and came to the conclusion that this was not a case where the appellant-minor could be said to be without any means of livelihood other than the land in question.

8. It is not necessary on the facts of the present case to decide whether the statutory right of maintenance of a minor can or cannot be treated as a means of livelihood. There are facts in this case which clearly show that even after the proprietary rights of the minor in the land in question are acquired by the tenant there would be other means of livelihood left with the appellant. The first and the most obvious one is that

there are standing on the land two houses. the proprietary rights in which are not sought to be acquired by the respondent. The plan got prepared by the District Judge shows the two houses together with the portions of land appertaining thereto which would still remain with the appellant. The evidence of the appellant's father was that the whole of the land together with the trees and the two houses standing thereon was acquired by him for the appellant for Rs. 4000 only. By 1964 when he gave his evidence, the value of the two houses alone was between Rupees 7000 to Rs. 8000. The father's evidence further shows that he got land measuring 25 to 30 bighas on the death of his father, that he had since then purchased several other pieces of land, thus increasing the extent of the ancestral property held by him. Over and above these lands, he had planted a number of apple and other fruit bearing trees. The property held by him thus was, on his own admission, ancestral property in which the appellant has an interest as a coparcener in a Hindu joint family. It is thus manifest that the land in question is not the only means of the appellant's livelihood and even when he is deprived of the proprietary rights therein there would be other properties, even besides the said two houses and the trees, in which he has an interest. Therefore, the conclusion reached by the Judicial Commissioner that the protection under Section 11 (2) could not be availed of by the appellant is correct without any regard being had to his right of maintenance under the Hindu Adoptions and Maintenance Act.

9. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1024

(V 57 C 215)

(From: Mysore)

J. C. SHAH AND K. S. HEGDE, JJ.

The State of Mysore, Appellant v. Alexander Misquith etc., Respondents.

Civil Appeals Nos. 1724-1726 of 1966, D/- 8-4-1970.

Constitution of India, Article 136 — Appeal by special leave — Exercise of special and discretionary jurisdiction — Question involving validity of statute no longer in operation — Claim not substantial — Appeal dismissed without considering merits. (Para 3)

EN/EN/B677/70/DVT/B

procedural protections afforded a defendant in a criminal prosecution, or whether something less was sufficient, were to be initially answered by the District Court on remand, the plaintiff being entitled to relief if he proved at trial that the Commission was designed to and did act in the manner alleged by him and that its procedures failed to meet the requirements of due process.

(Paras 35, 36)

Cases Rferred: Chronological Paras

(1968) 286 F Supp 537, Jenkins v. Mc. Keithen	1, 12, 36
(1968) 392 US 83 = 20 L Ed 2d 947 = 88 S Ct 1942, Flast v. Cohen	16, 20, 43
(1968) 393 US 12 = 21 L Ed 2d 12 = 89 S Ct 46	43
(1967) 388 US 14 = 18 L Ed 2d 1019 = 87 S Ct 1920, Cf. Washington v. Texas	32
(1965) 382 US 172 = 15 L Ed 2d 247 = 86 S Ct 347, Walkar Process Equipment Inc. v. Food Machinery & Chemical Corporation	47
(1963) 373 US 96 = 10 L Ed 2d 224 = 83 S Ct 1175, Willner v. Committee	31
(1962) 369 US 186 = 7 L Ed 2d 663 = 82 S Ct 691, Baker v. Carr.	20
(1960) 363 US 420 = 4 L Ed 2d 1307 = 80 S Ct 1502, Hannah v. Larche	13, 22, 26, 27, 30, 33, 34, 39, 40, 62, 63, 68
(1960) 361 US 212 = 4 L Ed 2d 252 = 80 S Ct 270, Stirone v. United States	34
(1959) 360 US 474 = 3 L Ed 2d 1377 = 79 S Ct 1400, Green v. Mc. Elroy	22, 27, 31
(1958) 357 US 449 = 2 L Ed 2d 1488 = 78 S Ct 1163, Cf. Naacp v. Alabama	22
(1957) 355 US 41 = 2 L Ed 2d 80 = 78 S Ct 99, Conley v. Gibson	47
(1951) 341 US 123 = 95 L Ed 817 = 71 S Ct 624, Joint-Fascist Refugee Committee v. Mc. Grath	20, 22, 27, 28
(1948) 333 US 257 = 92 L Ed 682 = 68 S Ct 499, In re, Oliver	32
(1943) 318 US 44 = 87 L Ed 603 = 63 S Ct 493, Tileston v. Ula-man	15
(1942) 316 US 407 = 86 L Ed 1563 = 62 S Ct 1194, Columbia Broadcasting System Inc. v. United States	22
(1938) 304 US 1 = 82 L Ed 1129 = 58 S Ct 773, Morgan v. United States	27, 32
(1936) 298 US 349 = 80 L Ed 1209 = 56 S Ct 797, Baltimore & Ohio R. R. v. United States	32

(1929) 279 US 263 = 73 L Ed 692 = 49 S Ct 268, Sinclair v. United States	22
(1927) 273 US 299 = 71 L Ed 651 = 47 S Ct 413, Cf. United States v. Los Angeles & S. L. R. R.	22
(1927) 273 US 135 = 71 L Ed 580 = 47 S Ct 319, Mc. Grain v. Daugherty	22
(1887) 121 US 1 = 30 L Ed 849 = 7 S Ct 781, Ex Parte Brain	34
251 La 993 = 207 So 2d 770, Mor-tone v. Morgan	13, 28
J. Minos Simon, for Appellant; Ashton L. Stewart, for Appellees (Respondents).	

SUMMARY

A member of a labor union instituted an action for declaratory and injunctive relief in the United States District Court for the Eastern District of Louisiana, challenging the constitutionality under the due process clause of a Louisiana statute, and the actions thereunder of the defendants, state officials. The challenged statute created a Labor-Management Commission of Inquiry to investigate criminal violations in the field of labor-management relations upon referral by the governor, to hold public hearings for determining whether there was probable cause to believe that violations of the criminal laws had occurred, and to make public findings and recommendations to appropriate authorities with regard to the institution of criminal prosecutions, including conclusions as to specific individuals, the statute also limiting the right of a witness, who could be compelled to attend, or his counsel, to examine other witnesses and to call witnesses. The complaint contained allegations that the commission was an executive trial agency performing an accusatory function designed to publicly find the plaintiff and others guilty of violations of criminal laws without trial or procedural safeguards, allegedly for the purpose of injuring the plaintiff and destroying the Labor union of which he was a member, and that the defendants, acting in concert with others and in connection with the administration of the statute, had engaged in a course of conduct designed publicly to brand the plaintiff and others as criminals, including the filing of allegedly baseless criminal charges against the plaintiff. The three-judge District Court granted the defendants' motion to dismiss the complaint for failure to state a cause of action, holding that the Act was constitutional, and that the other matters alleged were merely potential defenses to the pending criminal charges against the plaintiff (286 F Supp 537).

On appeal, the United States Supreme Court reversed and remanded. Five members of the court agreed that the District

Court's judgment should be reversed, but did not agree upon an opinion.

MARSHALL, J., announced the judgment of the court, and in an opinion joined by **WARREN, CH. J.**, and **BRENNAN, J.**, expressed the view that (1) under the allegations in the complaint, the plaintiff had standing to attack the constitutionality of the statute and the acts taken by the defendants thereunder, notwithstanding that the plaintiff had not alleged that he had been or would be called before the commission, since the allegations showed that he had sufficient adversary interest with regard to his reputation and economic well-being to insure proper presentation of issues, and also showed a substantial, legally redressable injury to the plaintiff as a direct, rather than a collateral, consequence of the statute's administration, and since the plaintiff's opportunity to defend any criminal prosecutions against him was not sufficient to deprive him of standing to challenge the statute, (2) if the state commission in fact exercised an accusatory function akin to an official adjudication of criminal culpability in branding individuals as criminals in public, its procedures did not meet minimal due process requirements as to the right of an investigated person to confront and cross-examine witnesses against him and to present evidence on his own behalf, and (3) the allegations of the complaint were sufficient to state a cause of action, and the questions whether due process required that the commission provide all the procedural protections afforded a defendant in a criminal prosecution, or whether something less was sufficient, were to be initially answered by the District Court on remand, the plaintiff being entitled to relief if he proved at trial that the commission was designed to and did act in the manner alleged in his complaint, and that its procedures failed to meet the requirements of due process.

DOUGLAS, J., concurred in the result on the basis of his opinion, expressed in an earlier decision of another case, that an accusatory, investigative commission must comply with due process.

BLACK, J., concurred in the Court's judgment, expressing the view that the Louisiana statute denied due process of law, since it was nothing more nor less than a scheme for a non-judicial tribunal to charge, try, convict, and punish people without Courts, juries, lawyers, or witnesses.

HARLAN, J., joined by **STEWART** and **WHITE, JJ.**, dissented on the grounds that (1) the complaint failed to show that the plaintiff had standing to challenge the commission's procedures, since it was not alleged that the plaintiff had been affected by the asserted unconstitutional

procedures or had been or would be investigated or called by the commission or identified in its findings, (2) the commission did not determine guilt or innocence, but performed only investigative functions designed to discover violations which might result in the initiation of criminal proceedings, and thus should not be required to follow strict adjudicatory procedures, (3) the statutory safeguards afforded persons under investigation by the commission were at least equal to those provided by most federal investigative agencies, and (4) the complaint could not be reasonably construed as alleging that in fact the commission acted primarily as an agency of exposure, rather than serving the ends required by the State statute.

SEPARATE OPINIONS

Mr. Justice **MARSHALL** announced the judgment of the Court and delivered an opinion in which Mr. Chief Justice **WARREN** and Mr. Justice **BRENNAN** join.

This case involves the constitutionality of a 1967 Louisiana statute, known as Act No. 2, which creates a body called the Labor-Management Commission of Inquiry. La Rev Stat Ann Ss. 23:880.1-23:880.18 (Supp 1969). The stated purpose of this Commission is "the investigation and findings of facts relating to violations or possible violations of criminal laws of the state of Louisiana or of the United States arising out of or in connection with matters in the field of labor-management relations. . . ." Act No. 2, Preamble, [1967 Extra Sess] La Acts 3. Appellant, a member of a labor union, filed this suit in the District Court for the Eastern District of Louisiana challenging the constitutionality of Act No. 2 and of certain actions taken by state officials in the administration of the Act and otherwise. He sought both declaratory and injunctive relief. A three-judge court was convened and that court ultimately granted appellees' motion to dismiss the complaint. *Jenkins v. McKelthen*, 286 F Supp 537 (DC ED La 1968). We noted probable jurisdiction of an appeal brought under 28 USC S. 1253.(1) We reverse.

2. Since the case was decided on a motion to dismiss, a rather detailed examination of the structure of the Act and of the allegations of the complaint is necessary.

I.

3. The impetus for the formation of the Commission was stated in the pre-

1. The constitutionality of the Act was upheld in *Martone v. Morgan*, 251 La 993, 207 So 2d 770, appeal dismissed, 393 US 12, 21 L Ed 12 d 12, 89 S Ct 46 (1968) (petition for rehearing pending).

amble of the Act. [1967 Extra Sess] La Act 2. It cited "unprecedented conditions" in the labor relations of the construction industry, and it particularly noted certain "allegations and accusations of violations of the state and federal criminal laws which should be thoroughly investigated in the public interest. . .

.. " Id., at 3 The additional investigative facilities of the Commission were thought necessary to "supplement and assist the efforts and activities of the several district attorneys, grand juries, and other law enforcement officials and agencies. . ." Id., at 3.

4. The Commission is composed of nine members appointed by the Governor. La Rev Stat Ann S. 23:880.1 (Supp 1969). It is empowered to act only upon referral by the Governor when, in his opinion, there is substantial indication that there are or may be "widespread or continuing violations of existing criminal laws" affecting labor-management relations. La Rev Stat Ann S. 23:880.5 (Supp 1969). Upon referral by the Governor, the Commission is to proceed by public hearing to ascertain the facts pertaining to the alleged violations. La Rev Stat Ann S. 23:880.6 (Supp 1969). In order to carry out this function, the Commission has the power to make appropriate rules and regulations, to employ attorneys, investigators, and other staff, to compel the attendance of witnesses, to examine them under oath, and to require the production of books, records, and other evidence. La Rev Stat Ann S. 23:880.8 (Supp 1969). It can enforce its orders by petition to the state Courts for contempt proceedings. La Rev Stat Ann S. 23:880.9 (Supp 1969).

5. The scope of the Commission's investigative authority is explicitly limited by the Act to violations of criminal laws. "The commission shall have no power, authority or jurisdiction to investigate, hold hearings or seek to ascertain the facts or make any reports or recommendations on any of the strictly civil aspects of any labor problem. . ." La Rev Stat Ann S. 23:880.6 (B) (Supp 1969).(2)

2. "[I]ts power, authority or jurisdiction shall in no case extend to (1) any matter which is solely an 'unfair labor practice' or an 'unfair employment practice' or a legitimate labor dispute under the provisions of any federal or state law; or (2) any matter which relates to legitimate economic issues arising between labor and management or the manner in which such labor practices or economic issues are to be settled between the parties, whether by negotiation, arbitration, lock-out or strike; or (3) any matter which relates solely to the internal affairs of labor organizations, including but not necessarily restricted to membership

Further, the Commission has no power to participate in any manner in any civil proceeding, except, of course, contempt proceedings. Ibid. The limitation of the Commission to criminal matters is further reinforced by the provision of the Act allowing the Commission, at the request of the Governor, to assign its investigatory forces to the state police to assist the latter in their investigatory activities. La Rev Stat Ann S. 23:880.6 (C) (Supp 1969).

6. The Commission is required to determine, in public findings, whether there is probable cause to believe violations of the criminal laws have occurred. La Rev Stat Ann S. 23:880.7 (A) (Supp 1969). Its power is limited to making these findings and recommendations:

"The commission shall have no authority to and it shall make no binding adjudication with respect to such violation or violations; however, it may, in its discretion, include in its findings the conclusions of the commission as to specific individuals . . . and it may make such recommendations for action to the governor as it deems appropriate". Ibid.

7. The findings are to be a matter of public record, La Rev Stat Ann S. 23:880.15 (B) (Supp 1969), although they may not be used as prima facie or presumptive evidence of guilt or innocence in any Court of law, La Rev Stat Ann S. 23:880.7 (A) (Supp 1969). The Commission is required to report its findings to the proper state or federal authorities if it finds there is probable cause to believe that violations of the criminal laws have occurred, and it may file appropriate charges. La Rev Stat Ann S. 23:880.7 (B) (Supp 1969). Finally, the Commission may request the Governor to

policies, election procedures, membership rights and like matters; or (4) any alleged acts of violence or threats of violence or so-called 'mass picketing,' or like conduct by either an employer or a union, which is not related to bribery or extortion, as defined by law, but which is related only to an organizational objective of a labor union or which is related only to furthering the interests of one side or the other in a 'labor dispute,' as that term is defined by federal or state law, such conduct being already regulated by and subject to the police power of the state, exercised through such agencies as the Division of State Police; or (5) any matter which relates solely to the internal affairs of any business organization, including but not necessarily restricted to its labor and business policy and general operations, or (6) any matters which constitute a combination of any two or more of these." La Rev Stat Ann S. 23:880.6 (B) (Supp 1969).

refer matters to the State Attorney General asking the latter to exercise his authority to cause criminal prosecutions to be instituted. La Rev Stat Ann S. 23:880.7 (D) (1967). Nothing in the Act makes any provision for preparation of findings or reports for submission to the Governor or the legislature for the explicit purpose of legislative action. Indeed, the preamble of the Act and the Act itself make it clear that the purpose of the Commission is to supplement the activities of the State's law enforcement agencies in one narrowly defined area.

8. As indicated above, the Commission has the power to compel the attendance of witnesses. A witness is given notice of the general subject matter of the investigation before being asked to appear and testify. La Rev Stat Ann S. 23:880.10 (A) (Supp 1969). A witness has the right to the presence and advice of counsel, "subject to such reasonable limitations as the commission may impose in order to prevent obstruction of or interference with the orderly conduct of the hearing". La Rev Stat Ann S. 23:880.10 (B) (Supp 1969). Counsel may question his client as to any relevant matters, *ibid.*, but the right of a witness or his counsel to examine other witnesses is limited:

"In no event shall counsel for any witness have any right to examine or cross-examine any other witness but he may submit to the commission proposed questions to be asked of any other witness appearing before the commission, and the commission shall ask the witness such of the questions as it deems to be appropriate to its inquiry". *Ibid.*

With one limited exception to be discussed below, neither a witness nor any other private party has the right to call anyone to testify before the Commission.

9. Although the Commission must base its findings and reports only on evidence and testimony given at public hearings, the Act does provide for executive session when it appears that the testimony to be given "may tend to degrade, defame or incriminate any person". La Rev Stat Ann S. 23:880.12 (A) (Supp 1969). In executive session the Commission must allow the person who might be degraded, defamed, or incriminated an opportunity to appear and be heard, and to call a reasonable number of witnesses on his behalf. *Ibid.* However, the Commission may decide that the evidence or testimony shall be heard in a public hearing, regardless of its effect on any particular person. *Ibid.* In that case, the person affected has the right to appear as a "voluntary witness" and may submit "pertinent" statements

of others *ibid.* He may submit a list of additional witnesses, but subpoenas will be issued only in the discretion of the Commission. *Ibid.*: See also La Rev Stat Ann S. 23:880.12 (C) (Supp 1969).

II.

10. Appellant's complaint named as defendants the Governor of Louisiana and six members of the Commission. The complaint presented, *inter alia*, the question of whether the provisions of Act No. 2 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Appellant alleged that the Commission was an executive trial agency "aimed at conducting public trials concerning criminal law violations", and that its function was publicly to condemn. Appellant asserted that the defendants "in connection with the administration of the provisions of said Act, have singled out the complainant and members of Teamsters Local No. 5 as a special class of persons for repressive and willfully punitive action . . . in furtherance of which a deliberate effort has been made and continues to be made by such officials . . . to destroy the power structure of the labor union aforesaid"

More specifically, the complaint alleged that defendants and their agents, acting under color of law and in conspiracy, procured false statements of criminal activities and used such statements to initiate baseless criminal proceedings against appellant, that they intimidated and coerced public officials into filing and prosecuting false criminal charges against appellant, and that they knowingly, willfully, and purposefully intimidated state Court judges having under consideration legal controversies involving appellant. These acts of defendants allegedly denied plaintiff and all others similarly situated of "rights, privileges and immunities secured to them by the Constitution and laws of the United States". Finally, appellant alleged that the defendants intended to continue to deprive him and others of their rights and that there was no "plain, adequate or efficient remedy at law".

11. Appellant prayed that a three-judge district Court be convened, that a temporary restraining order issue, that Act No. 2 be declared unconstitutional, that all civil and criminal actions against appellant be permanently restrained, and that other unspecified relief be granted.

12. Temporary relief was denied by the District Court and a three-judge Court was empanelled to hear the case. Defendants answered and moved to dismiss. They alleged that appellant lacked standing to question the constitutionality of Act No. 2 and that the com-

plaint failed to state a cause of action. Thereafter, appellant filed a "Supplemental and Amending Petition" in which he alleged, in some detail, that defendants had continued the course of action described in the original complaint. After a hearing, the Court dismissed the complaint. *Jenkins v. McKeithen*, (1968) F Supp 537, *supra*.

13. The Court, relying largely on the opinion of the Louisiana Supreme Court in *Martone v. Morgan*, 251 La 993, 207 So 2d 770, appeal dismissed, (1968) 393 US 12, 21 L Ed 2d 12, 89 S Ct 46 (petition for rehearing pending), held that this Court's decision in *Hannah v. Larche*, (1960) 363 US 420 = 4 L Ed 2d 1307 = 80 S Ct 1502 was dispositive of the issue of the constitutionality of the Act. The Court further ruled that appellant had not stated any other claim for relief under Ss. 1981, 1983 and 1988 of Title 42, United States Code. Rather, the Court held that the other matters sought to be raised in the complaint were merely potential defenses to the pending criminal charges and that appellant had not alleged any basis for restraining prosecution of those charges. Finally, the Court ruled that appellant's suit was not a proper class action under Rule 23 of the Federal Rules of Civil Procedure.(3) The Court did not explicitly rule on the issue of whether appellant lacked standing to challenge the Act.

14. Appellant presents two questions for review in this Court: Whether Act No. 2 is constitutional and whether the complaint otherwise states a cause of action under 42 USC Ss. 1981, 1983 and 1988.

III.

15. We are met at the outset with the State's assertion that appellant lacks standing to attack the constitutionality of Act No. 2. This argument is based in part upon certain allegations in the complaint that Act No. 2 is unconstitutional because it denies to "a person compelled to appear before . . . [the] Commission" the right to effective assistance of counsel, the right of confrontation, and the right to compulsory process for the attendance of witnesses. Since appellant did not allege in his complaint that he was called to appear before the Commission or that he expected to be called, the State asserts that he lacks standing to assert the denial of rights to those who do appear. See, e.g., *Tileston v. Ullman*, (1943) 318 US 44, 87 L Ed 603, 63 S Ct 493. Further, the State argues that appellant lacks standing because he cannot demonstrate that he has been, or will be, "injured" by the operation of the challenged statute. We cannot agree.

3. Appellant does not assign this ruling as error on this appeal.

16. The present case was decided on the State's motion to dismiss, in which the State challenged appellant's standing to challenge the constitutionality of the Act. As noted above, the Court below made no explicit reference to the issue of standing. But since the question of standing goes to this Court's jurisdiction, see *Flast v. Cohen*, (1968) 392 US 83, 94-101, 20 L Ed 2d (1968) 947, 958-962, 88 S Ct 1942 we must decide the issue even though the Court below passed over it without comment. Cf. *Tileston v. Ullman*, *supra*.

17. For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. See, e.g., *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, (1965) 382 US 172, 174-175, 15 L Ed 2d 247, 249, 250, 86 S Ct 347. And, the complaint is to be liberally construed in favor of plaintiff. See Fed Rule Civ Proc 8 (f); *Conley v. Gibson*, (1957) 355 US 41, 2 L Ed 2d 80, 78 S Ct 99. The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief". *Conley v. Gibson*, *supra*, at 45-46, 2 L Ed 2d at 84. With these rules in mind, we turn to an examination of the allegations of appellant's complaint.

18. It is true, as the State asserts, that appellant alleges deprivations of rights of those who are or will be called to testify before the Commission and that he fails to allege that he was or will be called to testify. If this were the extent of appellant's allegations, we would agree that appellant lacks standing to challenge the Act. However, appellant's allegations are not limited to those mentioned by the State. Appellant alleged that the Commission was an "executive trial agency" whose function was to conduct public trials designed to find appellant and others guilty of violations of criminal laws, allegedly for the purpose of injuring him and destroying the labor union of which he was a member. More specifically, appellant alleged that "said Commission of Inquiry exercises (a) an accusatory function, (b) its duty to find that named individuals are responsible for criminal law violations, (c) it must advertise such findings, and (d) its findings serve as part of the process of criminal prosecution"

Finally, the complaint alleged that the defendants, acting in concert with others and in connection with the administration of the Act, have actually engaged in a course of conduct designed publicly to brand appellant and others as criminals, including, as noted above, the filing of allegedly baseless criminal charges against appellant.

19. Thus, although the complaint is inartfully drawn, it does allege that the Commission and those acting in concert with it have taken and will take in the future certain actions with respect to appellant. The issue is thus whether those allegations are sufficient to give appellant standing to challenge the constitutionality of the Act creating the Commission and the acts taken by the Commission under authority of that Act. We think that they are.

20. The concept of standing to sue, as we noted in *Flast v. Cohen*, supra, "is surrounded by the same complexities and vagaries that inhere in [the concept of] justiciability" in general. 392 US, at 98, 20 L Ed 2d at 960. Nevertheless, the outlines of the concept can be stated with some certainty. The indispensable requirement is, of course, that the party seeking relief allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions" *Baker v. Carr*, (1962) 369 US 186, 204, 7 L Ed 2d 863, 677, 82 S Ct 691; see *Flast v. Cohen*, supra; *Joint Anti-Fascist Refugee Committee v. McGrath*, (1951) 341 US 123, 151, 95 L Ed 817, 842, 71 S Ct 624 (concurring opinion). In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. See, supra, (1968) 392 US 83 at 101-106, 20 L Ed 2d 947 at 961. The decisions of this Court have also made it clear that something more than an "adversary interest" is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action. See supra, (1968) 392 US 83 at 101-106, 20 L Ed 2d 947 at 962-965.

21. In the present case, it is clear that appellant possesses sufficient adversary interest to insure proper presentation of issues facing the Court. His allegations if taken as true, indicate that the Commission and those acting in concert with it have carried out a series of public acts designed to injure him in various ways. Appellant's interest in his own reputation and in his economic well-being guarantee that the present proceeding will be an adversary one.

22. We also think that appellant has alleged that the Act's administration was the direct cause of sufficient injury to his own legally protected interests to accord him standing to challenge the validity of the Act. We are not presented with a case in which any injury to appellant is merely a collateral conse-

quence of the actions of an investigative body. See, supra, (1960) 363 US 420 at 443, 4 L Ed 2d 1307 at 1322; cf. *Sinclair v. United States*, (1929) 279 US 263, 295, 73 L Ed 692, 698, 49 S Ct 268; *McGrain v. Daugherty*, (1927) 273 US 135, 170-180, 71 L Ed 580, 595, 47 S Ct 319. Rather, it is alleged that the very purpose of the Commission is to find persons guilty of violating criminal laws without trial or procedural safeguards, and to publicize those findings. Moreover, we think that the personal and economic consequences alleged to flow from such actions are sufficient to meet the requirement that appellant prove a legally redressable injury. Those consequences would certainly be actionable if caused by a private party and thus should be sufficient to accord appellant standing. See *Green v. McElroy*, (1959) 360 US 474, 493, n 22, 3 L Ed 2d 1377, 1389, 79 S Ct 1400; supra, (1951) 341 US 123 at 140-141, 95 L Ed 817 at 837, (opinion of Burton, J.); id., at 151-160, 95 L Ed at 842-847 (Frankfurter, J., concurring). It is no answer that the Commission has not itself tried to impose any direct sanctions on appellant; it is enough that the Commission's alleged actions will have a substantial impact on him. See, e.g., *Columbia Broadcasting System, Inc. v. United States*, (1942) 316 US 407, 86 L Ed 1563, 62 S Ct 1104; cf. *NAACP v. Alabama*, (1958) 357 US 449, 460-483, 2 L Ed 2d 1488, 1498-1500, 78 S Ct 1163. Finally, in the circumstances of the present case, we do not regard appellant's opportunity to defend any criminal prosecutions as sufficient to deprive him of standing to challenge the act. Cf. *United States v. Los Angeles and S. L. R. R.* (1927) 273 US 299, 71 L Ed 651, 47 S Ct 413. Appellant's allegations go beyond the normal publicity attending criminal prosecution; he alleges a concerted attempt publicly to brand him a criminal without a trial. Further, he alleges that he has been unsuccessful in his attempts to secure prosecution of the charges against him.

23. We hold that appellant's complaint contains sufficient allegations of direct and substantial injury to his own legally protected interests to accord him standing to challenge the constitutionality of Act No. 2.

IV.

24. We thus reach the merits of appellant's contention that Act No. 2 is unconstitutional. Appellant's complaint is long and inartfully drawn; it contains many allegations of wrongdoing on the part of the Commission and other State officials. But the only issue presented by this aspect of the case is whether the Act creating the Commission is constitutional, either on its face or as applied.

Many of appellant's allegations are relevant to this latter contention, but many involve issues that the Court below ruled were properly matters to be raised in defense of any criminal prosecutions which might take place. We will deal with those allegations in the final section of this opinion.

25. The State, like the Court below, relies heavily on this Court's decision in *Hannah v. Larche*, supra. In *Hannah*, this Court upheld the Civil Rights Commission against challenges similar to those involved in the present case. Indeed, Act No. 2 was drafted with *Hannah* in mind and the structure and powers of the Commission are similar to those of the Civil Rights Commission. See *Jenkins v. McKeithen*, supra, 286 F Supp. at 540; *Martone v. Morgan*, supra. We cannot agree, however, that *Hannah* controls the present case, for we think that there are crucial differences between the issues presented by this complaint and the issues in *Hannah*.

26. The appellants in *Hannah* were persons subpoenaed to appear before the Civil Rights Commission in connection with complaints about deprivations of voting rights. They objected to the Civil Rights Commission's rules about non-disclosure of the complainants and about limitations on the right to confront and cross-examine witnesses. This Court ruled that the Commission's rules were consistent with the Due Process Clause of the Fifth Amendment. The Court noted that "[d]ue process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account". (1960) 363 US 420 at 442, 4 L Ed 2d 1307 at 1321.

27. In rejecting appellants' challenge to the Civil Rights Commission's procedures, the Court placed great emphasis on the investigatory function of the Commission:

"[I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving any one of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be

used as the basis for legislative and executive action". (1960) 363 US 420 at 441, 4 L Ed 2d 1307 at 1320.

The Court noted that any adverse consequences to those being investigated, such as subjecting them to public opprobrium, were purely conjectural, and, in any case, were merely collateral and "not . . . the result of any affirmative determinations made by the Commission . . ." (1960) 363 US 420 at 443, 4 L Ed 2d 1307 at 1322. *Morgan v. United States* (1938) 304 US 1, 82 L Ed 1129, 58 S Ct 773, (1951) 341 US 123 = 95 L Ed 817, supra, and (1959) 360 US 474 = 3 L Ed 2d 1377, supra, were distinguished on the ground that "those cases . . . involved . . . determinations in the nature of adjudications affecting legal rights". (1960) 363 US 420 at 451, 4 L Ed 2d 1307 at 1326.

28. We reaffirm the decision in *Hannah*. In our view, however, the Commission in the present case differs in a substantial respect from the Civil Rights Commission and the other examples cited by the Court in *Hannah*. It is true, as the Supreme Court of Louisiana has held, 251 La 993 = 207 So 2d 770, supra, that the Commission does not adjudicate in the sense that a Court does, nor does the Commission conduct, strictly speaking, a criminal proceeding. Nevertheless, the Act, when analyzed in light of the allegations of the complaint, makes it clear that the Commission exercises a function very much akin to an official adjudication of criminal culpability. See (1951) 341 US 123 = 95 L Ed 817, supra.

29. The Commission is limited to criminal law violations; the Act explicitly provides that the Commission shall have no jurisdiction over civil matters in the labor-management relations field. Indeed the Commission is even limited to certain types of criminal activities. (4) As noted above, nothing in the Act indicates that the Commission's findings are to be used for legislative purposes. Rather, everything in the Act points to the fact that it is concerned only with exposing violations of Criminal laws by specific individuals. In short, the Commission very clearly exercises an accusatory function; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public.

30. Given this view of the purpose of the Labor-Management Commission of Inquiry, we agree with Justice Frankfurter, concurring in *Hannah v. Larche*:

"Were the [Civil Rights] Commission exercising an accusatory function, were its duty to find that named individuals

were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of Criminal Prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides". (1960) 363 US 420 at 488, 4 L Ed 2d 1307 at 1353.

31. When viewed from this perspective, it is clear the procedures of the Commission do not meet the minimal requirements made obligatory on the States by the Due Process Clause of the Fourteenth Amendment. Specifically, the Act severely limits the right of a person being investigated to confront and cross-examine the witnesses against him. Only a person appearing as a witness may cross-examine other witnesses. Cross-examination is further limited to those questions which the Commission deems appropriate to its inquiry, and those questions must be submitted, presumably beforehand, in writing to the Commission. We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process. See, e.g., *Willner v. Committee on Character and Fitness*, (1963) 373 US 98, 103-104, 10 L Ed 2d 224, 229, 83 S Ct 1175, *supra*, (1959) 360 U. S. 474 at 495-499, 3 L Ed 2d 1377 at 1390-1392, and cases cited. In the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights. Cf. *Pointer v. Texas*, (1965) 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065.

32. The Commission's procedures also drastically limit the right of a person investigated to present evidence on his own behalf. It is true that he may appear and call a "reasonable number of witnesses" in executive session, but should the Commission decide to hold a public hearing, he is limited to presentation of his own testimony and the "pertinent" written statements of others. The right to present oral testimony from other witnesses and the power to compel attendance of those witnesses may be denied in the discretion of the Commission. The right to present evidence is, of course, essential to the fair bearing required by the Due Process Clause. See, e.g., *supra*, (1938) 304 U. S. 1 at 18, 82 L Ed 1129 at 1132; *Baltimore & Ohio R. v. United States*, (1936) 298 US 349, 368-369, 80 L Ed 1209, 1223, 1224, 56 S Ct 797. And, as we have noted above

this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime. Cf. *Washington v. Texas*, (1967) 388 US 14, 18 L Ed 2d 1019, 87 S Ct 1920. In *re Oliver*, (1948) 333 US 257, 273, 92 L Ed 682, 694, 68 S Ct 499. We do not mean to say that the Commission may not impose reasonable restrictions on the number of witnesses and on the substance of their testimony; we only hold that a person's right to present his case should not be conferred to the unfettered discretion of the Commission.

33. Appellant argues that the procedures contemplated by the Act are deficient in other respects. In particular, he alleges that the Act provides no meaningful rules of evidence and fails to provide standards of guilt or innocence. He also alleges that the Act deprives him of effective assistance of counsel. We have, however, said enough to demonstrate that appellant has alleged a cause of action for declaratory and injunctive relief. Whether the Due Process Clause requires that the Commission provide all the procedural protections afforded a defendant in a criminal prosecution, or whether something less is sufficient, are questions that we think should be initially answered by the District Court on remand. As we have noted, "[w]hether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors," *supra*, (1960) 363 U. S. 420 at 442, 4 L Ed 2d 1307 at 1321. We think it inappropriate to rule on the extent to which the Commission's procedures may run afoul of the Due Process Clause on the basis of the record before us, barren as it is of any established facts. That issue is best decided in the first instance by the District Court in light of the evidence adduced at trial.

34. We do not mean to say that this same analysis applies to every body which has an accusatory function. The grand jury, for example, need not provide all the procedural guarantees alleged by appellant to be applicable to the Commission. As this Court noted in *Hannah*, "the grand jury merely investigates and reports. It does not try." (1960) 363 US 420 at 449, 4 L Ed 2d 1307 at 1325. Moreover, "[t]he functions of that institution and its constitutional prerogatives are rooted in long centuries of Anglo-American history." *Id.*, at 489-490, 4 L Ed 2d at 1354 (concurring opinion). Finally the grand jury is designed to interpose an independent body of citizens between the accused and the prosecuting attorney and the court. See *Stirone v. United States*, (1960) 361 US 212, 218, 4 L Ed 2d 252, 257, 80 S Ct 270; *Ex parte Bain*, (1887) 121 US 1, 11, 30 L Ed 849, 852, 7 S Ct

781; supra, (1960) 363 US, 420 at 497-499, 4 L Ed 2d 1307 at 1358, 1359 (dissenting opinion). Investigative bodies such as the Commission have no claim to specific constitutional sanction. In addition, the alleged function of the Commission is to make specific findings of guilt, not merely to investigate and recommend. Finally, it is clear from the Act and from the allegations of the complaint that the Commission is in no sense an "independent" body of citizens. Rather, its members serve at the pleasure of the Governor, La Rev Stat Ann S. 23:880.1 (Supp 1969), and it cannot act in the absence of a "referral" from the Governor, La Rev Stat Ann Ss. 23:880.5, 23:880.6 (A) (Supp. 1969).

35. We also wish to emphasize that we do not hold that appellant is now entitled to declaratory or injunctive relief. We only hold that he has alleged a cause of action which may make such relief appropriate. It still remains for him to prove at trial that the Commission is designed to and does indeed act in the manner alleged in his complaint, and that its procedures fail to meet the requirements of due process.

V.

36. As noted above, appellant also alleged in his complaint that defendants, and those acting in concert with them, have engaged in a course of conduct, both pursuant to the Act and otherwise, that has resulted in the filing of false criminal charges against appellant. He alleges numerous other related actions allegedly depriving him of his rights secured by the Constitution. The complaint seeks declaratory and injunctive relief with regard to these acts; in particular, appellant prayed that the District Court enjoin all civil and criminal actions pending or to be instituted against him. To the extent that these allegations involve actions taken under the direct authority of Act No. 2, we think that they may properly be considered by the District Court in determining the constitutionality of the Act. However, the District Court characterized many of appellant's allegations as involving merely potential defenses to the criminal charges assertedly pending. In the exercise of its discretion and because the issues were "intertwined" with the issue of the constitutionality of the Act, the court passed upon the question of whether appellant had alleged a cause of action for declaratory and injunctive relief. Relying in part on its determination that the Act was constitutional, the court held that appellant had not stated a claim for declaratory or injunctive relief and that appellant's remedy was to defend any criminal prosecutions then pending or that might be brought, supra (1968) 286 F Supp, 537 at 542-543.

Whether the court will take the same view of the propriety of passing on the question or of the merits in light of our holding and the evidence adduced at trial cannot be determined at this time. Accordingly, we think that issue should be left open for reconsideration on remand.

37. The judgment of the court below is reversed and the cause is remanded for further proceedings.

38. It is so ordered.

39. Mr. Justice DOUGLAS concurs in the result for the reasons stated in his dissenting opinion in (1960) 363 US 420, 493-508, 4 L Ed 2d 1307, 1356-1364, 80 S Ct 1502.

Mr. Justice BLACK, concurring.

40. I concur in the Court's judgment and in much of what is said in the prevailing opinion. I cannot agree, however, to reaffirming (1960) 363 US 420, 4 L Ed 2d 1307, 80 S Ct 1502. I joined the dissent of Mr. Justice Douglas in the Hannah case and still adhere to that dissent. The Louisiana law here, like the federal law considered in the Hannah case, is, in my judgment, nothing more nor less than a scheme for a nonjudicial tribunal to charge, try, convict, and punish people without Courts, without juries, without lawyers, without witnesses—in short, without any of the procedural protections that the Bill of Rights provides. The Louisiana law is reminiscent of the old Parliamentary and Ecclesiastical Commission trials which took away the liberty of John Lilburn and his contemporaries without due process of law—that is, without giving them the benefit of a trial in accordance with the law of the land. For these reasons I believe that the Louisiana law denies due process of law.

Mr. Justice HARLAN, whom Mr. Justice STEWART and Mr. Justice WHITE join, dissenting.

41. Swept up in a constitutional revolution of its own making, the Court has a tendency to lose sight of the principles that have traditionally defined and limited its role in our political system. Constitutional adjudication is a responsibility we cannot shirk. But it is a grave and extraordinary process, one of last resort. And when it cannot legitimately be avoided, it is a function that must be performed with the utmost circumspection and precision, lest the Court's opinions emanate radiations which unintentionally, and spuriously, indicate views on matters we have not fully considered.

42. Over the years, the Court has evolved a number of principles designed to assure that we act within our proper confines. Perhaps the most fundamental of these is that we adjudicate only when, and to the extent that, we are presented

with an actual and concrete controversy. Today, in its haste to make new constitutional doctrine, the Court turns this principle on its head, as it attempts to create a controversy out of a complaint which alleges none. With respect, I must dissent.

I

43. Only last Term, in (1968) 392 US 83, 20 L Ed 2d 947, 88 S Ct 1942 the Court reaffirmed the proposition that "when standing [to sue] is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue. . . ." *Id.*, at 99-100, 20 L Ed 2d at 961, that is, "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.*, at 102, 20 L Ed 2d at 963. In the present context, this means, simply, that for a plaintiff to challenge a particular course of conduct pursued or threatened to be pursued by a defendant, it is not enough for the plaintiff to allege that he has or will be injured by the defendant; the plaintiff must further claim that the injury to him (or to those whom he has status to represent) (1) results from the particular course of conduct he challenges.

44. Appellant in the case at bar attacks the constitutional validity of certain specific statutory procedures of the Louisiana Labor-Management Commission of Inquiry. Applying the principle stated above, it is not sufficient that he may be injured by the Commission or its members in some way. The injury must be alleged to arise out of, or relate to, the application of the procedures in question. The most generous reading of appellant's complaint cannot mask the simple truth that it falls short of this minimal requirement.

45. At the risk of wearying the reader I must deal with appellant's pleadings in some detail. The relevant portion of the complaint, and that relied upon by the Court, is part IV ("Facts"), which contains 17 operative paragraphs.

46. Paragraphs 1-3 identify the plaintiff and defendants.

47. Paragraphs 4-6 characterize the appellee Commission as an "executive trial agency," and outline its investigative functions. Paragraph 7 avers that the Commission's procedures for performing these functions are constitutionally defective with respect to matters of counsel, confrontation, compulsory process, rules of evidence, standards of guilt, right of appeal, and self-incrimination. Nowhere,

1. As the prevailing opinion notes, ante, at —, 23 L Ed 2d at 415, 416 and n 3, appellant does not assign as error the District Court's holding that this was not a proper class action.

either directly or indirectly, do these paragraphs intimate that appellant (or for that matter, anyone else) has been affected by the procedures themselves and their asserted effects.

48. Paragraph 8 should be quoted in full:

"Furthermore complainant alleges that said defendants, their agents, representatives and employees, and those acting in concert with them, in connection with the administration of the provisions of said Act, have singled out complainant and members of Teamsters Local No. 5 as a special class of persons for repressive and willfully punitive action, solely because they are members of said Teamsters Local No. 5, in furtherance of which a deliberate effort has been made and continues to be made by said officials, spearheaded by defendant McKelthen, while acting under color of state law, to destroy the current power structure of the labor union aforesaid and said union to which complainant belongs as a member and through which he experiences economic survival, and to install a new power structure oriented and sub-servient to the James R. Hoffa group or clique of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; this effort has included and continues to include (a) the deliberate circulation for public consumption of willful falsehoods about members of said labor union, such as characterizing said members as 'hoodlums' and 'gangsters,' comparable in depravity to the sinister Mafia gangsters of underworld criminals, while masking such lawless conduct behind a verbal facade of law and order, (b) the indiscriminate filing of criminal charges against members of said labor union, where there exists no justifiable basis therefor and the concomitant exaction of excessive bail bonds, (c) the intimidating of public officials into carrying out the tyrannical aims of such indiscriminate criminal prosecution, and (d) the dictatorial use of the powers of the office of Governor of Louisiana in furtherance thereof."

49. In paragraph 9, appellant avers, "as more specifically applies to him," that appellees conspired to file false criminal charges against him. Paragraphs 10-14 describe in detail the chronology and conduct of the resulting criminal proceedings.

50. Paragraph 15 alleges that appellees intimidated certain persons (not including appellant) in order to elicit false statements to bring about the prosecution of other persons (not including appellant).

51. Finally, paragraph 16 contains the usual averments requisite to equitable

and declaratory relief, and paragraph 17 requests a temporary restraining order.

52. Reading and re-reading these many paragraphs of legal and factual averments one cannot help but be struck by the conspicuous absence of any claim that appellant has been or will be investigated by the Commission, or called as a witness before it, or identified in its findings, or, indeed, subjected to any of its processes(2). Can this lacuna be filled by implication? I believe not.

53. Only paragraphs 9-14 relate specifically to appellant, and they contain no hint that the filing of the criminal informations against him was the result of the Commission's use of any of the procedures which the Court today indicates are constitutionally suspect. And assuming, contrary to fact, see n. 1, supra, that appellant represents others besides himself in this action, the only other arguably germane paragraph is Para 8 (a), which alleges the "deliberate circulation for public consumption of willful falsehoods about members of said labor union." This paragraph conspicuously omits any suggestion that such "falsehoods" were the result of testimony before the Commission or that they were contained in the Commission's "findings" — a term that is repeatedly emphasized in the earlier description of the Commission's functions.

54. The complaint's utter failure to allege any connection between the injuries asserted to have been suffered by appellant and the procedures complained of is not, on any objective reading of the complaint, an accidental omission or the result of counsel's "inartfulness" — as my Brother Marshall would put it. In my view, the only plausible inference — especially when it is remembered that appellant was represented by counsel throughout this litigation — is that such allegations were omitted because appellant had no facts to support them.(3)

55. The prevailing opinion's strained construction of the complaint goes well beyond the principle, with which I have no quarrel, that federal pleadings should be most liberally construed. It entirely undermines an important function of the federal system of procedure — that of disposing of unmeritorious and unjustifiable claims at the outset, before the parties and courts must undergo the expense

and time consumed by evidentiary hearings.

56. Accordingly, I would sustain the dismissal of the complaint on the ground that appellant has not shown himself to have standing to challenge the Commission's procedures.

II.

57. Because the complaint is barren of any indication of the manner in which appellant is affected by the Commission's formal procedures, the prevailing opinion is required to make its own assumptions. It places appellant in the vague position of "a person being investigated" by the Commission, ante, at —, 23 L Ed 2d at 420, 421 = (ante, AIR 1970 USSC 44) and thence proceeds to discuss the rights of such a person to confront witnesses and to offer evidence in his own behalf. The prevailing opinion appears understandably reluctant to commit itself to very much. As I read the opinion, it does not state that any of the Commission's procedures are actually unconstitutional, but holds only that there is enough latent in the complaint that the case should proceed to trial.

58. Of necessity, however, my Brother Marshall has to examine some of the constitutional issues sought to be raised by appellant in order to justify a remand, and his discussion leaves radiations which are, at least, unclear. Reluctant as I am, under the circumstances of this case, to discuss the merits, I therefore feel compelled to outline my own views. I am not certain to what extent they comport with those of the majority.

59. The prevailing opinion fails to articulate what I deem to be a constitutionally significant distinction between two kinds of governmental bodies. The first is an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing. To the extent that such a determination — whether called a "finding" or an "adjudication" — finally and directly affects the substantial personal interests, I do not doubt that the Due Process Clause may require that it be accompanied by many of the traditional adjudicatory procedural safeguards. (1951) 341 US 123, 95 L Ed 817, 71 S Ct 624.

60. By the terms of the Louisiana legislation, the appellee Commission is not of this sort. Its authority is "investigatory and fact finding only." La Rev Stat Ann S. 23:880.6 (A). Its stated purpose is "to supplement and assist the efforts and activities of the several district attorneys, grand juries and other law enforcement officials and agencies of the State of Louisiana." Preamble to Act No. 2. Its duty, when it finds probable cause to believe that the criminal laws

2. And, of course, there is no suggestion that appellant ever requested that the Commission accord him any of the rights of whose absence he complains.

3. This inference is supported by the Report of the Labor-Management Commission of Inquiry, filed in this Court, which, other than mentioning the litigation challenging the Commission, nowhere refers to this appellant.

have been violated, is to "report its findings and recommendations to the proper federal and state authorities. . . charged with the responsibility for prosecuting criminal offences," or to file charges itself. La Rev Stat Ann S. 23:880.7 (B). The Commission has no authority to adjudicate a person's guilt or innocence, and its recommendations and findings have no legal consequences whatsoever. Id., S. 23:880.7 (A).

61. The Commission thus bears close resemblance to certain federal administrative agencies, *infra*, at —, (*Infra* AIR 1970 USSC 44) = 23 L Ed 2d at 427, and to the offices of prosecuting attorneys. These agencies have one salient feature in common, which distinguishes them from those designed simply to "expose." None of them is the final arbiter of anyone's guilt or innocence. Each, rather, plays only a preliminary role, designed, in the usual course of events, to initiate a subsequent formal proceeding in which the accused will enjoy the full panoply of procedural safeguards. For this reason, and because such agencies could not otherwise practically pursue their investigative functions, they have not been required to follow "adjudicatory" procedures.

62. I see no constitutionally relevant distinction between this State Commission and the federal administrative agencies that perform investigative functions designed to discover violations which may result in the initiation of criminal proceedings. In (1960) 363 US 420, 445-448, 454-485, 4 L Ed 2d 1307, 1323, 1324, 1328-1351, 80 S Ct 1502 the Court expressly condoned the denial of "rights such as appraisal, confrontation and cross-examination" in such "nonadjudicative, fact-finding investigations." Id., at 446, 4 L Ed 2d at 1323. The Court recognized, for example, that the Federal Trade Commission "could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding. . . ." Id., at 446, 4 L Ed 2d at 1324.

And the Court said of the Securities and Exchange Commission:

"Although the Commission's Rules provide that parties to adjudicative proceedings shall be given detailed notice of the matters to be determined, . . . and a right to cross-examine witnesses appearing at the hearing, . . . those provisions of the Rules are made specifically inapplicable

to investigations, . . . even though the Commission is required to initiate civil or criminal proceedings if an investigation discloses violations of law.' Undoubtedly, the reason for this distinction is to prevent the sterilization of investigations by burdening them with trial-like procedures." Id., at 446 — 448, 4 L Ed 2d at 1324. (Emphasis (here in ' ') added.)

63. The statutory safeguards afforded persons being investigated by the Louisiana Commission are at least equal to those provided by most of these federal agencies. See *id.*, (1960) 363 US 420 at 454-485, 4 L Ed 2d 1307 at 1328-1351.

64. The Commission's functions also find close analogies in the investigations and determinations that take place daily in the offices of state and federal prosecuting attorneys. In both instances, the responsible officials proceed by interrogating persons with knowledge of possible violations of the criminal law. If the prosecutor believes that an individual has committed a crime, he files an information or seeks a grand jury indictment. When the Commission reaches a similar conclusion, it turns its intelligence over to a prosecutor so that he may initiate the formal criminal process.

65. For obvious reasons, it has not been seriously suggested that a "person under investigation" by a district attorney has any of the "adjudicative" constitutional rights at the investigative stage.(4) These rights attach only after formal proceedings have been initiated. Nor, of course, does one under investigation have a constitutional right that the investigations be conducted in secrecy, or that the official keep his plans to prosecute confidential. The decision whether or not to disclose these matters rests in the sound discretion of the responsible public official. Various factors, such as the fear that a suspect will flee or the concern for obtaining an unbiased jury when the matter comes to trial, may militate in favor of secrecy. On the other hand, an appropriate disclosure of a pending investigation may bring forth witnesses and evidence, and serves a proper ancillary function in keeping the public informed.(5)

4. Of course, a person called upon to participate in the investigation, e.g., by answering questions, may have relevant rights at this stage. Cf., e.g., *Mancusi v. De Forte*, 392 US 364, 20 L Ed 2d 1154, 88 S Ct 2120 (1968). But appellant does not intimate, and the majority does not assume, that he has been or will be subpoenaed to testify or produce documents.

5. It is ironic that appellant should complain of the open nature of the Commission's proceedings. The statutory requirement that the Commission "shall base its findings and reports only upon

66. The Commission does differ from the operations of a prosecuting attorney in one important respect, however. The very formality of the Commission's investigatory process may lend greater credibility and a greater aura of official sanction to the testimony given before it and to its findings. Although in this respect the Commission is not different from the federal agencies discussed above, I am not ready to say that the collateral consequences of government-sanctioned opprobrium may not under some circumstances entitle a person to some right, consistent with the Commission's efficient performance of its investigatory duties, to have his public say in rebuttal. However, the Commission's procedures are far from being niggardly in this respect. They include not only the right to make a personal appearance, but the right to submit the statements of others, and under some circumstances, to present questions to adverse witnesses. This is far more than is given persons under investigation by the federal agencies, and certainly serves adequately to neutralize and adverse collateral effects of the Commission's investigative proceedings.

67. As I noted above, the very insubstantiality of appellant's complaint leaves it unclear what the Court holds today. It may be that some of my Brethren understand the complaint to allege that in fact the Commission acts primarily as an agency of "exposure", rather than serving the ends required by the state statutes. If so — although I do not believe that the complaint can be reasonably thus construed—the area of disagreement between us may be small or non-existent.

68. Before the Court holds that a purely investigatory agency must adopt the full roster of adjudicative safeguards, however, it would do well to heed carefully its own warning in *Hannah*, that such a requirement "would make a shambles of the investigation and stifle the agency in its gathering of facts". (1960) 363 US 420 at 444, 4 L Ed. 2d 1307 at 1322. Such a requirement would not only incapacitate state criminal investigatory bodies at a time when their need cannot be gainsaid, but would cast a

evidence and testimony given at public hearings," *La Rev Stat S. 23:880.12 (A)*, is plainly designed to protect witnesses and persons under investigation from what some members of the Court have criticized as secret inquisitions or Star Chamber proceedings. See *In re Groban*, 352 US 330, 337, 1 L Ed 2d 376, 383, 77 S Ct 510 (1957) (Mr. Justice Black, dissenting); *Anonymous No. 6 v. Baker*, 360 US 287, 298, 3 L Ed 2d 1234, 1241, 79 S Ct 1157 (1959) (Mr. Justice Black, dissenting).

broad shadow of doubt over the propriety of long-standing procedures employed by many federal agencies—procedures which less than a decade ago the Court believed to be proper and necessary.

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(V 57 C 7)

(1969-23 L Ed 2d 430)*

BLACK, HARLAN, DOUGLAS,
BRANDEIS AND HOLMES, JJ.

Clarence Brandenburg, Appellant v.
State of Ohio, Respondent.

(No. 492) Decided on 9-6-1969.

† Constitution of India, Article 19 (1) (a) — Case from America — State is not permitted to forbid or proscribe advocacy of use of force or of law violation except where such advocacy is directed to incite or produce imminent lawless action and is likely to incite or produce such action — *Whitney v. California*, (1927) 274 US 357 = 71 L Ed 1095 = 47 S Ct 641, Overruled — (Constitution of America, First Amendment and Fourteenth Amendment).

Constitutional guarantees of free speech and free press under the First and the Fourteenth Amendments do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which the American Constitution has immunized from Governmental control. (Para 6)

Where a State Criminal Syndicalism Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines

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† Reference is given to a parallel Indian Provision for the convenience of Indian Lawyers.

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of criminal syndicalism"; or who "..... voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism", the Act cannot be sustained. The statute by its own words purports to punish mere advocacy and to forbid on pain of criminal punishment assembly with others merely to advocate the described type of action such a statute falls within the condemnation of the First and the Fourteenth Amendments. *Whitney v. California*, (1927) 274 US 357 = 71 L Ed 1095 = 47 S Ct 641, Overruled.

(Para 7)

Cases Referred: Chronological Paras

- (1968) 393 US 948 = 21 L Ed 2d 360 = 89 S Ct 377
 (1967) 391 US 367 = 20 L Ed 2d 672 = 89 S Ct 63, *United States v. O'Brien*
 (1967) 391 US 308 = 20 L Ed 2d 603 = 88 S Ct 1601, *Food Employees v. Logan Plaza*
 (1967) 389 US 258 = 19 L Ed 2d 508 = 88 S Ct 419, *United States v. Robel*
 (1967) 385 US 589 = 17 L Ed 2d 629 = 87 S Ct 675, *Keyishian v. Board of Regents*
 (1966) 385 US 116 = 17 L Ed 2d 235 = 87 S Ct 330, *Bond v. Floyd*
 (1966) 384 US 11 = 16 L Ed 2d 321 = 86 S Ct 1238, *Elfbrandt v. Russell*
 (1964) 379 US 559 = 13 L Ed 2d 487 = 85 S Ct 478, *Cox v. Louisiana*
 (1964) 378 US 500 = 12 L Ed 2d 992 = 84 S Ct 1659, *Aptheker v. Secy. of State*
 (1964) 377 US 260 = 12 L Ed 2d 377 = 84 S Ct 1316, *Baggett v. Bullitt*
 (1963) 377 US 58 = 12 L Ed 2d 129 = 84 S Ct 1063, *Labour Board v. Fruit Packers*
 (1961) 367 US 290 = 6 L Ed 2d 836 = 81 S Ct 1517, *Noto v. United States*
 (1961) 367 US 203 = 6 L Ed 2d 782 = 81 S Ct 1469, *Scales v. United States*
 (1958) 360 US 109 = 3 L Ed 2d 1115 = 79 S Ct 1081, *Barenblatt v. United States*
 (1957) 357 US 513 = 2 L Ed 2d 1460 = 78 S Ct 1332, *Speiser v. Randall*
 (1957) 354 US 208 = 1 L Ed 2d 1356 = 77 S Ct 1064, *Cf. Yates v. United States*
 (1951) 341 US 494 = 95 L Ed 1137 = 71 S Ct 857, *Dennis v. United States*
 (1949) 339 US 460 = 94 L Ed 985 = 70 S Ct 718, *Hughes v. Superior Court*

- (1948) 336 US 490 = 93 L Ed 834 = 69 S Ct 684, *Giboney v. Empire Storage Co.*
 (1943) 322 US 680 = 88 L Ed 1534 = 64 S Ct 1233, *Hartzel v. United States*
 (1941) 315 US 769 = 86 L Ed 1178 = 62 S Ct 816, *Bakery Drivers Local v. Wohl*
 (1941) 314 US 252 = 86 L Ed 192 = 62 S Ct 190, *Bridges v. California*
 (1937) 301 US 242 = 81 L Ed 1066 = 57 S Ct 732, *Herndon v. Lowry*
 (1937) 299 US 353 = 81 L Ed 278 = 57 S Ct 255, *De Jonge v. Oregon*
 (1931) 283 US 359 = 75 L Ed 1117 = 51 S Ct 532, *Stromberg v. California*
 (1927) 274 US 380 = 71 L Ed 1108 = 47 S Ct 655, *Cf. Fiske v. Kansas*
 (1927) 274 US 357 = 71 L Ed 1095 = 47 S Ct 641, *Whitney v. California*
 (1919) 252 US 239 = 64 L Ed 542 = 40 S Ct 205, *Pierce v. United States*
 (1919) 251 US 466 = 64 L Ed 360 = 40 S Ct 259, *Schaeffer v. United States*
 (1918) 250 US 618 = 83 L Ed 1173 = 40 S Ct 17, *Abrams v. United States*
 (1918) 249 US 204 = 63 L Ed 561 = 39 S Ct 249, *Frohwerk v. United States*
 (1918) 249 US 211 = 83 L Ed 568 = 39 S Ct 252, *Debs v. United States*
 (1918) 249 US 47 = 83 L Ed 470 = 39 S Ct 247, *Schenk v. United States*
 263 NY 652, *Gitlow v. N. York*
 Allen Brown, for Appellant; Leonard Kirschner, for Appellee (Respondent).

SUMMARY

The defendant, a leader of a Ku Klux Klan group, spoke at a Klan rally at which a large wooden cross was burned and some of the other persons present were carrying firearms. His remarks included such statements as: "Bury the niggers", "the niggers should be returned to Africa", and "send the Jews back to Israel". In an Ohio State Court, he was convicted, under Ohio's criminal syndicalism statute, both for advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform, and for voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of

criminal syndicalism. Although he challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the Federal Constitution, the intermediate appellate Court of Ohio affirmed his conviction without opinion, and the Supreme Court of Ohio dismissed his appeal on the ground that no substantial constitutional question was presented.

On appeal, the United States Supreme Court reversed. In a per curiam opinion, expressing the unanimous views of the Court and overruling *Whitney v. California*, (1927) 274 US 357, 71 L Ed 1095, 47 S Ct 641, it was held that the constitutional guaranties of free speech and free press did not permit a State to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy was directed to inciting or producing imminent lawless action and was likely to incite or produce such action, and that since the Ohio criminal syndicalism statute, by its own words and as applied, purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, the statute violated the First and Fourteenth Amendments.

BLACK AND DOUGLAS, JJ.: each concurring separately, joined the Court's opinion, but expressed disagreement with the "clear and present danger" test which had been applied in an earlier decision cited by the Court.

OPINION OF THE COURT

Per Curiam.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute of "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and of "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism". Ohio Rev Code S. 2923.13. He was fined \$1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate Court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, sua sponte, "for the reason that no substantial constitutional question exists herein". It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. (1968) 393 US 948, 21 L Ed 2d 360, 89 S Ct 377. We reverse.

2. The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the co-operation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

3. The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

4. One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.⁽¹⁾ Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

"This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our

1. The significant phrases that could be understood were:

"How far is the nigger going to — yeah"

"This is what we are going to do to the niggers"

"A dirty nigger"

"Send the Jews back to Israel"

"Let give them back to the dark garden"

"Save America"

"Let's go back to constitutional betterment"

"Bury the niggers"

"We intend to do our part"

"Give us our state rights"

"Freedom for the whites"

"Nigger will have to fight for every inch he gets from now on".

Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken.

"We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you".

5. The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revenge" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel". Though some of the figures in the film carried weapons, the speaker did not.

6. The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal Penal Code §§. 11400-11402, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, (1927) 274 US 357, 71 L Ed 1095, 47 S Ct 641. The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. *Cf. Fiske v. Kansas*, (1927) 274 US 380, 71 L Ed 1108, 47 S Ct 655. But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*, (1951) 341 US 494, at 507, 95 L Ed 1137, at 1151, 71 S Ct 857. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. (2) As

2. It was on the theory that the Smith Act, 54 Stat 670, 18 USC § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis v. United States*, 341 US 494, 95 L Ed 1137, 71 S Ct 857 (1951). That this was the basis for *Dennis* was emphasized in *Yates v. United States*, 354 US 298, 320-324, 1 L Ed 2d 1356, 1375-1378, 77 S Ct 1064 (1957), in which the Court overturned convictions for advocacy of the forcible

we said in *Noto v. United States*, (1961) 367 US 290, 297-298, 6 L Ed 2d 836, 841, 81 S Ct 1517, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action". See also *Herndon v. Lowry*, (1937) 301 US 242, 259-261, 81 L Ed 1066, 1075, 1076, 51 S Ct 732; *Bond v. Floyd*, (1966) 385 US 116, 134, 17 L Ed 2d 235, 246, 87 S Ct 339. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from Governmental control. *Cf. Yates v. United States*, (1957) 354 US 298, 1 L Ed 2d 1356, 77 S Ct 1064; *De Jonge v. Oregon*, (1937) 299 US 353, 81 L Ed 278, 57 S Ct 255; *Stromberg v. California*, (1931) 283 US 359, 75 L Ed 1117, 51 S Ct 532. See also *United States v. Robel*, (1967) 389 US 258, 19 L Ed 2d 508, 88 S Ct 419; *Keyishian v. Board of Regents*, (1967) 385 US 589, 17 L Ed 2d 629, 87 S Ct 675; *Elmbrandt v. Russell*, (1966) 384 US 11, 16 L Ed 2d 321, 86 S Ct 1238; *Aptheker v. Secretary of State* (1964) 378 US 500, 12 L Ed 2d 992, 84 S Ct 1659; *Bargrett v. Bullitt*, (1964) 377 US 360, 12 L Ed 2d 377, 84 S Ct 1316.

7. Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who ". . . voluntarily assemble with a group formed 'to teach or advocate the doctrines of criminal syndicalism'". Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action. (3)

overthrow of the Government under the Smith Act, because the trial Judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

2. The first count of the indictment charged that appellant "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform" The second count charged that appellant "did unlawfully voluntarily assemble

equate safeguard, even though it be by prescribing merely the conditions and guidelines in conformity with which the power to terminate has to be exercised.

38. We have come a long way from the age when the tenure of a Government servant rested entirely at the pleasure of the sovereign. The doctrine of absolute power in the sovereign which then held away (sway?) has now lost its validity. Increasingly, down the years, expression has been given to the need to assure the Government servant in his security of service. In AIR 1964 SC 1585 the Supreme Court observed:—

"It is hardly necessary to emphasise that for the efficient administration of the State it is absolutely essential that permanent public servant should enjoy a sense of security of tenure."

39. I have pointed out earlier that it is possible, upon the language of paragraph (1) of the proviso, to terminate the service of a Government servant under the clause at any point of time after the age of 55 years. That power hovers over him constantly, and inasmuch as it is not confined to grounds which appear from the Rule nor does its exercise require the disclosure of any reasons, its impact in undermining the sense of security and certainty of tenure, to which the Supreme Court has adverted, assumes vital significance.

40. I shall now turn to the cases cited before us.

41. In AIR 1954 SC 369 the question before the Supreme Court was whether the compulsory retirement of a Government servant amounted to his removal or dismissal so as to entitle him to the protection of Art. 311 (2) of the Constitution. The provision under consideration was Note 1 to Art. 465-A of the Civil Service Regulations. The Supreme Court did not consider the question whether the provision was contrary to Arts. 14 and 16 of the Constitution. Besides, the Note specifically provided that the right of the Government to retire an officer prematurely could not be exercised except when it was in the public interest to dispense with the further services of the officer.

42. The next case is AIR 1957 SC 892. There, the provision under consideration was R. 165-A of the Bombay Civil Services Rules, as adopted by the State of Saurashtra, which after reciting that the Government retained an absolute right to retire any Government servant after he had completed 25 years qualifying service or 50 years of age declared that the right would not be exercised except when "it is in the public interest to dispense with the further services of a Government servant such as on account of inefficiency or dishonesty." The question before the Supreme Court was whether action under the rule

amounted to casting a stigma upon the Government servant and Art. 311 (2) was attracted. No question as to the validity of the Rule in relation to Arts. 14 and 16 was raised.

43. Reliance has been placed before us upon the following observations of the Supreme Court:—

"When the Government decides to retire a servant before the age of superannuation it does so for some good reason, and that, in general, would be misconduct or inefficiency."

The observation takes meaning according to the context in which it was made. The argument for the petitioner in that case was that R. 165-A of the Bombay Civil Services Rules specifically stated that a Govt. servant may be removed from service or required to retire from it on account of inefficiency or dishonesty. That, urged the petitioner, would bring the case within Art. 311 (2). It was contended that the decision of the Supreme Court in Shyam Lal, AIR 1954 SC 369 (supra) holding that an order retiring a Government servant under Note 1 of Art. 465-A of the Civil Service Regulations would not attract Art. 311 (2), was distinguishable. Repelling the contention, the Supreme Court pointed out that although, unlike Note 1 of Art. 465-A, R. 165-A expressly stated that the power to retire a Government servant would not be exercised except on grounds of inefficiency or dishonesty, an order under R. 165-A could not be held to be one of dismissal or removal as it did not entail forfeiture of the proportionate pension due for past services. The Supreme Court proceeded to say:—

"Indeed, in Shyam Lal's case, AIR 1954 SC 369 the Government did give to the officer concerned, notice of charges of misconduct and inefficiency and called for his explanation, though a formal enquiry was not held. In providing that no action would be taken except in case of misconduct or inefficiency Rule 165-A only made explicit what was implicit in Note 1 of Article 465-A".

These observations were made entirely for the purpose of determining whether Article 311 (2) came into play. It is not possible to speculate what the Supreme Court would have held in case the question was whether Note 1 of Article 465-A violated Articles 14 and 16 of the Constitution.

44. Apart from this, it is worthy of note that the provision considered in Shyam Lal, AIR 1954 SC 369 (Supra), reproduced in full as set out by the Supreme Court in that case, reads as follows:—

"Note I— Government retains an absolute right to retire any officer after he has completed 25 years qualifying service without giving any reasons, and no claim

to special compensation on this account will be entertained. "This right will not be exercised except when it is in the public interest to dispense with the further services of an officer." (Emphasis here in ' ') mine.]

45. The power conferred by Note I of Art. 465-A was circumscribed by the limitation that the right to retire could not be exercised except in the public interest.

46. The respondents relied upon Gopal Narain, AIR 1964 SC 370 (Supra). In that case it was clearly found that the power in the Municipal Board to select a part of the municipality for levying a tax was controlled by the purpose intended to be achieved by the statute itself, and the Supreme Court referred to several considerations clearly indicating the objects confining the exercise of the power.

47. In Shivcharan v. State of Mysore, AIR 1965 SC 220 the provision entitled the Government to retire a Government servant at any time after he had completed 25 years of qualifying service or on attaining 50 years of age "if such retirement was considered necessary in the public interest." The guideline was laid down by the provision itself and distinguishes the case from those before us.

48. We have also been referred to certain observations of the Supreme Court in AIR 1965 SC 1567:

"Now It cannot be urged that if Government decides to retain the services of some public servants after the age of retirement it must retain every public servant for the same length of time. The retention of public servants after the period of retirement depends upon their efficiency and the exigencies of public service, and in the present case the difference in the period of retention has arisen on account of exigencies of public service." These observations were made while upholding the validity of the Rules specifying the different ages on attaining which different categories of servants would retire. The exercise of the power to retire was controlled by the rule itself.

49. Reference was also made to AIR 1960 SC 1305. The question considered there was whether the compulsory retirement of a Government servant for "administrative reasons" amounted to removal within the meaning of Art. 311 (2) of the Constitution, and the Court held that the retirement would amount to such removal.

50. In Moti Ram v. N. E. Frontier Rly., AIR 1964 SC 600 the question was whether R. 148 (3) of Volume I of the Indian Establishment Code contravened Art. 14 of the Constitution. The rule provided for the termination of service of certain railway servants, and did not mention any grounds upon which the termination could be effected. Gajendragadkar, J., who ex-

pressed the majority view of the Court, noted the contention but specifically declined to express any opinion on it.

51. It is also necessary to refer to AIR 1968 Punjab 189. The learned Judges noted what was stated in Shridhar Prasad Nigam, 1966 All LJ 153 = (AIR 1966 All 560) (Supra), but, apart from this, proceeded upon considerations which were not identical with those placed by the petitioners before us.

52. Finally, the respondents have also referred to AIR 1957 SC 397. An order made by the Board of Revenue transferring a case under Section 5 (7-A) of the Indian Income-tax Act, 1922 was challenged before the Supreme Court. That was a case where no substantial right of the subject was involved and there was no denial of equal rights. As the Supreme Court pointed out:—

"It is further to be noted that the infringement of such a right by the order of transfer under Section 5 (7-A) of the Act is not a material infringement. It is only a deviation of a minor character from the general standard and does not necessarily involve a denial of equal rights for the simple reason that even after such transfer the case is dealt with under the normal procedure which is prescribed in the Act. The production and investigation of the books of account, the enquiries to be made by the Income-tax Officer and the whole of the procedure as to assessment including the further appeals after the assessment is made by the Income-tax Officer are the same in a transfer case as in others which remain with the Income-tax Officer of the area in which the other assessee reside or carry on business. There is thus no differential treatment and no scope for the argument that the particular assessee is discriminated against with reference to others similarly situated."

53. In conclusion, I think it right to point out that a rule conferring discretionary power upon an authority which affects the rights of a citizen must always be carefully formulated. This is especially so when the Rule of Law extends its mantle of protection wherever the power of the State impinges upon the right of the individual. On this, it is necessary to recall what the Supreme Court said in Jaisinghani v. Union of India, AIR 1967 SC 1427:

".....It is important to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which a whole constitutional system is based. In a system governed by the rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in

general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law (See Dicey—“Law of the Constitution”—Tenth Edn., Introduction cx). “Law has reached its finest moment”, stated Douglas, J. in *United States v. Wunderlich*, (1951) 342 US 98, “when it has freed man from the unlimited discretion of some ruler..... where discretion is absolute, man has always suffered.” It is in this sense that the rule of law may be said to be the sworn enemy of caprice. “Discretion”, as Lord Mansfield stated it in classic terms in the case of *John Wilkes*, (1770) 4 Burr 2528 at p. 2539 “means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful.”

54. Upon the considerations to which I have adverted, I find myself unable to agree with the conclusion expressed in *Shridhar Prasad Nigam*, 1966 All LJ 153= (AIR 1966 All 560) (Supra) that paragraph (1) of the proviso to Fundamental R. 56 (a) does not violate Art. 14 of the Constitution. In my judgment, it does.

55. Accordingly, I answer the two questions referred in Civil Misc. Writ Petitions Nos. 1254, 3958, 4033, 4394 and 4400 of 1968 as follows:—

- (1) Under CL (a) of Fundamental R. 56 the age of compulsory retirement is 58 years.
- (2) Paragraph (1) of the proviso to CL (a) of Fundamental R. 56 violates Arts. 14 and 16 of the Constitution.

56. In respect of Special Appeals Nos. 307 and 320 of 1968, the entire case has been referred for decision. While the only questions raised in those appeals before us are the two questions referred in the writ petitions mentioned above, and should be answered accordingly, the facts disclose that the appellant in Special Appeal No. 307 of 1968 would have ordinarily retired on January 1, 1969 and the appellant in Special Appeal No. 320 of 1968 would have ordinarily retired on January 11, 1969 even if the impugned orders terminating their services prematurely had not been passed. Even if the impugned orders are held to be invalid in the two appeals, the period during which the respective appellants would have ordinarily served has already expired. In the circumstances, both the appeals are infructuous and are accordingly dismissed, except that the order of the learned single Judge decreeing costs against the appellants is substituted by an order directing the parties to bear their own costs throughout.

57. BY THE COURT—In view of the majority opinion we answer the two ques-

tions referred to us in Civil Miscellaneous Writ Petitions Nos. 1254, 3958, 4033, 4394 and 4400 of 1968 as under:—

- (1) Under CL (a) of Fundamental R. 56 the age of compulsory retirement is 58 years.
- (2) Paragraph (1) of the proviso to CL (a) of Fundamental Rule 56 violates Arts. 14 and 16 of the Constitution.

Special Appeals Nos. 307 and 320 of 1968 are dismissed but the parties are directed to bear their own costs.

Order accordingly.

AIR 1970 ALLAHABAD 307 (V 57 C 48)

B. S. PATHAK, J.

Bhondoo and others, Appellants v. Udatoo, Respondent.

Second Appeal No. 2741 of 1967, D/- 16-1-1970, against Judgment of Civil and S. J., Tehri, D/- 20-7-1967.

(A) Easements Act (1882), S. 1—Applicability — Act not applicable to certain area — Still principles incorporated in the provisions of the Act can be applied. AIR 1962 Punj 299, Rcl. on. (Para 5)

(B) Civil P. C. (1908), O. 41, R. 33, O. 7, R. 7 — Trial Court can mould relief and grant decree as required by merits of case — Appellate Court has the same powers.

The appellate Court has as wide a jurisdiction as the trial Court in granting relief, and it is now settled law that when disposing of a suit the trial Court has power to mould the relief and to grant such appropriate decree as it called for by the merits of the case. Though the plaintiff merely prayed for a prohibitory injunction the appellate Court could grant a mandatory injunction instead.

Under Order 41, Rule 33 the appellate Court has power to pass any decree which ought to have been passed or made as the case may require and this power may be exercised by the court in favour of all or any of the respondents, although such respondents may not have filed any appeal or objection. (Para 6)

Cases Referred: Chronological Paras (1962) AIR 1962 Punj 299 (V 49)=

ILR (1962) 2 Punj 255, Nuniamal v. Mahadeo

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S. N. Doyal, for Appellants.

JUDGMENT:— This is a defendant's appeal arising out of a suit for an injunction.

2. The suit was brought on the allegation that the plaintiff had been taking water to his field through a Gool which passed through two plots belonging to the defendants, that the defendants had de-

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molished a portion of the Gool and thus stopped the water flowing to the plaintiff's fields. The plaintiff prayed for a permanent injunction restraining the defendants from interfering with his taking water to his field through the said Gool.

3. The suit was contested on the ground that no Gool at all passed through the said plots and there was no right in the plaintiff to receive water passing through the defendants' fields.

4. The suit was decreed by the trial Court and a perpetual injunction was granted in the terms prayed for by the plaintiff. The defendants appealed. The learned Civil & Sessions Judge modified the decree of the trial Court in so far that a mandatory injunction was granted directing the defendants to restore the Gool in question to its original condition as marked in the map forming part of the decree.

5. Learned counsel for the defendants-appellants points out that the matter arises in the district of Tehri Garhwal, that the district originally formed the State of Tehri Garhwal which merged in 1949 in the United Provinces, and urges that there is no law applying the Indian Easements Act, 1882 to that area. He has referred to the provisions of the Merged States (Laws) Act, 1949 to show that the Indian Easements Act, 1882 is not one of the Acts mentioned in the schedule to that Act. Reference has also been made to Section 3(2) of the U.P. Merged States (Application of Laws) Act, 1950 and it is pointed out that in the absence of the Notification contemplated by Section 3(3) the Indian Easements Act, even if referred to by Section 3(2), cannot be said to have been extended to that area.

Learned counsel for the plaintiff-respondent concedes that the Indian Easements Act does not apply as such to the district of Tehri Garhwal. But he relies upon the principles incorporated in the provisions of that Act. It does appear that in respect of areas where the Indian Easements Act in terms does not apply, the Courts in this country have applied the principles incorporated there. It is not necessary to set out the several decisions of the Courts in that regard. It seems to me sufficient to refer to what was said by Tek Chand, J. in *Nunia Mal v. Mahadev*, AIR 1962 Punj 239:

"there is an imposing array of authority for the view that in those parts of the country where Indian Easements Act is not in operation, there is no reason why the principles underlying the provisions of the Indian Act, should not be followed in so far as they embody the rules of equity, justice and good conscience. Where the provisions of the Act coincide with the equitable principles, the Indian

Easements Act will equally serve as a safe guide and as the measure and standard of such principles"

I respectfully agree with those observations. In the circumstances, I have no hesitation in holding that the courts below were plainly right in recognising a right in the plaintiff-respondent to flow water through the Gool passing through the defendants-appellants' fields for the purpose of irrigating his own fields.

6. The next contention of learned counsel for the defendants-appellants is that the plaintiff-respondent had merely prayed for a prohibitory injunction and the lower appellate Court should not have granted a mandatory injunction. Instead, it cannot be disputed that the appellate Court had as wide a jurisdiction as the trial Court in granting relief, and it is now settled law that when disposing of a suit the trial Court has power to mould the relief and to grant such appropriate decree as is called for by the merits of the case. It is pointed out that having regard to the terms of the trial Court decree, it was for the plaintiff-respondent to have appealed and to have claimed a mandatory injunction, and in the absence of such appeal it is said, the lower appellate Court should not have granted the decree which it did. Now, Order 41, Rule 33 of the Code of Civil Procedure clearly declares that the appellate Court shall have power to pass any decree which ought to have been passed or made as the case may require and this power may be exercised by the Court in favour of all or any of the respondents, although such respondents may not have filed any appeal or objection. It seems to me that what the lower appellate Court did cannot be said to have exceeded the power conferred upon it by Order 41, Rule 33.

7. The last contention of learned counsel for the defendants-appellants is that the terms of the decree made by the lower appellate Court are vague and consequently effect cannot be given to the decree. The lower appellate Court has decreed a mandatory injunction directing the defendants to "restore the Gool in question to its original condition as marked in the map 7C Ex. I forming part of the decree.....". The map referred to here is the settlement map, as is clear from the observations contained in the judgment of the lower appellate Court. It is, therefore, apparent that in complying with the decree the defendants must proceed according to the position of the Gool as shown in the settlement map. No question of vagueness can then arise.

8. The appeal fails and is dismissed. In the circumstances, there is no order as to costs.

Appeal dismissed.

AIR 1970 ALLAHABAD 309 (V 57 C 49)

FULL BENCH

GYANENDRA KUMAR, J. S. TRIVEDI
AND T. P. MUKERJEE, JJ.

Jagannath Prasad and others, Appellants v. Smt. Chandrawati and another, Respondents.

Second Appeal No. 1379 of 1963, D/-
23-9-1969.

(A) Houses and Rents — U.P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 — Payment of arrears of rent — Modes of — Decree against tenant for arrears of rent — Service of notice under S. 3 by landlord — Deposit of decretal amount in Court under O. 21, R. 1, Civil P. C. — Amounts to payment to landlord.

One of the modes of payment of the decretal amount to the decree-holder is by depositing it in Court. The additional requirement of Section 3 of the U. P. (Temp.) Control of Rent and Eviction Act is that the amount should be paid within a month of the service of notice of demand, if the tenant wants to escape the penalty of ejectment. However, no mode of payment is prescribed in Sec. 3 or any other section of the Act. Section 3 only says that payment of arrears should be made to the landlord. Hence if the landlord also happens to be the decree-holder of the amount of rent, the same can be paid by deposit of the decretal amount in Court, which will amount to payment to the landlord. Thus the deposit under Order XXI, Rule 1, C. P. C. does amount to payment of arrears to the landlord, within the meaning of Section 3 of the Act. (Paras 3, 15 and 25)

(B) Civil P. C. (1908), Ss. 146, 100-101 — Decree for arrears of rent, mesne profits and ejectment — Death of tenant thereafter — Competency of his heirs to file appeal — Decree, whether can be set aside in its entirety — Houses and Rents — U.P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3.

A landlord holding a decree for certain amount of rent served a notice under S. 3 for payment of the decretal amount. The tenant deposited the amount in Court under O. 21, R. 1, C.P.C. within one month of service of notice. The landlord, however, filed a suit against tenant for arrears of rent, mesne profits and ejectment on ground that decretal amount was not paid to him. Suit was dismissed by the trial Court but decreed in first appellate Court. Due to death of tenant after passing of decree, his heirs filed second appeal challenging the decree.

Held (i) (Per Full Bench) that as the appellants were the heirs of the deceased tenant and were bound for the payment

of money decree to the extent of the assets of the deceased received by them, they were competent to file the second appeal. (Paras 2, 16)

(ii) Per Majority (J. S. Trivedi, J. Contra) that the decretal amount already having been deposited in Court, there was no cause of action for filing the suit and hence the decree was liable to be set aside in its entirety. (Paras 3, 4, 9, 22)

Per Gyanendra Kumar, J.:

Once it is held that the heirs of the deceased tenant were liable for the money part of the decree and that the suit was not maintainable for want of cause of action, there could be no question of maintaining the decree for ejectment for such a decree did not exist in the eye of law. There could not also be any question of such a decree exhausting itself on account of the death of tenant, for before it could exhaust itself, it must have had a legal existence, which was totally wanting. (Para 8)

Per Mukerjee, J.:

The decree passed by the lower appellate Court, though wrong, cannot be said to be one which "did not exist in the eye of law". A decree may be said to be non-existent in the eye of law when it is a nullity, for instance, when a decree is passed by a court without jurisdiction. In such a case the decree may be ignored and challenged even in collateral proceedings. When, however, a court having jurisdiction in respect of a suit or action passes a decree, but the decree is a wrong one, it cannot be said to be non-existent in the eye of law. It has a valid legal existence, and it would be binding on the parties concerned, if it is not set aside or reversed in due course of law. (Paras 28, 29)

(C) Civil P. C. (1908), O. 7, R. 11 — Total want of cause of action — Dismissal of plaint on that ground, when permissible.

Per Gyanendra Kumar, J.:

There is a clear distinction between a case where the plaintiff himself does not disclose any cause of action and a case in which, after the parties have produced oral and documentary evidence, the Court, on consideration of the entire material on record, comes to the conclusion that there was no cause of action for the suit. In the latter case, obviously, the plaint cannot be rejected under O. 7, R. 11. (Para 6)

Where on the face of the plaint it could not be said that it did not disclose any cause of action, but it was only after the entire evidence had been led and documents produced in the case considered that the trial Court came to the conclusion that in point of fact and law it had not been proved that the tenant had committed any default in payment of arrears of rent within the statutory period, so as

to expose him to the penalty of eviction from the accommodation, it was a case where it was ultimately proved that there was no cause of action for the suit and not a case where the plaint itself did not disclose a cause of action. (Para 6)

(D) Houses and Rents — U.P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 — Scope — Prohibition under S. 3 to file suit — Its effect on right of landlord to determine tenancy — Transfer of Property Act (1882), S. 111 — Civil P. C. (1908) Pre. — Interpretation of Statutes.

Per Trivedi, J.:

The whole scheme of the U.P. Act is to control the letting out of premises and to restrict ejectionment of tenants. It is true that the power to allot an accommodation is given to the District Magistrate and the choice of the landlord in choosing his tenant is restricted but nonetheless it is the landlord who lets the accommodation. The District Magistrate under Sec. 7(2) only directs the landlord to let or not to let an accommodation to any person. The contractual relationship of landlord and tenant, though regulated by the statute, remains. The U.P. Act does not provide the manner of determination of tenancy, for which purpose one has to fall back upon the provisions of the Transfer of Property Act. The prohibition under S. 3 of the Act is against filing of a suit and not from determining the tenancy. The tenancy is determined under Section 111 of the T. P. Act and a suit for ejectionment can only follow the determination of the tenancy. S. 3 only postpones or defers the filing of the suit till the fetters mentioned in S. 3 are removed. The section does not create a fetter to the determination of the tenancy. The words "no suit can be filed" in S. 3 cannot be interpreted also to mean that no tenancy can be determined. It would be adding certain words to the statute which do not exist there. It would also amount to speculating the intention of the Legislature as against the express and clear words of the statute. The intention of the Legislature has always to be gathered from the words used by it, giving to the words their plain, normal and grammatical meaning. (Para 19)

Cases Referred: Chronological Paras

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| (1966) 1966 All WR (HC) 55, Smt. Bhartoo v. Mst. Asa Devi | 14, 18 |
| (1965) AIR 1965 SC 414 (V 52) = (1964) 4 SCR 892, Anand Nivas v. Anandji | 14, 18 |
| (1961) AIR 1961 SC 1067 (V 48) = (1961) 3 SCR 813, Ganga Dutt v. Kartik Chandra Das | 14, 18 |
| (1960) AIR 1960 SC 236 (V 47) = (1960) 3 SCR 578, Mahadeolal v. Administrator General | 19 |

Shantil Bhusan, for Appellants; K. C. Agarwal and K. C. Saxena, for Respondents.

GYANENDRA KUMAR, J.:— I have had the advantage of reading the judgment of Trivedi, J. It is not necessary to reiterate the facts of the case which are clearly contained in his judgment. However, it may be recollected that the trial Court had dismissed the suit in toto. But on appeal, it was decreed by the Civil Judge, who granted three reliefs to the plaintiff, viz. (a) ejectionment of the defendant, Behari Lal (since deceased) from the premises in question, (b) recovery of Rs. 41/- as arrears of rent from 22-10-1958 to 14-12-1958 and (c) recovery of damages for use and occupation at the rate of Rs. 23/- per month from the date of termination of tenancy to the date of defendant's ejectionment.

2. It cannot be doubted that so far as the decree for arrears of rent and damages for use and occupation is concerned, the present appellants (who are the personal heirs and legal representatives of the deceased defendant, Behari Lal) would be liable to pay the same to the extent of the assets inherited by them, from the deceased. I, therefore, respectfully agree with the finding of my brother Trivedi that they were competent to file the instant second appeal in this Court.

3. I further agree that the deposit of the decretal amount of arrears of rent by Behari Lal under Order XXI, Rule 1, C.P.C., within one month of the receipt of the notice of demand, amounted to valid payment to the landlord decree-holder himself, within the meaning of Section 3 of the U.P. (Temporary) Control of Rent and Eviction Act. It may also be remembered that the subsequent arrears of rent had further been directly paid by the defendant to the landlord, within one month of the aforesaid notice. The result was that no arrears of rent remained due from the defendant at the time of the institution of the suit. Consequently, there could be no default or failure on the part of the tenant to pay any arrears of rent, as none existed at the time of the filing of the suit. That being so, the landlord had no cause of action for instituting the suit either for ejectionment or for recovery of rent and damages on the ground of alleged default of the tenant in payment of rent, in spite of notice of demand.

4. Under Section 3 of the Act there was also a statutory bar against the institution of such a suit. In fact, Trivedi, J. has himself observed: "In view of my finding that Behari Lal did not commit any default, within the meaning of Section 3 of the Act, no suit for his ejectionment could have been legally filed. If Behari Lal could not be ejected, his status conti-

nued to be that of a tenant, with the result that a decree for mesne profits could not have been passed against him." Towards the end of his judgment, Trivedi, J. again held that the decree in question "was a wrong decree" and that "the suit was not maintainable". Needless to repeat that inasmuch as there were no arrears of rent due against the defendant and he still continued to be a statutory tenant, in spite of the termination of his contractual tenancy under the Transfer of Property Act, there was no case for ejectment of the tenant and recovery of arrears of rent, much less for mesne profits. Thus it proved to be a case of total want of cause of action or right of suit in the plaintiff, so far as it was based on the ground of supposed default of payment of arrears of rent by the tenant.

5. Undoubtedly an appeal is a projection of the suit and the suit can still be said to be pending decision in this second appeal. It has been argued on behalf of the appellants that clause (a) of O. VII, Rule 11, C.P.C., inter alia, provides that "the plaint shall be rejected where it does not disclose a cause of action". This is a mandatory provision of law which goes to the root of the matter and the Court has no option but to reject the plaint where there is total want of cause of action, as is alleged to be the position in this case. Therefore, it is urged that there was no valid plaint or suit in the present case before the Court below and, therefore, no decree could have legally been passed on the basis of such a plaint, which did not disclose any cause of action and had to be rejected.

6. Initially I was impressed by the above argument and was inclined to accept the same but on closer scrutiny I find that there is a clear distinction between a case where the plaint itself does not disclose any cause of action and a case in which, after the parties have produced oral and documentary evidence, the Court, on consideration of the entire material on record, comes to the conclusion that there was no cause of action for the suit. In the latter case, obviously, the plaint cannot be rejected under Order VII, Rule 11, C.P.C. The instant one is a case where on the face of the plaint it could not be said that it did not disclose any cause of action. It was after the entire evidence had been led and documents produced in the case considered that the trial Court came to the conclusion that in point of fact and law it had not been proved that the tenant had committed any default in payment of arrears of rent within the statutory period, so as to expose him to the penalty of eviction from the accommodation, on the ground of his alleged default in payment of rent, after the receipt of the notice of demand. The above argument of the appellants, though

plausible, has no substance and has to be rejected, because it is a case where it was ultimately proved that there was no cause of action for the suit and not a case where the plaint itself did not disclose a cause of action.

7. At any rate, once it has been held that the appellants have a right of appeal to this Court, they cannot be stopped from challenging the decree for arrears of rent and damages for use and occupation, inter alia, on the ground that the suit was not at all maintainable against their predecessor-in-interest, as it was proved that there was no default on his part and consequently, there was no cause of action for the suit as such and also because there was an absolute statutory bar against the institution of such a suit, in terms of Section 3 of the Act.

8. With the profoundest respect to my learned brother Trivedi, I cannot persuade myself to agree with the proposition that even though no suit, giving rise to the present appeal, could lie and the consequent decree was also illegal and wrong, yet the appellants could not challenge the same notwithstanding that they are liable at least for the money part of the decree and have a right to institute the present appeal. As indicated above, they can obviously challenge the money decree for arrears of rent and so-called damages for use and occupation on the ground that there was no cause of action for such a suit. In these circumstances, there can be no question of maintaining the decree for ejectment, when such a decree did not exist in the eye of law. A fortiori there also cannot be any question of such a decree exhausting itself on account of the death of Behari Lal, for before it could exhaust itself, it must have had a legal existence, which was totally wanting in this case.

9. I find that Trivedi, J. has only set aside the decree for mesne profits, but he has not said anything about the decree for arrears of rent granted to the plaintiff by the lower appellate Court, even though, as held above, there were no actionable arrears due from the defendant at the time of the lodging of the suit. In my view, the suit has to be dismissed in its entirety for want of cause of action and this appeal has to be allowed as a whole, with costs throughout, and it has further to be declared that no valid and legal decree ever came into existence.

10. TRIVEDI, J.: This defendant's second appeal is against a decree for ejectment and recovery of arrears of rent and mesne profits, passed by the lower appellate Court.

11. Behari Lal, the predecessor of the appellants, was the tenant and respondent No. 1 Smt. Chandrawati was the landlord of the premises in suit. Behari

Lal was in arrears of rent and in suit No. 822 of 1957 filed by the landlord a decree for arrears of rent was passed against him. The decretal amount remained unsatisfied. The plaintiff respondent then served a composite notice under Section 3 of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 (hereinafter called the Act) and Sec. 106 of the Transfer of Property Act, on November 14, 1958, on Behari Lal asking him to pay the decreed sum together with the rent that had fallen in arrears for the period beginning from 22-10-1957 to 21-10-1958, within one month of the receipt of the notice. Behari Lal paid the rent that was due for the aforesaid period within one month of the receipt of the notice. However, the amount due under the rent decree of 1957 was not paid to the landlord but was deposited in Court in satisfaction of the decree, under Order XXI, Rule 1, C.P.C.

12. The plaintiff respondent then filed the suit, giving rise to this appeal, on 16-12-1958 for ejectment, for arrears of rent and for damages for use and occupation with the allegation that Behari Lal defendant was liable to ejectment, as he had failed to make the payment of the entire arrears of rent, as required under Section 3 of the Act, within one month from the date of receipt of the notice of demand. Relief for ejectment was also claimed on other ground with which this Court is not concerned in this appeal. Behari Lal contested the suit by alleging that he, having deposited the decretal amount of the previous suit under O. XXI, Rule 1, C.P.C., was not liable to ejectment from the premises. The trial Court dismissed the plaintiff's suit. However, the lower appellate Court decreed the plaintiff's suit holding that the satisfaction of the decree under Order XXI, Rule 1, C.P.C. did not amount to payment of the arrears to the landlord within Section 3 of the Act.

13. The appeal was decided by the lower appellate Court on 4-2-1963. Behari Lal died thereafter before the second appeal could be filed. The appellants, who are the heirs of Behari Lal, then filed this second appeal under Chapter X, Rule 1, Rules of Court.

14. It has been contended by Shri K. L. Misra, learned counsel for the appellants that the deposit of the decretal amount under Order XXI, Rule 1, C.P.C. did amount to valid payment under Section 3 of the Act. Shri K. C. Saxena, learned counsel for the respondent, while supporting the judgment of the lower appellate Court has contended that the tenancy of Behari Lal was terminated by a notice under Section 106 of the Transfer of Property Act and on the expiry of the period of notice, the status of Behari Lal

was that of a mere statutory tenant which was non-heritable. He contends that Behari Lal having died after the decree of the lower appellate Court, the appellants are precluded from challenging the decree of ejectment passed against the deceased. The essence of his arguments is that Section 3 of the Act only restricts the filing of a suit for ejectment of a tenant but it does not restrict the right of a landlord to determine the tenancy created under the Transfer of Property Act. According to him, the tenancy can be determined by a notice under Section 106 of the Transfer of Property Act, whereafter the status of a tenant would be reduced to that of a mere statutory tenant, terminable on his death. In support of his arguments he has placed reliance on *Ganga Dutt v. Kartik Chandra Das*, AIR 1961 SC 1067; *Anand Nivas v. Anandji*, AIR 1965 SC 414 and *Smt. Bhartoo v. Mt. Asa Devi*, 1966 All WR (HC) 55. I will revert to this problem a little later.

15. The first question for determination is whether the deposit of the decretal amount under Order 21, Rule 1, C. P. C., made within one month of the service of notice of demand will amount to payment of that amount to the landlord within the meaning of Section 3 of the Act. Section 3 provides that no suit shall without the permission of the District Magistrate be filed in a Civil Court for the eviction of a tenant except on the ground, *inter alia*, that the tenant is in arrears of rent for more than three months and has failed to pay the same to the landlord within one month of the service upon him of the notice of demand. It is not disputed by the parties that the nature of the arrears was not changed by passing of a decree for the same. All that is contended is that the payment of arrears to the landlord required by the aforesaid section means actual payment to the landlord and a deposit of the amount in Court under O. 21, R. 1, Civil P. C. could not amount to payment to the landlord. The learned counsel attempted to establish the correctness of the proposition by referring to Section 7-C of the Act. His argument is that where the Legislature wanted that the method of payment to the landlord would also be by deposit of the amount in Court it has expressly said so. But in relation to Section 3 (a) of the Act, the Legislature has not said so and, therefore, according to him, the payment of arrears to the landlord, within the meaning of Section 3 (a) has actually to be made to the landlord himself. I do not find any force in this submission of the learned counsel for the respondent. Order 21, Rule 1, Civil P. C., as amended by this Court, reads thus:—

"(1) All money payable under a decree shall be paid as follows, namely,

(a) into the Court whose duty it is to execute the decree; or

(b) out of Court to the decree-holder; or

(c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under Cl. (a) of sub-rule (1) notice of such payment shall be given to the decree-holder."

This rule shows that one of the modes of payment of the decretal amount to the decree-holder is by depositing it in Court. The additional requirement of Section 3 of the Act is that the amount should be paid within a month of the service of notice of demand, if the tenant wants to escape the penalty of ejectment. However, no mode of payment is prescribed in Section 3 or any other section of the Act. Section 3 only says that payment of arrears should be made to the landlord. Hence if the landlord also happens to be the decree-holder of the amount of rent, the same can be paid by deposit of the decretal amount in Court, which will amount to payment to the landlord. The lower appellate Court was, therefore, wrong in holding that the deposit under O. 21, R. 1, Civil P. C. did not amount to payment of arrears to the landlord, within the meaning of Section 3 of the Act.

16. The admitted or proved facts are that a composite notice under Section 106 of the Transfer of Property Act read with Section 3 of the Act was given to Behari Lal on 13-11-1958 and was served on him the next day. The suit out of which this appeal arises was filed on 18-12-1958. The lower appellate Court decreed the suit on 4-2-1963. The decree under appeal is one for ejectment, arrears of rent and damages for use and occupation. Behari Lal died shortly after the decree of the lower appellate Court and this appeal was filed on behalf of his heirs under Chapter X, R. 1, Rules of Court read with S. 146, Civil P. C. As stated above, the contention of the learned counsel for the respondent is that the tenancy of Behari Lal having been terminated, his status after the notice of termination was that of a bare statutory tenant liable to ejectment under the Act. And inasmuch as Behari Lal died without leaving any heritable claim to tenancy, his heirs cannot prosecute the appeal. Section 146 of the Code of Civil Procedure lays down that:—

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceedings may be taken or the application may be made by or against any person claiming under him." Under R. 1, Chapter X, Rules of Court, a right is given to any legal representative whose interest is affected to appeal from such a decree. The question for

determination, therefore, is whether the heirs of Behari Lal, who have filed this second appeal, can be said to be persons claiming under Behari Lal or whose rights are affected by a decree passed against Behari Lal. The decree against Behari Lal was for rent for a specified period, mesne profits thereafter and ejectment. The accrual of mesne profits was dependent on the question whether the status of Behari Lal continued to be that of a tenant or not. In view of my finding that Behari Lal did not commit any default, within the meaning of Section 3 of the Act, no suit for his ejectment could have been legally filed. If Behari Lal could not be ejected, his status continued to be that of a tenant, with the result that a decree for mesne profits could not have been passed against him. The appellants, who are the heirs of Behari Lal and are bound for the payment of money decree to the extent of the assets of the deceased received by them, could very well challenge the correctness of the decree and were quite competent to file the instant second appeal.

17. The next question, which falls for determination, is whether the decree for ejectment granted against Behari Lal can be set aside in this appeal, filed by his legal representatives. The answer to this question involves the determination of Behari Lal's status at the time of his death, i.e. whether Behari Lal's status at that time was that of a contractual heritable tenant or was he a simple statutory tenant, without leaving heritable rights. The cases referred to above and relied upon by the learned counsel for the respondent lay down that where the tenancy is determined but the tenant is still protected from ejectment on account of some provision of a statute, the status of the tenant is reduced to that of a statutory tenant.

18. Shri K. L. Misra, learned counsel for the appellant, has tried to distinguish the above cases. According to him, the case of Ganga Dutt, AIR 1961 SC 1067 (supra) involved the interpretation of the West Bengal Premises Rent Control Act, under which protection from eviction is granted to tenants including tenants whose tenancies have expired. In the case of Anand Nivas, AIR 1965 SC 414 (supra) the Hon'ble Supreme Court was considering the status of a tenant under the Bombay Rents, Hotel and Lodging House Rates Control Act, under which statute also the possession of a tenant, including a tenant whose lease has been determined, is protected, so long as he continues to pay rent. The purpose of the Bombay and Calcutta Acts, according to him, was only to regulate the rent and maintain the possession of the tenant so long as he paid the rent. On the other hand, the U. P. (Temporary) Control of Rent and Eviction

Act not only controls the letting of accommodations but also, in substance, obligates the contractual relationship of landlord and tenant. According to Shri Misra, the tenancies in this State, after the enforcement of the U. P. Act, cannot be determined unless the fetters mentioned in Section 3 thereof are removed. Smt. Bhartoo's case, 1966 All WR (HC) 55 (supra) decided by this Court, is distinguished on the ground that the same was a case of fixed term tenancy, where the lease stood determined automatically by the efflux of time. In the case of Anand Nivas, AIR 1965 SC 414 (supra) it was laid down by their Lordships of the Supreme Court:—

"A person remaining in occupation of the premises let to him after the determination or expiry of the period of the tenancy is commonly, though in law not accurately, called a statutory tenant. Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on the death only in the manner provided by the statute. The right of a lessee from a landlord on the other hand is an estate or interest in the premises and in the absence of a contract to the contrary is transferable and the premises may be sublet by him. But with the determination of the lease, unless the tenant acquires the right of a tenant holding over, by acceptance of rent or by assent to his continuing in possession by the landlord, the terms and conditions of the lease are extinguished, and the rights of such a person remaining in possession are governed by the statute alone."

19. The whole scheme of the U. P. Act is to control the letting out of premises and to restrict ejection of tenants. It is true that the power to allot an accommodation is given to the District Magistrate and the choice of the landlord in choosing his tenant is restricted but nonetheless it is the landlord who lets the accommodation. The District Magistrate under Section 7 (2) only directs the landlord to let or not to let an accommodation to any person. The contractual relationship of landlord and tenant, though regulated by the statute, remains. The U. P. Act does not provide the manner of determination of tenancy, for which purpose one has to fall back upon the provisions of the Transfer of Property Act. The relevant portion of Section 3, which restricts the right of the landlord, is in these words:—

"..... No suit shall without the permission of the District Magistrate be filed in any Civil Court against a tenant for his eviction from any accommodation, except on one or more of the following grounds"

The prohibition is against filing of a suit and not from determining the tenancy. The tenancy is determined under Section 111 of the Transfer of Property Act and a suit for ejection can only follow the determination of the tenancy. Section 3 only postpones or defers the filing of the suit till the fetters mentioned in Section 3 are removed. The section does not create a fetter to the determination of the tenancy. The words "no suit can be filed" in Section 3 of the Act cannot be interpreted also to mean that no tenancy can be determined. It would be adding certain words to the statute which do not exist there. It would also amount to speculating the intention of the Legislature as against the express and clear words of the statute. It has been laid down in Mahadeo Lal v. Administrator General, AIR 1960 SC 936 at p. 939 that the intention of the Legislature has always to be gathered from the words used by it, giving to the words their plain, normal and grammatical meaning.

20. The effect of determination of Behari Lal's tenancy by a valid notice was that his status became that of a person against whom no suit for ejection could be filed till the conditions enumerated in Section 3 of the Act were fulfilled. His status technically, therefore, was that of a statutory tenant and that right in the absence of any provision to the contrary in the statute was personal only. The right to remain in possession being personal, extinguished with the death of Behari Lal. As a matter of fact the decree for ejection itself is a dead decree. The right to remain in occupation of the accommodation being personal and having been extinguished with the death of Behari Lal, his heirs cannot in law be termed as persons affected or claiming under him and cannot challenge the dead decree even though it was a wrong decree and could have been successfully challenged by Behari Lal.

21. The result, therefore, is that this appeal succeeds in part. The decree of the lower appellate Court to the extent of mesne profits is set aside and as the decree for ejection has exhausted itself by the death of Behari Lal, the appellant cannot claim reversal of the same and no order is passed in respect of that part of the decree. In view of my finding that the suit was not maintainable the costs of the suit throughout are awarded to the appellants.

22. MUKERJEE, J.:— I agree with my learned brother Gyanendra Kumar, J. that

The suit has to be dismissed in its entirety. I would however, like to add a few words.

23. The action in ejectment brought by the plaintiff landlord Smt. Chandrawati against the defendant Behari Lal (since deceased) who was her tenant registered as suit No. 1029 of 1958, in the Court of the Munsif, Muzaffarnagar was based on the following grounds:

- (1) That the tenant had installed a flour mill in a part of the premises and thereby used the accommodation for a purpose inconsistent with the purpose of the tenancy;
- (2) That the tenant had caused substantial damage to the accommodation;
- (3) That the tenant had sublet the house without authority; and
- (4) that the tenant had defaulted in payment of rent.

24. At the hearing of the suit before the learned Munsif grounds Nos. (1), (2) and (3) were abandoned and the decree in ejectment was sought for only on the ground of default in payment of rent. The learned Munsif held that there was no default in payment of rent. He dismissed the suit. The learned Civil Judge, however, held otherwise. He was of the view that the tenant, who was the first defendant in the suit, had failed to pay the arrears of rent to the landlord within one month of the service of the notice of demand and he granted a decree to the plaintiff for ejectment, for arrears of rent and for mesne profits.

25. My learned brothers Gyanendra Kumar, J. and Trivedi, J. have both held that there was no default in payment of the arrears of rent within the meaning of Section 3 of Act 3 of 1947. I respectfully concur in the view taken by them in point.

26. The conclusion at which brother Gyanendra Kumar, J. has arrived as a result of his finding, that the tenant was not in default is that the suit was not maintainable at all as there was no cause of action for the suit as such, and also because there was an absolute statutory bar against the institution of such a suit, in terms of Section 3 of the Act. My learned brother also remarks that the decree does not exist in the eye of law and it had no legal existence. He is, therefore, of the opinion that the suit has to be dismissed in its entirety for want of cause of action and the appeal has to be allowed as a whole with costs throughout, and it has further to be declared that no valid and legal decree ever came into existence.

27. The relevant clauses of sub-s. (1) of Section 3 of Act 3 of 1947 are quoted below:—

"Subject to any order passed under sub-section (3) no suit shall, without the permission of the District Magistrate, be

filed in any Civil Court against the tenant for his eviction from any accommodation except on one or more of the following grounds:

(a) that the tenant is in arrears of rent for more than three months and has failed to pay the same to the landlord within one month of the service upon him of a notice of demand.

(b) that the tenant has wilfully caused, permitted to be caused substantial damage to the accommodation;

(c)

(d)

(e) that the tenant has on or after the first day of October 1946 sublet the whole or any portion of the accommodation without the permission of the landlord.

(f)

(g)

28. It would appear that Section 3 of Act 3 of 1947 is a bar to the filing of a suit, except on one or more of the grounds set out in the different clauses mentioned in sub-section (1) thereof. There is, however, no bar to the filing of a suit against a tenant for his eviction on one or more of the above grounds. In the present case, as already noted, the plaintiff had pleaded in the plaint that the tenant was in arrears of rent for more than three months and had failed to pay the same to the landlord within one month of the service of the notice of demand, that the tenant had caused substantial damage to the accommodation and that the tenant had sublet a portion of the accommodation without the permission of the landlord. There was therefore, no bar to the filing of the suit in ejectment. In other words, the bar of S. 3 of Act 3 of 1947 did not apply to the suit filed by the plaintiff. It was, however, fit to be dismissed, as the plaintiff had failed to establish and substantiate the grounds or the causes of action upon which she based her suit for the eviction of the tenant. In point of fact, the learned Munsif dismissed the suit, but the learned Civil Judge decreed the same holding that the tenant was in default in payment of rent to the landlord as contemplated in clause (a) of sub-section (1) of Section 3.

29. In my opinion, the decree passed by the learned Civil Judge, though wrong, in the circumstances of the case, cannot be said to be one which, "did not exist in the eye of law." A decree may be said to be non-existent in the eye of law when it is a nullity, for instance, when a decree is passed by a Court without jurisdiction. In such a case the decree may be ignored and challenged even in collateral proceedings. When, however, a Court having jurisdiction in respect of a suit or action passes a decree, but the decree is a wrong one, it cannot be said to be non-existent in the eye of

law. It has a valid legal existence, and it would be binding on the parties concerned if it is not set aside or reversed in due course of law.

30. In the present case, as I have already pointed out, there was no statutory bar to the institution of the suit on the grounds of the causes of action pleaded in the plaint. The learned Civil Judge decreed the suit, but as we are unanimously of the view that the decree was a wrong one, the order of the learned Civil Judge has to be reversed and the suit has to be dismissed in its entirety.

31. BY THE COURT: The appeal is allowed. The decree of the lower appellate Court is set aside and that of the trial Court restored, the suit being dismissed in its entirety with costs throughout.

Appeal allowed.

AIR 1970 ALLAHABAD 316 (V 57 C 50)

FULL BENCH

R. S. PATHAK, M. H. BEG AND
H. C. P. TRIPATHI, JJ.

M/s. R. R. Engineering Co., Petitioner v. Zilla Parishad, Bareilly and another, Opposite Parties.

Civil Misc. Writ No. 37 of 1967, D/-23-5-1969.

(A) U. P. District Boards Act (10 of 1922), S. 108 — Circumstance and property tax imposed under — Nature of.

Per Full Bench: Circumstance and property tax is a tax bearing on the circumstances and property of a person. It is a tax on a person in relation to his status or, as it is said, his *Haisiat*. It is also a tax in respect of his property.

(Paras 6, 29)

Per Pathak, J.:— A tax on circumstances and property is a composite tax and word circumstance means a man's financial position, his status as a whole depending, among other things on his income from trade or business. It is a composite tax, but nonetheless a single tax. Although the status of a person and the property of that person are the two inter-twined strands which enter into the composition of the tax, it is not possible to say that the tax can be considered as two distinct taxes under a single denomination. It is a single tax possessing a separate and distinct identity from all other taxes. It cannot be confused either with a tax on profession, trade, calling or employment nor with a tax on property. It is a composite tax, and the constituent elements which enter into its composition cannot be separated. (Para 6)

Per Beg J.:— Neither incidence of a tax on income nor the fact that income is

its yardstick or measure for fixing the amount payable will determine the true character of a tax conclusively. The character of a tax is perhaps determined more accurately by answering the question: what is the legal basis of the tax or the reason without which there could be no such tax? In the case of a tax on circumstances and property probably the best answer one could give to such a question is that it is status (*haisiyat* to use the Hindi equivalent) which is the legal basis or the subject-matter of the tax. Circumstances (including income) or property may serve as its sources or measures, but the resultant or the amalgam sought to be taxed could not perhaps be described more precisely than by using term "status" for it. (Para 29)

(B) Constitution of India, Arts. 276 (2), proviso and 277 — U. P. District Boards Act (10 of 1922), Section 108 — U. P. Zilla Parishad and Kshettra Samitis Act (33 of 1961), S. 270 (a) — Imposition of circumstance and property tax by District Board — Continuation of its levy by Zilla Parishad is valid — Maximum amount of tax can exceed Rs. 250.

Per Full Bench:— Where the District Board, in exercise of its power under Section 108 of the District Boards Act, has imposed circumstance and property tax, its successor the Zilla Parishad is entitled to continue the levy of that tax on the assessee. The amount of tax to be levied cannot also be restricted to the maximum of Rupees Two hundred and fifty per annum as provided in Art. 276 (2). (Case law discussed). (Paras 7, 37, 58)

Per Pathak J.:— From the fact that a tax is levied with respect to the status of a person it cannot be considered as a tax in respect of his profession, trade, calling or employment. But even if it be assumed that a tax with respect to the status of a person can be identified as a tax in respect of his profession, trade, calling or employment, the element of status does not by itself constitute circumstance and property tax. The constituent element of property plays as essential a part in determining the quality of its composition. Circumstance and property tax is a composite tax, and when the element of property necessarily enters into that composition circumstance and property tax cannot be identified as tax on professions, trades, callings or employments, which as the plain language shows, is a tax exclusively related to the vocational activity of a person and has nothing to do with his property. Consequently circumstance and property tax cannot be considered as a tax contemplated by Article 276 (2) of the Constitution and the protection of the proviso to Art. 276 (2) cannot be invoked by the assessee.

(Para 7)

Moreover by virtue of Art. 277 circumstance and property tax levied before the commencement of the Constitution can be continued even thereafter. When the Constitution of India came into force, circumstance and property tax still did not find place as an entry expressly enumerated in any of the three lists of the Seventh Schedule. But there is the residuary entry, namely Entry 97 of List I, and therefore, circumstance and property tax will now fall within the legislative competence of Parliament. That being so, the provisions of Art. 277 come into play. Circumstance and property tax was levied before the commencement of the Constitution by a local authority. The Zilla Parishad can be identified with the District Board. The area for whose benefit the tax is to be utilised and substantially the purposes for which the utilisation is to take place continued to be the same. The rate of tax remains at the level fixed by the initial Notification of 1933 and the incidence of the tax has not been altered in any manner. In nature and effect, it continues to be the same tax. Art. 277 ensures the continued levy of the circumstance and property tax.

(Paras 11 and 12)

Per Beg, J.:— Circumstance and property tax is a composite tax and not merely a tax upon professions, callings, or employments. Therefore, it is not correct to apply the limit imposed by Art. 276 (2) to such a tax at all. The terms circumstances and property are too vague and undefined to be capable of being confined to Items 49 and 60 of List II of the Seventh Schedule. They could easily embrace other items mentioned in both State and Union Lists. Therefore, entry No. 97 of the Union List I is more appropriate for so vaguely described a tax. But once it is assumed that the circumstance and property tax is fully covered by the State List, there is no need to seek the protection of either Art. 276 or of Art. 277 at all to justify its levy under the Act. Indeed, both Arts. 276 and 277 would become inapplicable if the circumstance and property tax is fully covered by the State List. Section 270 (a) of the Zilla Parishad Act shall save the imposition of circumstance and property tax by Zilla Parishad.

(Paras 35, 37, 38)

(C) Constitution of India, Art. 276 (2), Proviso — Imposition of tax by Government agency before Constitution — Its continuance after Constitution by same agency, whether necessary.

Per Beg, J.:— The composition and identity of the body which levies a tax is one thing, but the identity of the tax which is levied by a body is another matter. It is possible that even though the agency through which the tax is imposed is different, yet, the tax, which continues to be levied through another gov-

ernmental agency, is the same. All the agencies through which the tax can be imposed are mentioned in the proviso to Art. 276 (2) but the proviso does not anywhere enact that the continuance of the levy must also be by the very authority or agency through which the tax was being levied before the Constitution.

(Para 20)

(D) Constitution of India, Art. 277 — Words "same purpose" appearing in Article 277 — Meaning.

Per Beg, J.:— One of the requirements of attracting Art. 277 is that the tax must be shown to be applied for the same purposes as the pre-Constitution tax. On the language of Art. 277 this seems to be a requirement for testing due application of proceeds of a tax only. Even if it were assumed to be a criterion for determining the character of a tax or for justifying its levy, the test does not seem to be capable of application with precision or strictness to taxation inasmuch as the very nature of a tax, as distinct from license fees, implies that it is not earmarked for specific purposes. It is presumed that taxation is meant for the benefit of the public which results from expenditure incurred or from schemes undertaken by State or local governmental authorities. A fulfilment of this broad purpose with reference to any particular area for which taxation takes place is all that could be required. AIR 1961 SC 459, Foll.

(Para 32)

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Dehra Dun v. H. Trotter 26

J. Swarup and A. N. Verma, for Petitioner; S. N. Kacker and Sant Prakash, for Opposite Parties.

PATHAK, J.:— The District Board, Bareilly, by resolution No. 3 dated February 18, 1928, imposed circumstance and property tax in exercise of the powers conferred by Section 108 of the District Boards Act, 1922, By Notification No. 2049/II/X-342-11930 dated November 29, 1933 made by the State Government under Section 114 (d) of the Act, it was provided:

"The total amount of the tax on circumstances and property imposed by a District Board on any single assessee shall not, in any year, exceed the sum of Rs. 2,000."

The tax continued to be levied for many years.

2. On April 20, 1958 the U.P. Antarim Zila Parishad Ordinance 1958 was enacted providing for the establishment of Antarim Zila Parishads for the interim administration of local self-Government in rural areas facilitating the establishment of Zila Parishads for the co-ordinated administration of affairs concerning economic and social planning and local self-Government in the districts in Uttar Pradesh. The Ordinance was replaced by the U. P. Antarim Zila Parishads Act, 1958. It was followed by the U. P. Kshettra Samitis and Zila Parishads Adhiniyam, 1961. By Section 274 of the Act, the U. P. District Boards Act was repealed as from the date on which Kshettra Samitis were established in a district, and the U. P. Antarim Zila Parishads Act, 1958 was repealed from the date on which the Zila Parishad was established in a district.

3. The petitioner carries on business in Bareilly. Although the business is carried on within what were the local limits of the District Board, Bareilly and thereafter of the Antarim Zila Parishad, Bareilly the petitioner was never assessed to circumstance and property tax by those local bodies. Some time after the Zila Parishad, Bareilly was constituted, the petitioner, who was carrying on business within what were now the local limits

of the Zila Parishad, Bareilly received a notice on January 5, 1965 from the Zila Parishad demanding circumstance and property tax in the sum of Rs. 1,500 for the year 1964-65. The petitioner objected, but upon the assurance of the Adhyaksha of the Zila Parishad that the matter would be looked into, it paid the sum demanded. In 1966 the petitioner received a bill for the year 1965-66 demanding circumstance and property tax in the sum of Rs. 2,000. The petitioner filed an objection contending that the levy was illegal and that the Zila Parishad had no power to levy it. In particular, the petitioner contended that the Zila Parishad could not demand circumstance and property tax in excess of Rs. 250 and relied upon Article 276 of the Constitution. The objection was rejected by the Zila Parishad, which issued a notice of demand dated August 20, 1966 requiring the petitioner to pay the tax levied. The petitioner has filed this petition praying for relief against the demand.

4. The case was first heard by me sitting as a single Judge. The petitioner contended that the demand contravened Article 276 (2) of the Constitution declaring that the total amount payable by any one person to any local authority by way of taxes on professions, trades, callings or employments shall not exceed Rupees 250 per annum. The Zila Parishad relied, however, upon the proviso to Article 276 (2) which excepted from the substantive provision of Article 276 (2) a tax in force during the financial year preceding the commencement of the Constitution imposed by a local authority on professions, trades, callings and employments even if the rate exceeded Rs. 250 per annum unless Parliament by law provided to the contrary. In reply to the submission of the petitioner that the proviso contemplated a local authority which was the same as that imposing the tax before the commencement of the Constitution and that the Zila Parishad, Bareilly could not be said to be the same as the District Board, Bareilly, the Zila Parishad relied upon Allahabad Canning Co., Bamrauli v. Commissioner of Allahabad Division Civil Misc. Writ. No. 2882 of 1966, D/- 20-2-1967 (All). Upon the submissions of learned counsel for the parties it appeared necessary that the view taken in that case should be reconsidered and accordingly the case was referred to a larger Bench. It was then placed before a Division Bench consisting of myself and Gulati, J., and as the Bench found itself unable to accept the view taken in Allahabad Canning Co., Bamrauli, Civil Misc. Writ. No. 2882 of 1966, D/- 20-2-1967 (All) (Supra) it directed the case to be laid before a larger Bench. Accordingly, this case has now been laid before us.

5. The submissions of learned counsel for the parties proceeded on the assumption that circumstance and property tax is a tax on professions, trades, callings and employments. While the petitioner relied upon the substantive provision of Art. 276 (2) the Zila Parishad seeks to escape its severity by recourse to the proviso to that provision.

6. The first question, I think, is whether circumstance and property tax is a tax on professions, trades, callings and employments. Circumstance and property tax, it has been repeatedly laid down, is a tax bearing on the circumstances and property of a person. It is a tax on a person in relation to his status or, as it is said, his 'Haisiat'. It is also a tax in respect of his property. It is a composite tax, in relation to his status and property. Reference may be made to the decisions cited before us as to the nature of circumstance and property tax. In *District Board of Farrukhabad v. Prag Dutt*, AIR 1948 All 382 a Full Bench of this Court held that circumstance and property tax cannot be identified with a tax on income. Subsequently a Bench of this Court consisting of Agarwala and Chaturvedi, JJ., expressed the view in *Tata Oil Mills v. District Board of Allahabad*, 1955 All LJ 630 that circumstance and property tax was nothing else but a tax on income. This was followed by the decision in *Western U. P. Electric Power and Supply Co. Ltd. v. Town Area, Jaswant Nagar*, AIR 1957 All 433, where Mootham & Srivastava, JJ., took the view that circumstance and property tax was a composite tax on property and circumstances. The Supreme Court laid down in *Ram Narain v. State of U. P.*, AIR 1957 SC 18 that a tax on circumstances and property was a composite tax and the word 'circumstance' means a man's financial position, his status as a whole depending, among other things, on his income from trade or business. We have also been referred to *Bharat Kala Bhandar Ltd. v. Municipal Committee, Dhamangaon*, AIR 1966 SC 249 but that is a case concerned with a tax on professions, trades, callings or employments.

A tax on professions, trades, callings or employments is a tax imposed on a person because he carries on a vocational activity which can be described as a profession, a trade, a calling or an employment. It is neither in respect of his status nor of his property. An example of such a tax is that imposed by the U. P. Vriti, Vyapar, Ajivika Aur Sevaoyan Kar Adhiniyam, 1965. The two taxes are different in quality. A tax on the circumstances and property of a person is a tax in respect of his status and his property. It is a composite tax, but nonetheless a single tax. Although the status of a person and the property of that person are the two inter-

twined strands which enter into the composition of the tax, it is not possible to say that the tax can be considered as two distinct taxes under a single denomination. It is a single tax possessing a separate and distinct identity from all other taxes. It cannot be confused either with a tax on professions, trades, callings or employments nor with a tax on property. It is a composite tax, and the constituent elements which enter into its composition cannot be separated. In that regard, I confess I am unable to agree with the contrary view expressed in *Zila Parishad, Muzaffarnagar v. Jugalkishore Ramswarup*, AIR 1969 All 40 (FB) where legislative sanction for the tax was traced to two distinct provisions in List II of the Seventh Schedule of the Constitution, namely Entry 49 relating to tax on lands and buildings and Entry 60 relating to tax on professions, trades, callings and employments. But having regard to the ultimate conclusion to which I have come in this case, I do not think reference to a larger Bench is called for.

7. Now, as the Supreme Court observed in AIR 1957 SC 18 (supra) the word "circumstance" means "a man's financial position, his status as a whole depending upon, among other things, on his income from trade or business". The income from trade or business may be only one of the considerations determining his status and there may be other considerations which enter into that determination. Since a man's standing in his trade or business may not be the only consideration determining his status, I find it difficult to accept that if a tax is levied with respect to the status of a person it must be considered as a tax in respect of his profession, trade, calling or employment. But even if it be assumed that a tax with respect to the status of a person can be identified as a tax in respect of his profession, trade, calling or employment, it cannot be forgotten that the element of status does not by itself constitute circumstance and property Tax. The constituent element of property plays as essential a part in determining the quality of its composition. It appears to me that there can be no dispute that circumstance and property tax is a composite tax, and when the element of property necessarily enters into that composition I find it difficult to conceive that circumstance and property tax can be identified as a tax on professions, trades, callings or employments, which, as the plain language shows, is a tax exclusively related to the vocational activity of a person and has nothing to do with his property.

8. I may at once say that we are not concerned when determining the nature of circumstance and property tax, with the measure or quantum of the tax. The measure or quantum of the tax may be

determined by reference to the income from the vocational activities of a person and from his property. It is possible that a person may have no property and yet circumstance and property tax may be assessed in his hands quantified on the basis of his vocational income. The quality or nature of the tax is a thing apart from its measure or quantum.

9. Upon these considerations, in my opinion, Art. 276 (2) of the Constitution cannot be invoked by the petitioner.

10. The decision in Civil Misc. Writ No. 2882 of 1966, D/- 20-2-1967 (All) (Supra) dealt with circumstance and property tax but it proceeded on the basis that it was a tax falling within the contemplation of Art. 276 (2) of the Constitution. The learned Judges relied upon the decision of the Supreme Court in Ram Krishna Ram Nath v. Janpad Sabha, AIR 1962 SC 1073. That case was concerned with Section 143 (2) of the Government of India Act, 1935 and Art. 277 of the Constitution and not with Sec. 142-A of the Government of India Act, 1935 and Art. 276 of the Constitution. In the view that circumstance and property tax cannot be considered as a tax contemplated by Art. 276 (2) of the Constitution, the protection of the proviso to Art. 276 (2) cannot be invoked by the petitioner. And as that is the entire submission on the basis of which relief is claimed by the petitioner, the case could have ended here.

11. It may, however, be desirable to ascertain whether circumstance and property tax levied before the commencement of the Constitution can be continued even thereafter. Article 277 of the Constitution provides, in my opinion, for the continued levy of such tax. It declares that a tax which immediately before the commencement of the Constitution was lawfully levied by a local authority for the purpose of a local area may, notwithstanding that the tax is mentioned in the Union List, continue to be levied and applied to the same purposes until provision to the contrary is made by Parliament by law. Circumstance and property tax was imposed in the constitutional context prevailing before the Government of India Act, 1935 came into force. It is not disputed before us that the tax continued as a valid imposition throughout, before the Government of India Act, 1935 was enacted and through all the years thereafter. Proceeding on that assumption, we must examine the effect upon that tax of the constitutional change over from the Government of India Act, 1935 to the Constitution of India. When the Constitution of India came into force, circumstance and property tax still did not find place as an entry expressly enumerated in any of the three Lists of the seventh Schedule. But there is the "residuary"

entry, namely Entry 97 of List I, which deals with any matter not enumerated in the previous entries in List I nor enumerated in List II or List III. It seems to me upon this that circumstance and property tax will now fall within the legislative competence of Parliament. That being so, the provisions of Art. 277 come into play.

12. Circumstance and property tax was levied before the commencement of the Constitution by a local authority, and Art. 277 declares that it may be continued to be levied and applied to the same purposes notwithstanding that the tax now falls in the Union List until provision to the contrary is made by parliamentary law. There was considerable argument before us as to the true understanding of the Supreme Court decision in Ram Krishna Ram Nath, AIR 1962 SC 1073 (Supra). It seems to me that what was said there applies fully to the case before us. On the reasoning which appealed to the Supreme Court in that case, the Zila Parishad, Bareilly can be identified with the District Board, Bareilly. The area for whose benefit the tax is to be utilised and substantially the purposes for which the utilisation is to take place continued to be the same. It is true that some additional functions have been conferred upon the Zila Parishad, but that, in my opinion, is merely an extension of the functions imposed in the scope of local self-Government. The rate of tax remains at the level fixed by the Notification of 1933 and the incidence of the tax has not been shown to have altered in any manner. In nature and effect, it continues to be the same tax. Article 277 of the Constitution ensures the continued levy of the circumstance and property tax demanded from the petitioner.

13. In the result, the writ petition is dismissed with costs.

14. M. H. BEG, J.:— This reference to a Full Bench was occasioned by doubts entertained by my learned brethren R. S. Pathak and Gulati, JJ. about the correctness of the Division Bench decision of this Court in Civil Misc. Writ No. 2882 of 1966, D/- 20-2-1967 (All) by Hon'ble Beg, C. J. and Hon'ble Dwivedi, J., where it was held that circumstance and property tax of Rs. 2,000/-, imposed upon the assessee for the year 1965-66 by the Zila Parishad Allahabad, was not hit by the provisions of Article 276 (2) of the Constitution. This article reads as follows:—

"The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum.

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally, or in relation to any specified States, municipalities, boards or authorities."

15. It appears from the judgment of the Division Bench in Allahabad Canning Co.'s case, Civil Misc. Writ No. 2882 of 1966, D/- 20-2-1967 (All.) (supra) that the contention of the petitioner's counsel in that case was that the tax imposed upon the petitioner was not the same tax as was being imposed under the U.P. District Boards Act X of 1922 before the commencement of the Constitution. The submission seemed to be that the identity of the tax was altered if it was levied under a subsequent enactment by a different body. Relying upon the decision of the Supreme Court, AIR 1962 SC 1073, the Division Bench rejected this contention. It pointed out that even if the body levying the tax was different, the identity of the tax was preserved. The Division Bench observed that the U.P. District Boards Act of 1922 had not been repealed by the U. P. Antaram Zila Parishad Act of 1958 which was a temporary Act revived by an amending Act I of 1960 after a gap of at least 13 days from the expiry of the temporary Act. It seems to have been also contended by the petitioner's counsel there that an expired Act could not be revived, but this contention was also rejected by the Division Bench. The case, was, however, decided on the assumption that the contention of the petitioner that the tax under consideration was one of the taxes mentioned in Article 276 of the Constitution was correct. Their Lordships observed:

"The law provided for the assessment of the tax on circumstances and property and fixing the amount of such tax as well as the resultant liability of a person to be assessed to such tax always remained in force, and will continue to be in force even after the assumed expiry of the Antaram Zila Parishad Act. Accordingly, the proviso to Article 276 will apply to the case."

16. It may also be pointed out that the Supreme Court decision in the case of Ram Krishna Ram Nath, AIR 1962 SC 1073 (supra), which was relied upon by the Division Bench, dealt with the application of Section 143(2) of the Govern-

ment of India Act, 1935 which corresponds to Article 277 of the Constitution and not with Section 142-A which corresponds to Article 276 of the Constitution. Section 143(2) of the Government of India Act, 1935 enacted:

"143(2). Any taxes, duties, cesses or fees which, immediately before the commencement of Part III of this Act, were being lawfully levied by any Provincial Government, municipality or other local authorities or body for the purposes of the province, municipality, district or other local area under a law in force on the first day of January, nineteen hundred and thirty five, may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Federal Legislative List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by the Federal Legislature."

17. It seems that no contention was advanced before the abovementioned Division Bench that the case of the petitioner before it did not fall within the purview of Article 276 inasmuch as a tax on the circumstances and property is not identical with a tax on a profession, trade, calling or employment with which Article 276 deals. It has been held recently by a Full Bench of this Court in AIR 1969 All 40, relying on the case of AIR 1957 SC 18, as follows:—

"In our view circumstances and property tax is leviable only on immoveable property (lands and buildings) or on financial status derived from profession, business or employment; and legislation in relation to such a tax is clearly within the competence of the said legislature by virtue of Items 49 and 60 of List II of the VII Schedule of the Constitution."

In other words, although the circumstances and property tax may include a tax on a profession, calling, or employment, yet, it cannot be said to be confined to the limits of such taxes. It is a composite tax. I confess that I find the terms 'circumstances and property' to be very vague. But, the validity of the 'circumstances and property' tax as such has not been questioned before us either on the ground that it is too vague and wide a class or a subject to taxation that it is outside the competence of the State Legislature to impose a tax which may fall within its scope. This brings me to the facts upon which the petitioner now before us came to this Court and the questions which have been argued before us.

18. The petitioner is a partnership firm manufacturing machinery and machine tools and carrying on the business of structural engineers. Its business extends all over India, but the registered office of the partnership is located at

Clutter-buckganj within the area subject to the authority of the Zila Parishad, Bareilly. This very area was previously subject to the authority of the District Board, Bareilly, which functioned under the U.P. District Boards Act. The District Boards ceased to exist from 1st of May, 1958, but their powers were vested in or were transferred to the Antarim Zila Parishads set up under the U.P. Antarim Zila Parishad Act of 1958. The U.P. District Boards Act X of 1922 was only repealed districtwise, by Sec. 274 of the U.P. Kshettra Samitis and Zila Parishads Act XXXIII of 1961 (hereinafter referred to as the Act), from the date on which Kshettra Samitis were established in each district. The petitioner before us, on whom circumstances and property tax of Rs. 2,000/-, the maximum permissible under a rule notified on 25-9-1930 with reference to provisions of Sec. 114(d) of the U.P. District Boards Act, was imposed in 1965-66, objected to the payment of the tax on the ground that the levy was not the same as that made by the former District Board. The ground put forward for denying the identity of the tax imposed with what was being levied by the District Board before the Constitution was that the Kshettra Samitis and Zila Parishads under the Act were legally different entities from the District Board under the repealed Act.

19. Mr. Jagdish Swarup appearing for the petitioner drew our attention to the preamble of the U.P. District Boards Act of 1922 where the object of the Act was stated to be 'to make better provision for local self-Government in rural areas of the United Provinces' and to that of the U.P. Act No. XXXIII of 1961 which was intended to enable the Kshettra Samitis and the Zila Parishads established in the districts of Uttar Pradesh under the Act to undertake certain governmental functions in furtherance of the principle of democratic decentralization of governmental functions and for ensuring proper municipal government in rural areas. I do not think there is any need to refer to the preamble of the two Acts for the purpose of showing that the District Boards functioning under the Act of 1922 were very different bodies from the Zila Parishads and the Kshettra Samities set up under the Act XXXIII of 1961. The preamble need only be referred to if there is any ambiguity in the interpretation of the provisions of an Act. There is no such difficulty before us. In coming to the conclusion that the District Boards constituted under Chapter II of the U.P. Act X of 1922 and incorporated under Section 4 of that Act were entirely different in composition from the Kshettra Samities and Zila Parishads set up under Chapter II of the U.P. Act XXXIII of 1961 and incorporated under Sections 5

and 17 of the Act performing the functions given in Chapter III of the Act. The separate identity of a corporate body is sufficiently established by a separate incorporation which puts the seal of birth upon a new corporate entity.

20. The composition and identity of the body which levies a tax is one thing, but the identity of the tax which is levied by a body is another matter. It is possible that even though the agency through which the tax is imposed is different, yet, the tax, which continues to be levied through another governmental agency, is the same. It may not be out of place to mention here that the definition of the term "State", given in Article 12 of the Constitution, includes all governmental authorities within the territorial limits of the State whether they operate at the State level or at lower levels. One of the questions of construction which arises before us is whether the Article 276 (2) is applicable to the tax before us, and, if so, whether the proviso in Article 276(2) makes it imperative, as a condition precedent to the protection it gives to certain taxes, that the tax for which protection is sought must be levied by the same body which levied it in the financial year immediately preceding the commencement of the Constitution. It will be noticed that the proviso to Article 276(2) would only apply if the particular tax was being levied in the financial year immediately preceding the commencement of the Constitution. All the agencies through which the tax can be imposed are mentioned in the proviso, but the proviso does not anywhere enact that the continuance of the levy must also be by the very authority or agency through which the tax was being levied before the Constitution. Therefore, if Article 276(2) was really applicable to the circumstances and property tax imposed upon the petitioner, there was much to be said for adopting the interpretation accepted by the Divisional Bench in the Allahabad Canning Co.'s case, Civil Misc. Writ No. 2832 of 1966, D/- 20-2-1967 (All) according to which the identity of the body continuing to levy the tax was immaterial.

21. It, however, appears to me that we are bound to hold, in view of the authorities already mentioned above, that the tax before us is a composite tax and not merely a tax upon professions, callings, or employments. Therefore, it would not be correct to apply the limit imposed by Article 276(2) to such a tax at all. Hence, the question of invoking the aid of the proviso would not arise. Although, the circumstances and property tax may include a tax on an assessee's profession, calling, or employment, yet, the petitioner has not shown that the tax imposed upon him in the present case can be apportion-

ed between a tax upon his business and a tax on his property. Nor has the petitioner taken up the case that the Zila Parishad of Bareilly is really taxing only a business or trade under the guise of taxing circumstances and property. The argument advanced on behalf of the petitioner proceeds on the basically incorrect assumption that a tax on circumstances and property must always be equated or identified with a tax on a business, calling, or employment. If that assumption is erroneous, as it appears to me to be clearly, the main plank of the petitioner's attack upon the assessment is removed.

22. I may mention here that one of the grounds taken up by the petitioner was that imposition of the tax is entirely arbitrary. No attempt was, however, made to show that the imposition of the tax was not correlated to the circumstances and property or the status of the petitioner. The burden of proving facts to justify such a contention lay upon the petitioner. As no argument was based on alleged arbitrariness in applying the maximum rate to the petitioner, it would be safe to assume that this ground has now been abandoned although taken up vaguely in the petition.

23. Learned counsel for the petitioner, in the course of argument, however, also relied on the provisions of Article 265 of the Constitution which prohibits the levy and collection of tax except by the authority of law. This provision only places the burden of showing the legal authority for the levy upon taxing authorities. The opposite parties, therefore, relied on provisions other than proviso to Art. 276(2) also to justify the tax.

24. As it appeared, in the course of the hearing, that the tax in question could not be entirely covered by Article 276 of the Constitution, the learned counsel for the petitioner was asked what reply he had to give to the possible view that the tax in question, not being a tax confined to a tax upon a business or calling wholly, did not fall under Article 276 of the Constitution but could be covered completely by Article 277 of the Constitution which corresponds to Section 143(2) of the Government of India Act. Article 277 reads as follows:—

"Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law."

25. The answer which the learned counsel for the petitioner gave to this

point of view was that Article 277 applies only to taxes "mentioned in the Union List". It was contended that this conclusion was reinforced by the provision that the tax would continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law. It was urged that unless the tax was specifically mentioned in the Union List it could not be protected by Article 277 of the Constitution. It was pointed out that, in *Ram Krishna Ram Nath's case*, AIR 1962 SC 1073 (supra), the Supreme Court was concerned with the validity of the 'terminal tax' which was specifically mentioned as item 58 of the Federal List in the seventh Schedule of the Government of India Act, 1935 and is now found as item 89 of the Union List in the Seventh Schedule to the Constitution. It was submitted that the contention of the opposite parties themselves also was that the tax in question was covered by the proviso to Art. 276.

26. It is true that the opposite parties had also primarily contended that the tax in question was protected by the proviso to Article 276. Learned counsel for the opposite parties, however, did not give up the alternative submission that it is also protected by Article 277 of the Constitution. Indeed, the learned counsel for the opposite parties relied upon 1955 All LJ 680 where a Division Bench of this Court held: "The circumstances and property tax, therefore, being a tax on income, is saved by reason of the provisions of Article 277 of the Constitution, provided that it was lawfully levied prior to the commencement of the Constitution. The Act was valid when it was enacted in 1922 when there was no division of powers between the Centre and the Provinces, as was held in *District Board, Dehra Dun v. H. Trotter*, 1939 All LJ 161 = (AIR 1939 All 389). It continued to be valid even under the Government of India Act, 1935 by reason of the provisions of Section 143, Clause (2) of that Act read with the seventh Schedule, List I, item 54."

27. The view adopted by the above mentioned Division Bench was that circumstances and property tax could be equated with income tax, and, therefore, was covered by item 82 of the Union List. Agarwala, J., speaking for the Division Bench, interpreted the majority view of Dayal and B. Prasad, JJ. in 1948 All LJ 338 = (AIR 1948 All 382 FB) to be that the tax on circumstances and property was really a tax on income. This view was sought to be supported by an application of the pith and substance rule and an examination of the provisions of Section 114 of the U.P. District Boards Act, 1922, indicating the character of a tax on circumstances and property. The rele-

vant part of Section 114 which may be reproduced here, reads as follows:—

"The power of a board to impose a tax on circumstances and property shall be subject to the following conditions and restrictions, namely:

(a) the tax may be imposed on any person residing or carrying on business in the rural area (provided that such person has so resided or carried on business for a total period of at least six months in the year under assessment);

(b) no tax shall be imposed on any person whose total taxable income is less than two hundred rupees per annum;

(c) the rate of tax shall not exceed four pies in the rupee on the total taxable income; and

(d) the total amount of tax imposed on any person shall not exceed such maximum (if any) as may be prescribed by rule.

Explanation— For the purpose of this Section "taxable income means estimated income," but shall not include income of the following classes;

(i) "agricultural income" as defined in the Indian Income Tax Act, 1922,

(ii) income on which any tax has previously been imposed under Section 123 of the United Provinces Municipalities Act, 1916,

(iii) income on which any tax has previously been imposed by any other board under clause (b) of Section 108".

28. The Division Bench's view that circumstances and property tax could be identified with income tax was not accepted by the recent Full Bench in Zila Parishad Muzaffarnagar's case, AIR 1969 All 40 (FB) (supra).

29. I may respectfully point out that the nature of a tax cannot be conclusively shewn by the fact that its incidence is upon income. Even taxes upon professions, trades, callings, and employments can be viewed as taxes on income. It was for this reason, as Mudholkar, J. pointed out in AIR 1966 SC 249 at p. 257, that Section 142-A of the Government of India Act and Article 276 of our Constitution were enacted. But for these provisions taxes on businesses, professions, callings, and employments, could have been excluded from the State List as taxes on income. Article 276(1) clearly indicates that this was the reason for the provision. The incidence of taxes on circumstances and property will also generally fall on income. Again, income may be adopted as a yard stick for "quantifying" the tax as pointed out in S. C. Anand v. State of U.P., 1967 All LJ 999 = (AIR 1969 All 317) (FB) where the character of taxes covered by Article 276 was analysed by me (see at pp. 1009 to 1013 of All LJ) = (at pp. 326 to 329 of AIR). But, neither incidence of a tax on income nor the fact

that income is its yardstick or measure for fixing the amount payable will determine the true character of a tax conclusively. The character of a tax is perhaps determined more accurately by answering the question; what is the legal basis of the tax or the reason without which there could be no such tax? In the case of a tax on circumstances and property, probably the best answer one could give to such a question is that it is a status (haisiyat) to use the Hindi equivalent which is the legal basis or the subject matter of the tax. Circumstances (including income) or property may serve as its sources or measures, but the resultant or the amalgam sought to be taxed could not perhaps be described more precisely than by using the term 'status' for it. Could such a tax on the petitioner's 'status' be saved by Article 277?

30. Both Articles 276 and 277 occur in Chapter I on 'Finance', in Part XII of the Constitution, under the heading; 'Distribution of Revenues between the Union and the States'. Each of these two articles seeks to preserve for authorities within a State, including local government bodies, certain pre-Constitution taxes which may otherwise fall outside the competence of State bodies. Article 276(2), however, imposes an upper limit of Rs. 250/- per person per annum on a fresh tax of the nature indicated there and levied by any particular State or local authority, but Article 277 deals more generally with pre-Constitution taxation. Even if it could be urged that the subject matter of Article 276(2), which deals with impositions by particular authorities, should govern the scope of the proviso intended to exempt "a tax" from the ambit of impositions which used to be made by particular authorities, it appears to me that the reference in Article 277 to "taxes, duties, cesses, or fees" which were being lawfully levied by any of the authorities mentioned there was intended only to describe the kind of taxation which had been taking place before the commencement of the Constitution and not to confine the power of continued taxation in future of the same character to the very authorities already in existence before the Constitution.

31. On the face of it, Article 277 of the Constitution means that if a tax fell within the class mentioned there it could be continued by an authority otherwise authorised to levy it and could be applied "to the same purposes" as it had been applied before the commencement of the Constitution. It could be contended that the non obstante clause only removes the bar which may arise from a mention of the tax, duty, cess, or fees in the Union List. Even if the non obstante clause was held to cut down the scope of the apparently wide sweep of Article 277, it seems

to me that a tax on "circumstances and property" of every kind, not having been mentioned either in the State List or in the Concurrent List, could only be covered by entry No. 97 of the Union List read with Article 248 of the Constitution. Entry 97 reads as follows: "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists". This entry thus mentions taxes not specifically mentioned in other lists. The Constitution makers must be deemed to be aware of the existence of a tax on "circumstances and property". A tax covered by entry 97 seems to me to satisfy the requirement that a tax, to be protected by Article 277, must be mentioned in the Union List. Such a requirement for all taxes sought to be saved by Article 277 seems logical and implied, although it is not clearly expressed in the article, because taxation falling full within the competence of State legislatures does not require to be saved at all with the help of either Article 276 or of Article 277.

32. The next requirement for the protection given by Article 277 of the Constitution is said to be that the tax must be shown to be applied for the same purposes as the pre-Constitution tax. On the language of Article 277 this seems to be a requirement for testing due application of proceeds of a tax only. Even if it were assumed to be a criterion for determining the character of a tax or for justifying its levy, the test does not seem to me to be capable of application with precision or strictness to taxation inasmuch as the very nature of a tax, as distinct from license fees, implies that it is not earmarked for specific purposes (see: *The Himgir-Rampur Coal Co., Ltd. v. State of Orissa*, AIR 1961 SC 459 at p. 464). It is presumed that taxation is meant for the benefit of the public which results from expenditure incurred or from schemes undertaken by State or local governmental authorities. A fulfilment of this broad purpose with reference to any particular area for which taxation takes place is all that could be required.

33. The areas for which District Boards were set up under Section 4 of the U.P. District Boards Act are identical with the areas for which Zila Parishads were set up under Section 17 of the Act. Both the District Boards as well as the Zila Parishads exercise their powers by means of resolutions and bye-laws operating in the districts under their authority. Section 174 of the U.P. District Boards Act enabled a District Board to make bye-laws for the purpose of promoting the health, safety, and convenience of the inhabitants of a district and for the furtherance of the administration of the district under the Act. Similarly, Sec. 239

of the Act enables a Parishad to make bye-laws for the same area "for the purpose of promoting or maintaining the health, safety, and convenience of the inhabitants of the rural area of the district and for the furtherance of the administration of this Act in the Khand and the District". There seems to be no real difference in the purposes stated in the two provisions.

34. A glance at the illustrative subjects given in Section 174(2) of the U.P. District Boards Act and their comparison with the much longer and more comprehensive list in Section 139(2) of the Act only indicates the growth of activities serving the same broad purposes. It appears to me that although the names of the bodies making the bye-laws have changed and the activities of the Zila Parishads and Kshettra Samities have become more extensive, yet, the broad purposes served by the District Boards set up under the U.P. District Boards Act are the same as those of the new bodies set up under the Act.

In judging the purposes of taxation by local Government bodies, the term "purposes", as it is used in a constitutional provision, cannot be narrowly construed because, as already indicated, all taxation is presumed to be for public benefit. So long as the areas served remain the same, the purpose cannot be said to be altered by any expansion of activities or changes in the composition of the local Government authority imposing the same tax for corresponding purposes under a fresh enactment. The object of Article 277 of the Constitution appears to be to provide for continuance of pre-existing taxes in the same local areas for the same broad purposes. That continuity is not broken by the succession of a new statutory body imposing the same tax and expending its activities for the benefit of the public of the same area. Article 277 appears to me to be enough to save and continue the impugned tax for purposes which have also continued.

35. The difficulty in accepting the line of reasoning indicated above is caused by the ratio decidendi of the recent Full Bench decision in AIR 1969 All 40 (FB) (supra) where an attack upon the validity of the tax on circumstances and property was repelled from a different angle. It was held there that such a tax was within the competence of the State Legislature as it was covered fully by Entries 49 and 60 of List II or the State List of the Seventh Schedule of the Constitution. If the circumstances and property tax is fully covered by the State List, there is no need to seek the protection of either Article 276 or of Article 277 at all to justify its levy under the Act. Indeed, both Articles 276 and 277 would become

inapplicable if the circumstances and property tax is fully covered by the State List. As already indicated above, the presence of these articles in the Constitution, when Article 372 is there to save all laws existing before the Constitution until other provisions are made in that behalf, is explained by the need to bring within the competence of State and local governmental authorities and organs what would otherwise fall outside their taxing powers. Therefore, as soon as we adopt the line of reasoning and the ratio decidendi of the Full Bench decision in the case of Zila Parishad Muzaffarnagar, AIR 1969 All 40 (FB) (supra), as we are bound to do unless we were to refer the case to a still larger bench, it becomes unnecessary to decide whether the proviso to Article 276(2) or Article 277 protects the levy under consideration. On this view of the law, the tax could be supported simply by the authority of a post constitution statutory provision of the State Legislature. It would not require any other authority of law to sustain it.

36. Our attention has been drawn to such a post-Constitution provision made by the U. P. State Legislature. This is Section 270(a) of the Act which keeps alive, inter alia, any tax, rule, or bye-law or notification in force in a local area under the provisions of the U.P. District Boards Act X of 1922 until other provisions are made under the Act. S. 279(a) speaks also of other laws in force before "the appointed date", but, so far as taxes imposed under the provisions of the U.P. District Boards Act X of 1922 are concerned, this is immaterial. The impugned tax satisfies the requirements of Section 270(a) of the Act.

37. The only answer given by the learned counsel for the petitioner to the abovementioned contention was that Section 270(a) could not conflict with the provisions of Article 276 of the Constitution. This reply presupposes that Article 276 of the Constitution really applies to a case of circumstances and property tax. It is only if neither Article 276 nor Article 277 of the Constitution could apply to the case that the Zila Parishad need rely, as it did, on Section 270(a) of the Act. Article 372 of the Constitution also saves law existing before the Constitution until altered by competent authority provided it is not hit by other provisions of the Constitution to which it is subjected. Articles 276 and 277 of the Constitution were meant to protect certain pre-Constitution taxes even if they were hit by other provisions of the Constitution. If, however, as held by the Full Bench in the Zila Parishad Muzaffarnagar's case, AIR 1969 All 40 (FB) (supra), the circumstances and property tax falls fully within the State List, there would be no conflict between the legislative spheres of

the Parliament and State Legislatures when the State Legislature authorises it. Section 270(a) of the Act thus seems to provide a complete answer to the petitioner's attack upon the circumstances and property tax imposed by the Zila Parishad.

38. I confess that I find some difficulty, with great respect, in unhesitatingly accepting the view expressed by the Full Bench in the Zila Parishad Muzaffarnagar's case, AIR 1969 All 40 (FB) as the terms 'Circumstances and Property' are too vague and undefined to be capable of being confined to Items 49 and 60 of List II of the Seventh Schedule. They could easily embrace other items mentioned in both State and Union Lists. Therefore, I find entry No. 97 of the Union List I to be more appropriate for so vaguely described a tax. But, as the ultimate result will be the same whether the tax is held to be covered and protected by Article 277 or by Entries 49 and 60 of the State List, I do not think that this particular case would justify a reference by us to a still larger bench. We must, under the circumstances, follow the earlier Full Bench decision.

39. I may summarise my views as follows—

The conclusion reached by the Division Bench in Allahabad Canning Company's case, Civil Misc. Writ No. 2882 of 1966, D/- 22-2-1967 (All) (supra), that the continuance of the circumstances and property tax was legally justified, was correct, but the assumption on which it rested, that the tax was within the purview of Article 276 exclusively, cannot be said to be correct as it is inconsistent with the view that it is a composite tax as held by the Full Bench of this Court in the case of Zila Parishad Muzaffarnagar, AIR 1969 All 40 (FB) (supra) following the Supreme Court's decision in Ram Narain's case, AIR 1957 SC 18 (supra). The view expressed by another Division Bench in Tata Oil Mills' case, 1955 All LJ 630 (supra), that such a tax is protected by Article 277 of the Constitution, could be justified on the footing that the tax falls under Item 97 of the Union List instead of by holding, as this Division Bench held, that it fell under Item No. 82 of the Union List which is there for "taxes on income other than agricultural income". But, as the ratio decidendi of the Full Bench decision in Zila Parishad Muzaffarnagar's case, AIR 1969 All 40 (FB) (supra), which we are bound to follow, was that circumstances and property tax is fully within the competence of the State Legislature, its levy did not need any authority beyond what is found in Sec. 270(a) of the Act to justify it on facts set up in the case before us.

40. This writ petition must, therefore, be dismissed with costs.

41. **TRIPATHI, J.**— I concur with my learned brother Beg. J. that this petition must be dismissed, but my reasons are different.

42. The petitioner is a partnership firm having its registered office at Clutterbuckganj, Bareilly, which lies within the jurisdiction of the Zila Parishad of Bareilly. The petitioner-firm deals in the repairs and manufacture of sugar-cane machinery and machine tools. For the year 1964-65 the Zila Parishad Bareilly demanded and realised from the petitioner a sum of Rs. 1500/- as circumstances and property tax, and for the year 1965-66 it assessed a sum of Rs. 2000/- which is the maximum amount permissible, as circumstances and property tax on the petitioner. The petitioner has filed the present writ petition challenging the validity of the aforesaid assessment and has, *inter alia*, prayed for the issue of "a writ, order or direction in the nature of mandamus or any other appropriate writ, direction or order commanding the opposite parties not to recover from the petitioner the impugned tax, at any rate, not in excess of Rs. 250/- per annum."

43. On reference, the petition came up for hearing before a Division Bench (Hon'ble Pathak and Gulati JJ.) where the respondents placed reliance on an unreported decision of another Division Bench (N. U. Beg. C. J. and S. N. Dwivedi, J.) in the case of the Allahabad Canning Co., Bamrauli, Civil Misc. Writ No. 2882 of 1966 (All.) which completely covered the issues arising in the case. The Division Bench, however, felt some difficulty in accepting the dictum enunciated in the aforesaid decision and thought it expedient to refer the petition for consideration by a Full Bench. That is how the case has come up before us.

44. It is not disputed that prior to the commencement of the Constitution and even after such commencement but before the enactment of Kshettra Samities and Zila Parishads Act 1961, the U.P. District Boards Act (Act X of 1922) applied to the district of Bareilly and the rules framed thereunder permitted the imposition of a tax on circumstances and property upto the extent of Rs. 2000/-. It is also admitted that even after the repeal of the aforesaid Act the circumstances and property tax had been levied to that extent in the area under the Antaram Zila Parishad Act which came into force on the 29th of March, 1958.

45. Mr. Jagdish Swarup, learned counsel for the petitioner, has argued the case on the footing that the circumstances and property tax levied by the local bodies is in the nature of a tax in respect of professions, trades, callings or employments within the meaning of Article 276 of the Constitution. His contention, however, is

that under Clause (2) of the aforesaid Article the total amount payable in respect of any one person to the State or to any local authority in the State by way of such taxes cannot exceed Rs. 250/- per annum and the proviso to the aforesaid Article does not come into play in the instant case. It is contended that the proviso to Article 276 of the Constitution is in the nature of a saving clause intended to prevent sudden dislocation of the finances and working of the particular local bodies which were in existence at the time of the commencement of the Constitution. But where new local bodies have been incorporated and constituted under different enactments, and the earlier ones have ceased to exist such new bodies being separate and distinct corporate entities from those which had been levying the circumstances and property tax on the eve of the Constitution, cannot take advantage of the proviso to continue levying such taxes beyond the permissible limit of Rs. 250/- per annum.

It is urged that for saving such a taxation under the proviso it is necessary that the local body levying such a tax is identical in its nomenclature, objective and area of operation with one which had been imposing such a tax before the commencement of the Constitution, and with the repeal of United Provinces District Boards Act, 1922 under Section 274 of the Kshettra Samities and Zila Parishads Act, the District Board of Bareilly ceased to exist and the Zila Parishad which was established and incorporated under Section 17 of the Act was a different and distinct entity than the former having a different and more comprehensive aim for its achievement and as such it cannot claim the benefit of the proviso to Article 276 of the Constitution. Mr. Jagdish Swarup contends that in the case of the Allahabad Canning Co., Bamrauli (*supra*) this aspect of the question was not canvassed before the Division Bench, with the result that the decision in that case requires reconsideration.

46. Having given my anxious consideration to the points raised by the learned counsel, I regret my inability to agree with him. In my opinion, the questions posed by the learned counsel were equally in view of the Division Bench which heard Civil Misc. Writ No. 2882 of 1966 (All.), and the Division Bench, relying on a decision of their Lordships of the Supreme Court in AIR 1962 SC 1073 has given correct answers to those questions.

47. In the light of the decision of the Supreme Court in AIR 1957 SC 18 a Full Bench of this Court, *inter alia*, held in the case of AIR 1969 All 40 (FB) that,

"circumstances and property tax is leviable only on immovable property (lands and buildings) or on financial sta-

tus derived from profession, business or employment."

In view of this Full Bench decision Mr. Jagdish Swarup conceded that the circumstances and property tax in the instant case was in the nature of a tax on professions, trades or callings, as envisaged under Article 276 of the Constitution. That being so, I have to determine the validity or otherwise of the aforesaid tax in the light of Article 276 only because the question relating to the applicability of Article 277 of the Constitution has not been seriously canvassed at the Bar from either side.

48. The relevant part of Article 276 of the Constitution reads:

"276 (1) Taxes on professions, trades, callings and employments. Notwithstanding anything in Art. 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum:

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, Municipalities, boards or authorities."

Clause (2) of the Article puts a ban on payment of tax on professions, trades or callings, referred to in Clause (1) in excess of rupees two hundred and fifty per annum to the State or to any local authority after the commencement of the Constitution. The proviso however calls out an exception and lays down that:

"Where in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied"

49. Mr. Jagdish Swarup has argued that the word 'such' which falls before

the words 'municipality, board or authority' indicates that in order to take advantage of this proviso the identity of the pre-Constitution and post-Constitution local bodies must be the same. I am unable to agree with this contention. It will be noticed that in Clause (1) of the Article the words used are "the State or a municipality, district board, local board". In the proviso the word 'such' has been used in a generic sense to distinguish the local bodies from the State and not from one another amongst themselves.

50. In the case of AIR 1962 SC 1073 the Supreme Court had, *inter alia*, observed:

"The principal contention however, raised on behalf of the appellant before the High Court was based upon a denial of the identity of the authorities—three Janpad Sabhas with the District Council, Bhandara which levied and collected the tax prior to April 1, 1937. The learned Judges of the High Court rejected this contention and held that the three Janpad Sabhas which replaced the District Council of Bhandara were in substance identical with the "latter principally for the reason that the area covered by the three newly created Janpads was the same as that for which the District Council functioned and that the purposes for which the tax collected would be utilized—which are the criteria specified in Section 143 (2) — were exactly the same. Just as it could not be disputed that if there were any change in the composition of the District Council the identity of a local authority would not be altered for the purposes of S. 143(2), the mere splitting up of that local area for being administered by a plurality of Local Government units would not effect any change material for the purposes of the continued exigibility of the tax under S. 143(2). The learned Attorney-General therefore very properly did not press before us this point based upon the disappearance of the District Council and its being replaced by the respondent Sabhas as any ground for denying to the respondent-Sabhas the right to levy the tax."

51. In the light of this observation it must be held that it is the identity of purpose for which the tax has been imposed prior to and in the post-Constitution era and the area of its operation which is of paramount importance and not the identity of the bodies levying such taxes. While delivering the judgment of the Division Bench in the case of Canning Company, Civil Misc. Writ No. 2882 of 1966, D/- 20-2-1967 (All) (Supra) Hon'ble Dwivedi J. referring to the aforesaid decision of the case observed as follows:—

"This case arose under Section 143 (2) of the Government of India Act, 1935, the provisions of which were analogous to

Art. 276 of the Constitution. In that case a terminal tax was originally levied under Section 51 of the Central Provinces and Berar Local Self-Government Act, 1920. Subsequently the said tax was continued to be levied by the Central Provinces and Berar Local Self-Government Act, 1948 which came into force on June 11, 1948. It may be noted that the Act of 1920 contemplated the formation of a District Council. Under the Act of 1948, however, these District Councils were replaced by Janpad Sabhas which comprised smaller areas. In spite, however, of the change in the nature of the groups that constituted councils and Janpads, and in spite of the fact that a new Act was enacted to continue the said tax, their Lordships of the Supreme Court held that the tax remained the same. In view of the principle laid down in this case we find it difficult to accept the contention of the learned counsel for the petitioner."

52. I am in respectful agreement with this observation and propose to analyse the facts in its light.

53. The Kshettra Samitis and Zilla Parishads Act, 1961 provides for the incorporation of two separate entities. The Kshettra Samitis incorporated under Section 5 are to be a body corporate having perpetual succession and common seal. Same is the case with the Zila Parishads which are to be incorporated under Section 17 of the Act. The powers, functions and duties of the two bodies incorporated under the Act are entirely distinct and their funds are separate from one another. A perusal of the various sections of the Act will indicate that while the Kshettra Samitis have been constituted "to undertake certain Governmental functions at Kshettra level", the Zila Parishads have been constituted "for ensuring proper municipal Government in Rural Areas". It must, therefore, be held that the object of the incorporation of the Zila Parishads is the same, namely "to make proper provision for Local Self-Government in rural areas" as has been that of the Boards constituted under the District Boards Act, 1922. It cannot be disputed that there is no other local authority except the Zila Parishad which is making provisions for Local Self Government in the rural areas. There is no dispute also that the area of operation of the present Zila Parishads and the erstwhile District boards is the same.

54. Chapter VI of the Act deals with funds, property and contracts. Sections 99 and 100 which are relevant to the questions in controversy are these:

"99. Zila Nidhi and Kshettra Nidhi—

(1) There shall be established for each Zila Parishad a fund called Zila Nidhi and for each Kshettra Samiti a fund called Kshettra Nidhi, to the credit whereof shall be placed all sums received and all loans

raised by or on behalf of the Zila Parishad or the Kshettra Samiti, as the case may be;

Provided that a Zila Parishad or a Kshettra Samiti shall earmark parts of the fund received by it for a particular purpose for that purpose and shall expend the same in carrying out that purpose.

(2) Nothing in this section shall affect any obligations of a Parishad or a Kshettra Samiti arising from a trust legally imposed upon or accepted by it.

(3) A Parishad or a Kshettra Samiti may receive such contributions in cash or in kind as may be made by any person for any work of public utility and the Parishad or the Kshettra Samiti shall, thereupon, utilize the same together with its contributions, wherever necessary, in executing such work.

100. Parishad to be local authority under the Local Authorities Loans Act.

(1) A Parishad shall be deemed to be a local authority as defined in the Local Authorities Loans Act, 1914, and shall be subject to all its provisions and the rules made thereunder for the purpose of borrowing money under that Act.

(2) Subject to the provisions of S. 31 of the Reserve Bank of India Act, 1934 and with the prior sanction of the State Government a Parishad may raise loans in the open market by the issue of debentures in the manner and for the objects and subject to the conditions, including the condition of maintaining a sinking fund to be prescribed by rules."

55. It is obvious that the two local bodies constituted under the Act have their separate funds and the Parishad alone is to be recognised as the local authority as defined in the Local Authorities Loans Act, 1950. Section 33 of the Act which defines the powers and functions of the Zila Parishad, read with Schedule II indicates that the primary function of the Zila Parishad is nothing else but to continue and improve upon the services which were formerly rendered by the District boards to the rural community in the matter of municipal Government. In view of these provisions I am of opinion that the District Boards constituted under the Act of 1922 and the present Zila Parishads are substantially identical in respect of their objectives, area of operation and the purposes for which the taxes were levied, collected and used by them.

56. Section 119 gives powers to the Zila Parishad to impose a tax on Circumstances and Property and Section 120 (1) provides for the continuance of Circumstances and Property tax. The relevant part of Section 120 (1) reads,

"Where immediately before the appointed date there was in force a tax on Circumstances and Property in any district imposed or continued under the United

Provinces District Boards Act, 1922, such tax shall until abolished or altered with the previous sanction of the State Government, continue to be levied by the Zila Parishad at the same rates and under the same conditions at and under which it was being levied under the Act....."

This section authorises the Zila Parishad to continue to levy at the same rates. The contention of the petitioner that Sec. 120 of the Zila Parishads Act is in contravention of Art. 276 of the Constitution, and as such is either wholly void or cannot be held to authorise imposition of more than Rs. 250 per year as Circumstances and Property tax, is, in my opinion, without any substance in view of the proviso to Art. 276 of the Constitution.

57. Mr. S. N. Misra, learned counsel for the respondents, invited our attention to Section 270 of the Zila Parishads Act which provides for the continuation of appointments, taxes, budget estimates, assessments, made, issued, imposed or granted under the United Provinces District Boards Act or the Uttar Pradesh Antarim Zila Parishad Act or any other law in force in any local area immediately before the enforcement of the Zila Parishads Act and to a Division Bench decision of this Court in the case of Tata Oil Mills Co., Ltd. v. The District Board of Allahabad, 1955 All LJ 830 in which it was, *inter alia*, held that "the circumstances and property tax being a tax on income is saved by reason of the provisions of Art. 277 of the Constitution, provided that it was lawfully levied prior to the commencement of the Constitution".

58. As however, the case was argued by the petitioner on the footing that such a tax was in the nature of a tax on professions, trades and callings and as I am satisfied that the points raised in support of this writ petition are fully covered by the Judgment of the Division Bench in the case of Allahabad Canning Co., Civil Misc. Writ No. 2882 of 1966, D/- 20-2-1967 (All), referred to above, with which I am in respectful agreement, I refrain from expressing any opinion on these points.

59. I will, therefore, dismiss this petition with costs.

60. BY THE COURT:— For the reasons set out in our respective judgments the writ petition is dismissed with costs.

Petition dismissed.

AIR 1970 ALLAHABAD 330 (V 57 C 51)
FULL BENCH

JAGDISH SAHAI, SATISH CHANDRA
AND R. L. GULATI, JJ.

M/s. Hajilal Mohammad Bidi Works, Allahabad, Petitioner v. The State of U. P. and others, Opposite Parties.

Civil Misc. Writ Petns. Nos. 955, 1369 and 1621 of 1968, D/- 30-9-1969.

Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 8 (1-A) — Scope — For recovery of interest under the section — Sales Tax Officer not required to make assessment order in respect of interest and issue a notice of demand in respect of interest — 1968 All LJ 970, Overruled.

Per Majority (Gulati J. Contra)— In order to recover interest under S. 8 (1-A) of the U. P. Sales Tax Act it is not necessary for the sales tax officer to make an assessment order in respect of the interest and to issue a notice of demand in respect of such interest. 1968 All LJ 970, Overruled. (Paras 15, 30)

Per Gulati, J. (Contra)— In order to recover the interest under S. 8 (1-A) of the U. P. Sales Tax Act as arrears of land revenue, it is necessary for the sales tax officer to serve upon the assessee a notice of demand in pursuance of an order quantifying the amount of interest (even though it may not be an order of assessment) and on the assessee's failure to comply with the notice of demand to issue a recovery certificate to the Collector specifying therein the amount of interest sought to be recovered. (Para 68)

Cases Referred: Chronological Paras

(1968) 1968 All LJ 970 = 23 STC

423, Beni Ram Mool Chand v. Sales Tax Officer, Fatehgarh 14, 17, 29, 34, 35

(1968) Writ No. 1659 of 1967, D-13-9-1968 (All), Ram Autar Agarwal v. Sales Tax Officer 63

(1967) AIR 1967 SC 556 (V 54) = (1967) 63 ITR 310, Commr. of Income Tax v. Godawari Sugar Mills Ltd. 49

(1967) AIR 1967 Mad 249 (V 54) = (1967) 65 ITR 301, Collector of North Arcot v. Kannan 63

(1965) AIR 1965 SC 1818 (V 52) = (1965) 57 ITR 149, Narayan Row v. Ishwarlal Bhagwandas 49

(1964) AIR 1964 SC 1473 (V 51) = (1964) 52 ITR 538, Income Tax Officer, Kolar Circle v. Sekhu Buchiah Setty 29, 63

(1964) (1964) 51 ITR 29 (Bom), Vimlaben Khimji v. H. S. Manvi- kar 63

(1964) 1964-52 ITR 408 (Mys), Sri- ramiah v. Income Tax Officer 63

(1959) AIR 1959 SC 352 (V 46) = (1959) 35 ITR 408, Commr. of Income-tax, Delhi v. Teja Singh 49

(1958) AIR 1958 SC 875 (V 45) = (1958) 34 ITR 143, M. K. Venkata- chalam v. Bombay Dyeing and Manufacturing Co., Ltd. 49

(1952) 1952 AC 109 = (1951) 2 All ER 587, East End Dwellings Co. v. Finsbury Borough Council 49

S. N. Kacker, Dhar and A. S. Kapoor, for Petitioners; Standing Counsel, for Op- posite Parties.

JAGDISH SAHAI, J.:— The following question of law has been referred for the opinion of this Full Bench by a Division Bench of this Court:—

"Whether, in order to recover interest under Section 8 (1-A) of the U. P. Sales Tax Act, it is necessary for the Sales Tax Officer to make an assessment order in respect of the interest and to issue a notice of demand in respect of such interest."

2. In 1963 the Sales Tax (Second Amendment) Act was enforced. Section 2 of this Act added sub-section (1-A) to Section 8 of the principal Act. That provision reads:—

"If the tax payable under sub-section (1) remains unpaid for six months after the expiry of the time specified in the notice of assessment and demand, or the commencement of the Uttar Pradesh Bikri Kar (Dwitiya Sanshodhan), Adhiniyam, 1963, whichever is later, then without prejudice to any other liability or penalty which the defaulter may in consequence of such non-payment, incur under this Act, simple interest at the rate of eighteen per cent per annum 'shall run on the amount' then remaining due from the date of expiry of the time specified in the said notice, or from the commencement of the said Adhiniyam, as the case may be and shall be added to the amount of tax and be deemed for all purposes to be part of the tax."

Provided that where as a result of appeal, revision or reference, or of any other order of a competent Court or authority, the amount of tax is varied, the interest shall be 'recalculated accordingly':

Provided further that the interest on the excess amount of tax payable under an order of enhancement shall run from the date of such order if such excess remains unpaid for six months after the order".

(Underlined (here into ' ') by me) Section 3 of the amending Act introduced Section 33 in the principal Act. It provides that in respect of a sum recoverable under the Act as arrears of land revenue the assessing authority could forward to the Collector a certificate of recovery specifying the sum due. This provision further provides that the certificate would be conclusive evidence of the existence of the liability, the amount of liability and the person so liable. The Collector is required to recover the amount mentioned in the certificate as if it were arrears of land revenue.

3. The controversy between the parties relates to the interpretation of Section 8 (1-A) and the question for consideration is whether in the absence of notices of demand having been issued by the Sales Tax Officer requiring the petitioners to pay interest, the recovery proceedings in that behalf are competent.

4. To decide the question of law referred to us it is necessary to mention in brief certain facts relating to the cases before us. The dispute between the parties relates to the assessment years 1957-58 and 1958-59. Assessment orders on the petitioners in respect of these years were passed by the Sales Tax Officer on June 10, 1959 and February 12, 1963 respectively.

5. Recovery certificates were issued under Section 8 of the Act by the Sales Tax Officer to the Collector in respect of the assessments mentioned above as the amount assessed was not paid. The petitioners' case is that the entire amount of tax assessed by means of the two orders mentioned above has been paid and now the objection is confined only to the recovery of interest.

6. It has been contended on behalf of the assessee petitioners that Section 8 (1-A) creates a legal fiction that the amount of interest which is added to the tax is a part of the tax and for that reason the procedure for the demand of the tax should be followed also in respect of the recovery of the amount of interest.

7. What is provided in Section 8 (1-A) is:—

(1) That if the tax payable under sub-section (1) remains unpaid for six months after the expiry of the time specified in the notice of assessment and demand, or the commencement of the Uttar Pradesh Bikri Kar (Dwitiya Sanshodhan) Adhiniyam, 1963, whichever is later, interest at the rate of eighteen per cent per annum shall run on the amount then remaining due from the date of expiry of the time specified in the said notice, or from the commencement of the said Adhiniyam, as the case may be.

(2) That the amount of interest shall be deemed for all purposes to be part of the tax.

(3) That if as a result of appeal, revision or reference, the amount of tax is varied, the interest shall be recalculated.

(4) That the interest on the excess amount of tax payable under an order of enhancement shall run from the date of such order if such excess remains unpaid for six months after the order.

8. The entire argument of Mr. Kacker is based upon the words "and be deemed for all purposes to be part of the tax". He contends that inasmuch as the law makes the interest a part of the tax, the formalities required for the enforcement of the tax liability must be followed in the case of the enforcement of interest liability also and that inasmuch as in the case of the enforcement of liability of tax simpliciter, a notice of assessment and demand should issue. In the case of interest also a notice of assessment and demand should issue. In support of this

contention it has been contended that the language of the statute is clear and that inasmuch as it declares that the interest shall "be deemed for all purposes to be part of the tax", it must be treated to be tax. Learned counsel has contended that there is no reason to whittle down the clear language of Section 8 (1-A) of the Act. It is contended that the words being clear, full effect should be given to them and the full benefit of the legal fiction should be extended to the petitioners. In this connection it has been contended that in case restricted meanings are given to these words, the result would be that if there is any dispute between the revenue and the assessee in respect of either the chargeability or the quantum of interest, the assessee would have no forum to go.

It is contended that that could not be the intention of the legislature. It is urged that on the other hand if the words mentioned above are given their full grammatical meaning, the interest liability can also be made subject matter of appeal under Section 9, of revision under Section 10 and of reference to this Court under Section 11 of the Act. Learned counsel contends that the legislature could not have intended to make an assessee remediless in respect of an appeal or a revision or a reference with regard to interest liability. It is also contended that if restricted meanings are given to the words "and be deemed for all purposes to be part of the tax", the result would be that in a case where there has been default in the payment of tax, but the tax amount has been paid before recovery certificate is actually issued, the amount of interest would not be recoverable as arrears of land revenue. It is contended that clearly the legislature could not have intended that even though it creates a legal fiction that interest was a part of the tax and tax itself can be recovered as arrears of land revenue under certain circumstances, interest cannot be so recovered.

9. Having heard the learned counsel for the parties, I am of the opinion that the question referred to us should be answered in the negative, against the assessee petitioners and in favour of the Commissioner, Sales Tax.

10. My reasons are as follows:—

(1) Section 8 falls under Chapter IX, which is headed "Payment and Recovery of Tax". Section 8 itself is headed as "Payment and recovery of tax" and deals with the manner in which the tax shall be realised. The legislature has added sub-section (1-A) to Section 8 of the Act. The provision for interest has been introduced in the Act in order to facilitate recovery of the tax and to bring pressure on the assessee to pay it. Consequently the provisions of Section 8 (1-A) operate only in the field of recovery and the scope

of the words "be deemed for all purposes to be part of the tax" must necessarily be confined to interest being treated as a part of the tax for the limited purpose of recovering the tax. It appears to me that the sole purpose of creating this legal fiction was to make the recovery of interest as also as arrears of tax whether it be recovery from a living assessee or partners of a dissolved firm (S. 3-C) or executors, administrators and other legal representatives of a deceased assessee (Section 7-C) or it was the invocation of Section 14 of the Act, i.e. to launch prosecution with a view to realise or recover interest. It has been contended on the basis of Section 8 (8) of the Act that the amount of interest could be recovered as arrears of land revenue under that provision and for that reason the object of creating the legal fiction under S. 8 (1-A) could not be to recover the interest as arrears of land revenue.

11. Section 8 (8) reads:—

"Any tax or 'other dues' payable to the State Government under this Act, or any amount of money which a person is required to pay to the assessing authority under sub-section (3) or for which he is personally liable to the assessing authority under sub-section (6) shall be recoverable as arrears of land revenue." (Underlined (here into ' ') by me). The argument is that interest would be comprehended in the expression "other dues and for that reason it could be recovered as arrears of land revenue even though the legal fiction created by Sec. 8 (1-A) was not there.

12. It is submitted that inasmuch as there is already a provision in the Act making interest recoverable as arrears of land revenue, the legislature could not have provided for the same thing by introducing the legal fiction mentioned above. In the first place, the scope of the words "be deemed for all purposes to be part of the tax" is not confined only to recovery of interest as arrears of land revenue, but extends to recovery of interest by all modes. Secondly, it may be pointed out that the liability to pay interest did not exist under the Act before the introduction of Section 8 (1-A) in it by Act No. 3 of 1964 even though Section 8 (8) existed there. Therefore, when Section 8 (8) was enacted, "other dues" did not comprehend interest at least until Act 3 of 1964 was passed. I am therefore, not impressed with this submission of Mr. Kacker. Section 8 (1-A) is a special provision relating to interest. The legislature decided to provide for payment of interest by tax defaulters and for that reason enacted a self-contained provision for it in the shape of Section 8 (1-A) of the Act. It for the first time creates not only the liability to pay interest, but also provides the rate of interest chargeable

and the mode of recovery. Section 8 (8) is a general section and may now for the sake of argument include interest in its scope, whereas Section 8 (1-A) is a self-contained special provision dealing with interest liability only. There can be a general provision as also a special provision and in such cases the special will exclude the general. At best it can be said that there would be some overlapping between Section 8 (8) of the Act and the words "be deemed for all purposes to be a part of the tax" if these words are held to mean "deemed to be a tax for recovery purposes". Assuming it is so, the provisions of Section 8 (1-A) being self-contained in respect of interest and having been brought in by means of an amendment it would be inconsistent with the scheme of that provision to hold that it did not provide mode of recovery of interest and even though the words "be deemed for all purposes to be part of the tax" clearly mean "deemed to be part of the tax for recovery purposes", those meanings should not be given to it.

(2) Section 8 (1-A) uses the words "simple interest at the rate of eighteen per cent per annum shall run on the amount then remaining due" in contradistinction to the words "determine" the turnover and "assess" the tax used in Section 7 of the Act which deals with assessments. The use of the word "run" indicates that the liability to pay interest is automatic and a separate proceeding in respect of it is not required. This conclusion also follows from the words "shall be added to the amount of tax". The addition of interest to the amount of tax is also automatic. Therefore, it appears to me that no separate order for interest is required nor is it necessary to issue a demand notice. Default in payment of the tax would automatically attract the liability of interest being calculated on the amount under default and the liability to pay interest follows from the provisions of Section 8 (1-A) of the Act and is not dependent on any order passed or proceedings started for the assessment of the amount of interest.

(3) The first proviso to Section 8 (1-A) shows that the matter of interest is one of pure calculation, the word used being "recalculated", and not one of assessment. That being the position, neither an assessment order nor a notice of demand is necessary.

(4) It would be noticed that no amendment has been made in Section 9 to provide for an appeal against interest liability. Whereas Section 9 allows an appeal against an order allowing or refusing an application for exemption certificate, an order imposing a penalty under Section 15-A or an order of assessment made under Sections 7, 7-A, 7-B, 7-C and 7-D, it has not been so amended as to provide

for an appeal against the supposed order of interest.

13. Section 11 of the Act gives the revising authority the jurisdiction to call for the record and examine the legality or propriety of any order made by the assessing or the revising authority. Inasmuch as there has been no amendment in Section 9 of the Act, providing for an appeal against the supposed order of interest, and inasmuch as the law does not require the assessing authority to pass an order imposing interest, the addition of interest cannot be revised in a revision application. The reference under Section 11 is confined to orders made under Section 10. It would appear that no reference can also be made in respect of interest matter. If interest were a part of the tax for all purposes and if assessment proceedings were required for its imposition, the provisions relating to appeal, revision and reference would have been suitably amended.

(5) By the very nature of things it is not possible to have proceedings started for the assessment of interest and for the issue of a notice of demand for the same. Clearly the notice of demand must mention the specific sum, otherwise it would not be a notice of demand at all. It is not possible to issue such a notice until the defaulting assessee has paid the tax and the Sales Tax Officer knows the date of payment. If what Mr. Kacker says is correct, then the assessing authority has not only to mention in the recovery certificate that a specific amount has to be recovered as unpaid tax, but a certain amount has also to be paid as interest. Obviously the amount of interest that the assessee has to pay cannot be mentioned in the notice of demand because that has to be calculated and one of the factors required in making the calculation would be the date of payment of tax.

(6) A notice of demand or a copy of the assessment order is served on the assessee in order to enable him to know what amount he has to pay. An assessment order is passed in order to determine the liability of the assessee in respect of the tax. In respect of interest, no such considerations exist. The law itself provides that the interest shall run on the unpaid tax at eighteen per cent and shall be added to it. There is thus only a question of calculation and not one of determination as is the case with the orders of assessment of tax.

(7) I find no merits in the submission that if the legal fiction created by Section 8 (1-A) is confined only to recovery proceedings, the assessee would be without a remedy in respect of interest. The assessee can always resort to remedy open to him in cases where tax is sought to be recovered in excess of the amount due. While making such objections, he

can also say that the interest has been wrongly calculated or charged. The relief in respect of the interest would clearly be consequential and the Sales Tax Officer would have full jurisdiction to go into the matter. No analogy can be drawn from the Income-tax Act, the provisions of the Act and the Income-tax Act being different.

14. Mr. Kacker has placed reliance upon *Beni Ram Mool Chand v. Sales Tax Officer, Fatehgarh*, 1968 All LJ 970. This decision, no doubt, supports his contention, but with great respect to the learned Judges who decided it, I am unable to agree that the decision lays down correct law.

15. For the reasons mentioned above I answer the question referred to us by saying that it was not necessary for the Sales Tax Officer to make assessment order in respect of interest and to issue a notice of demand in respect of such interest.

16. SATISH CHANDRA, J.: A Division Bench has referred the following question to a Full Bench:

"Whether, in order to recover interest under Section 8(1-A) of the U. P. Sales Tax Act, it is necessary for the Sales Tax Officer to make an assessment order in respect of the interest and to issue a notice of demand in respect of such interest."

17. The petitioner firm carries on the business of manufacture and sale of Biris. For the year 1957-58, the Sales Tax Officer I, Allahabad, passed an assessment order on 10th June, 1959. For the year 1958-59, the petitioner firm was assessed to sales tax on 12th February, 1963. On 9th October, 1967, the Sales Tax Officer issued a recovery certificate for a sum of Rs. 1,65,684.43P., for the year 1957-58. On 25th October, 1967, another recovery certificate was issued by him for the year 1958-59 for a sum of Rupees 26,238.08 P. The recovery certificate for the year 1957-58 further stated that interest at the rate of 18 per cent per annum calculated on the amount of the tax with effect from 1st February, 1964, till the date of final payment shall also be recovered as an arrear of land revenue, in terms of the provisions of S. 8(1-A) of the U. P. Sales Tax Act. The recovery certificate for the year 1958-59 similarly mentioned that interest would run from 1st February, 1965. It has been stated that the tax has been paid and the amount of interest under the two recovery certificates comes to nearly Rs. 1,38,000. The petitioner challenged the validity of the imposition and recovery of the interest on several grounds, one of which was that without making an assessment order and issuing a notice of demand, the Sales Tax Officer had no jurisdiction to initiate

proceedings for recovery of the interest. In support, reliance was placed on the case of 1958 All LJ 970 where a Division Bench held that issuance of a notice of demand was a condition precedent to the recovery of penal interest.

18. The material and relevant provisions of the Act may first be noticed. Section 3 of the U. P. Sales Tax Act creates liability to sales-tax. Under it, every dealer is liable to pay the tax on his turnover of each assessment year which is to be determined in such manner as may be prescribed. Section 7 provides for determination of the turnover and assessment of tax. Section 8 deals with payment and recovery of tax. Under its sub-section (1) the tax assessed under the Act is to be paid within such time, not being less than 15 days from the date of service of the notice of assessment and demand, as may be specified in the notice. In default of such payment, the whole of the amount remaining due becomes recoverable in accordance with sub-section (8). Under sub-section (8) any tax or other dues payable to the State Government under the Act is recoverable as arrears of land revenue. Section 14 provides for offences and penalties. If a person fails to pay the tax within the permitted time he is liable on conviction to a fine which may extend to Rs. 1,000. Under sub-section (2) such a person is also liable to punishment with simple imprisonment which may extend to six months if he evades payment of tax. These provisions did not prove sufficiently deterrent to making defaults in prompt payment of the tax. The State Legislature with a view to lighten up the machinery for collection of sales tax added Cl. (1-A) to Section 8 by the U. P. Sales Tax (Second Amendment) Act, 1963. It also added Section 33 to the Act. Section 8 (1-A) runs as follows:—

"(1-A) If the tax payable under sub-section (1) remains unpaid for six months after the expiry of the time specified in the notice of assessment and demand, or the commencement of the Uttar Pradesh Bkri-Kar (Dwitiya Sanshodhan) Adhiniyam, 1963, whichever is later, then without prejudice to any other liability or penalty which the defaulter may, in consequence of such non-payment, incur under this Act, simple interest at the rate of eighteen per cent per annum shall run on the amount then remaining due from the date of expiry of the time specified in the said notice, or from the commencement of the said Adhiniyam, as the case may be, and shall be added to the amount of tax and be deemed for all purposes to be part of the tax:

Provided that where as a result of appeal, revision or reference, or of any other order of a competent Court or authority, the amount of tax is varied,

the interest shall be recalculated accordingly:

Provided further that the interest on the excess amount of tax payable under an order of enhancement shall run from the date of such order if such excess remains unpaid for six months after the order". Section 33 provided that the assessing authority may forward to the Collector, a recovery certificate in respect of any sum recoverable under this Act as arrears of land revenue. The certificate has to specify the sum due and is to be conclusive evidence of the existence of the liability of the amount and of the person who is liable.

19. For the petitioner It was urged that sub-section (1-A) of Section 8 was an independent provision authorising the levy of interest. The legal fiction that the interest shall be deemed to be part of the tax was for all purposes. It made the interest partake of all the characteristics of tax. So, just like the tax, the interest could be levied by means of an assessment order followed by a notice of demand. If the ambit of the legal fiction is restricted to recovery proceedings only, then the provisions of appeal and revision shall be shut out to the assessee. Section 33 makes the recovery certificate conclusive. The assessee cannot dispute his liability before the Collector. The assessee would, therefore, be without any remedy. Cases may arise involving serious dispute between the revenue and the assessee as to the chargeability or the quantum of interest; but the assessee would have no forum for adjudication of his pleas. It was also submitted that the Legislature could not have contemplated the incorporation of the legal fiction only for the purposes of recovery, because under sub-section (8) of Section 8, not only the tax but "other dues" payable under the Act are also recoverable as arrears of land revenue. The interest would certainly be dues payable under the Act. It was hence unnecessary to provide for the same thing by creating a legal fiction.

20. In my opinion sub-section (1-A) does not require the assessment of interest. Section 7 of the Act authorises the levy of tax. The subject matter of the tax is the turnover, which is required by Section 7 to be determined by the assessing authority on the basis of the return filed by the assessee. The tax is, even though its rate is fixed by the Act, required to be assessed on the turnover. The liability to pay the tax arises on service of the assessment order and the notice of demand. The assessee is not, and cannot possibly be required, to file a return for purposes of assessment of interest because its subject-matter, namely the unpaid tax has already been deter-

mined. Unlike Section 7 which requires the assessing authority to "determine" the turnover and "assess" the tax, sub-section (1-A) of Section 8 states that interest shall "run" on the amount of the tax remaining unpaid. This provision does not require any action or order by the assessing authority, before the liability to pay it arises. The liability accrues and becomes a debt payable instantaneously on the happening of the specified event, namely, the non-payment of the tax for six months. On the expiry of the period of six months, interest runs on the unpaid amount of the tax from the date of the expiry of the period mentioned in the notice of demand for the payment of the tax. The creation of the liability to pay cannot hence be made to depend on service of another assessment order and notice of demand. So, it is, in my opinion, inappropriate to say that sub-section (1-A) authorises the levy of interest so as to attract the procedure for the levy of tax.

21. The State Government's notification No. ST-949/X-900(34)-62 dated April 16, 1966, amended Form XI prescribed for the notice of assessment and demand for payment of tax. The amended paragraph 5 of Form XI says:—

"If the tax payable in terms of this Demand Notice remains unpaid for six months after the expiry of the time specified as above, you shall, in consequence of such non-payment, be further liable to pay simple interest at the rate of 18 per cent per annum which shall run on the amount then remaining due from the date of expiry of the time specified in para 3 and shall be added to the amount of tax and be deemed for all purposes to be part of the tax."

Service of notice in the amended form would mean service of a notice of demand for interest also. The intention appears to be that the assessing authority is not to pass any further or fresh orders to levy the interest. The recovery authority can straightway calculate the amount of interest and recover it, as if it was part of the unpaid tax.

22. It was submitted that the deeming is for all purposes. The legal fiction makes the interest part of the tax which has remained unpaid. It accrues as interest, but at once is deemed to merge into and swell the amount of the unpaid tax, for all purposes. The idea appears to be to make the interest payable or recoverable along with the unpaid tax, at the same time, without any further ado. Separate recovery proceedings are not needed. This was one purpose to be subserved by the legal fiction.

23. The Act by Section 3-C fastens liability of a dissolved firm to pay tax and penalty, on its partners. It does not

apply to interest. In order to attract Section 3-C to interest, the legal fiction to make it part of the unpaid tax, became necessary. Under Section 7-C, the executor, administrator, or other legal representative of the deceased is liable to pay the tax due from the deceased. On its language, this provision also deals with tax alone. So, to fix the liability to pay interest on the executors etc., interest was made part of the tax. This was another purpose. Similarly the penalty and prosecution provisions of Section 14 will become applicable. In my opinion, the phrase "for all purposes" was meant to attract the provisions which otherwise would not have applied to interest, as well as to facilitate recovery.

24. The other aspect emphasised by learned counsel for the petitioner was lack of any forum, where the assessee can obtain an adjudication of a dispute with the revenue as to his liability or the quantum of the interest. It is true that if the computation of interest is not treated as an order of assessment of the tax, the provision for appeal under Section 9 would not apply. But, in my opinion, a revision would lie under Sec. 10. Under it, the revising authority is entitled to call for and examine the record for satisfying itself as to the legality or propriety of any order made by the assessing authority under the Act. The Act or the Rules do not define the term "order". In my opinion an order would be a written direction, affecting the assessee made in virtue of the Act.

Section 33 requires the assessing authority to issue the certificate under his signatures specifying several particulars. He has, therefore, to specify the interest and to certify it as recoverable under his signatures. This written act fixes the liability of the assessee to recovery as an arrear of land revenue. It would, in my opinion, amount to the making of an order under the Act. So, the assessee can go up in revision.

25. The assessee would also have the remedy provided by Section 22 for rectification of any mistake apparent on the face of the record. A mistake apparent on the face of the record either on the question of chargeability or on the quantum of the tax or the interest would both be curable under Section 22. It is hence not quite right to say that all remedies are shut out to the assessee.

26. If it is held that the legal fiction makes the interest partake of all the characteristics of tax, the interest would be tax, properly so called. Then, as tax, it would attract Section 8 (1-A). If the interest itself is not paid within six months, the assessee would incur the liability to interest all over again on the unpaid amount. That will be con-

trary to the purpose and the language of sub-section (1-A). The assessee would virtually be liable to compound interest. But the provision expressly says that simple interest at 18 per cent shall run. The only way to avoid this anomalous situation is to confine the legal fiction to the language employed by the legislature, namely to treat the interest only as part of the already assessed tax, and not to treat it as tax independently.

27. The requirement of an assessment order for the interest followed by a fresh notice of demand would entail a deal of practical difficulties. Under Section 8 (1-A) interest runs from the mentioned date till the date of actual payment of the tax. Until the date of payment is known, the exact amount payable as interest cannot be found. Consequently a complete assessment order cannot be passed. Further, even if the original demand of tax has been paid, but the interest which may have accrued thereon till then, has not been paid, its non-payment would entail the accrual of interest under sub-section (1-A). Before this further interest can be recovered, another assessment order would be required. Since the amount of interest has not been paid, an assessment order cannot be passed indicating any specific amount as the additional interest. In practice, it will be virtually impossible to conclude a particular case.

28. For all these reasons I am not inclined to accept the submission advanced on behalf of the petitioner that the making of an assessment order and the issuance of a notice of demand were conditions precedent to the recovery of penal interest.

29. The decision in Beni Ram Mool Chand's case, 1968 All LJ 970 proceeds on two grounds. It was observed that the opening words of sub-section (1) of Section 8 are: "The tax assessed under this Act". The expression makes no mention of an assessment under Section 7 of the Act. Consequently, the expression must be understood in a broad sense. Section 8 (1) would apply to tax assessed under any other provision of the Act as well. That may be so. But, that will not by itself mean that sub-section (1-A) of Section 8 requires the assessment of any tax. Sub-section (1-A) makes the interest part of the tax which has already been assessed. It will, therefore, be payable and recoverable as an integral part of the already assessed tax, and not because it is independently assessed as tax. In the second place, the Bench drew support from the Supreme Court decision in Income-tax Officer, Kolar Circle v. Seghu Buchiah Setty, (1964) 52 ITR 533 = (AIR 1964 SC 1473). In my opinion,

this case is distinguishable. The Supreme Court held that the effect of an appellate order was to supersede and supplant the original assessment order. They applied this legal position to Section 29, Income Tax Act, which provided that if any tax, penalty or interest is due in consequence of any order passed under the Act, the Income-tax Officer shall serve upon the assessee a notice of demand specifying the sum so payable. The distinguishing feature is that Section 29 expressly required the service of a notice of demand for payment of interest as well. The Supreme Court only held that when interest became due in consequence of the appellate order, it was a new liability requiring a fresh notice of demand under Section 29. Under the U. P. Sales Tax Act there is no specific provision requiring a notice of demand for interest.

30. I would, therefore, answer the referred question in the negative.

31. **R. L. GULATI, J.:** This and the connected writ petitions involve a common question with regard to the recovery of interest on the arrears of sales tax. In Writ Petitions Nos. 955 of 1968 and 1621 of 1968 the petitioners are manufacturers of biris while the petitioner in Writ Petition No. 1369 of 1968 is a dealer in cloth. In order to answer the question which has been referred to the Full Bench, I shall confine myself to the facts of Writ Petition No. 955 of 1968.

32. The petitioner is a partnership firm which was assessed to tax under the U.P. Sales Tax Act for the assessment years 1957-58 and 1958-59 under two separate assessment orders, dated June 10, 1959 and February 12, 1963 levying Rs. 362,725/- and Rs. 81,994/- as tax for the two years respectively. The petitioner had applied for composition of the sales tax under Section 7-F of the Act and the Commissioner of Sales Tax had stayed the recovery of the tax during the pendency of the petitioner's application for composition. According to the petitioner's allegation without deciding its application for composition and without any prior notice to it, the State Government by its order dated May 25, 1967 vacated the stay order. Consequent upon the cancellation of the stay order, the Sales Tax Officer, Allahabad issued to the Collector of Allahabad two recovery certificates—one dated October 9, 1967 and the other dated October 25, 1967 requiring the Collector to recover from the petitioners as arrears of land revenue, the arrears of sales tax which at that time stood at Rs. 165,648/- and Rs. 26,238/- for the two years respectively. In the recovery certificates there is a direction that the Collector should realise, besides the arrears of sales tax mentioned therein, the interest at the rate of 18% per annum

with effect from February 1, 1964 till the date of final payment of the sales tax. The amount of interest, however, is not mentioned in the recovery certificates.

33. The petitioner alleges that the arrears of tax have since been paid by it, but the Collector is still pursuing the recovery proceedings for the realisation of interest amounting to Rs. 1,38,000/- which is alleged to be due on the arrears of sales tax even for the period during which the demand of tax remained stayed.

34. On these allegations the petitioner moved the writ petition before this Court challenging the recovery proceedings on a large number of grounds. One of such grounds was that as no notice of demand had been served upon the petitioner in respect of the amount of interest, the recovery proceedings through the Collector were unauthorised. In support of this contention the petitioner relied upon a decision of this Court in 1968 All LJ 970. On behalf of the opposite parties, it was contended that that decision was incorrect and required reconsideration. It was in these circumstances that I and brother Pathak, J. referred the following question for the decision of the Full Bench:

"Whether in order to recover interest under Section 8(1-A) of the U.P. Sales Tax Act, it is necessary for the Sales Tax Officer to make an assessment order in respect of the interest and to issue a notice of demand in respect of such interest."

35. Previously there was no provision under the U.P. Sales Tax Act for the levy of interest. By the U.P. Sales Tax Act (Second Amendment) Act, 1963 (Act No. III of 1964), sub-section (1-A) was added to Section 8 of the Act providing for the levy of interest on arrears of sales tax. The newly added Section 8(1-A) reads:

"8(1-A)— If the tax payable under sub-section (1) remains unpaid for six months after the expiry of the time specified in the notice of assessment and demand, or the commencement of the Uttar Pradesh Bikri Kar (Dwitiya San-shodhan) Adhiniyam, 1963, whichever is later, then without prejudice to any other liability or penalty which the defaulter may in consequence of such non-payment, incur under this Act, simple interest at the rate of eighteen per cent per annum shall run on the amount then remaining due from the date of expiry of the time specified in the said notice, or from the commencement of the said Adhiniyam as the case may be, and shall be added to the amount of tax and be 'deemed for all purposes to be part of the tax': (underlining (here in ') mine).

Provided that where as a result of appeal, revision or reference, or of any

other order of a competent court or authority, the amount of tax is varied, the interest shall be recalculated accordingly.

Provided further that the interest on the excess amount of tax payable under an order of enhancement shall run from the date of such order if such excess remains unpaid for six months, after the order."

36. The plain purpose of this amendment appears to be to levy interest at a rate which appears to be penal in character in order to exert pressure on the defaulters to pay up the arrears of tax. But while enacting this provision the Legislature has incorporated a legal fiction to the effect that the interest so imposed "shall be deemed for all purposes to be the part of the tax." The question arises as to what is the purpose, scope and the effect of this legal fiction. While this question came up before brother Pathak and myself, I expressed the opinion that one of the effects of the legal fiction would be that interest would partake of all the characteristics of the tax so far as its levy and collection was concerned. The levy of tax under the Act requires an assessment order after a prior notice to the assessee followed by a notice of demand in which is stated the time and place for payment of the tax. If the assessee defaults in making the payment in accordance with the terms of the notice of demand, he becomes a defaulter and the tax can be recovered from him as arrears of land revenue as provided in sub-section (3) of Section 8. I, therefore, took the view that the same procedure should have been followed for the levy and collection of interest and as that admittedly had not been done, I expressed the opinion that the recovery proceedings pending against the petitioner were unauthorised. In other words, I expressed my respectful agreement with the view taken by this Court in the case of Beni Ram Mool Chand, 1963 All LJ 970 (supra).

37. As brother Pathak, J. did not agree with my view, the question set out above was referred to the Full Bench.

38. I have had the advantage of reading the judgments prepared by my brothers Jagdish Sahai and Satish Chandra, JJ. but I regret very much that I cannot persuade myself to change the view that I have already expressed.

39. The main question which was mooted before the Full Bench related to the purpose, scope and effect of the legal fiction which admittedly has been enacted by the Legislature in Section 8(1-A) equating the interest with the tax.

40. Before I deal with this aspect, it would be proper to examine briefly the scheme with regard to the levy and collection of the tax and other incidental

dues, payable to the State under the U.P. Sales Tax Act. The tax is leviable under the charging Section 3. The amount of tax payable by an assessee is quantified by means of an assessment order under Section 7 read with the relevant rules and the tax so quantified is demanded from him by means of a notice of demand in Form XI under Rule 45, and the assessee has to pay tax so assessed within the time and in the manner specified in that notice. In case the assessee defaults in the payment of the tax in accordance with the terms of the notice of demand, then under Section 8 (1), the assessee is treated as a defaulter, and the amount of tax become recoverable from him under sub-section (3) of Section 8. That section reads;

"Any tax or other dues payable to the State Government under this Act, or any amount of money which a person is required to pay to the assessing authority under sub-section (3) or for which he is personally liable to the assessing authority under sub-section (3) shall be recoverable as arrears of land revenue." The 'other dues' mentioned in sub-section (3) of Section 8 are obviously penalty, composition fee, exemption fee and interest.

41. Previously, there was no provision in the Act requiring the Sales Tax Officer to forward to the Collector a certificate of recovery authorising him to recover the amount due from the assessee as arrears of land revenue. Such a provision has, however, now to be found in Section 33 which has been added by U.P. Act No. III of 1964 which introduces the provisions relating to levy of interest viz. sub-section (1-A) of Section 8. Sec. 33 provides:—

"Section 33: Further provisions regarding recovery— In respect of any sum recoverable under this Act as arrears of land revenue the assessing authority may forward to the Collector a certificate under his signature specifying the sum due. Such certificate shall be conclusive evidence of the existence of the liability, of its amount, and of the person who is liable and the Collector on receipt of the certificate shall proceed to recover from such person the amount specified therein as if it were an arrear of land revenue;

Provided that without prejudice to the powers conferred by this section the Collector, shall for the purposes of recovering the amount specified in the certificate, have also all the powers which—

(a) a Collector has under the Revenue Recovery Act, 1890; and

(b) a Civil Court has under the Code of Civil Procedure, 1908 for the purpose of recovery of an amount due under a decree."

This newly added Section 33 requires the Sales Tax Officer, to specify in the recovery certificate among other things, the exact amount which is sought to be recovered by the Collector.

42-43. From a perusal of the foregoing provisions, it is clear that where an assessee commits a default in the payment of tax or any other dues, payable to the Government under the Act, the amount can be recovered from him in a summary manner provided under Section 8(8) through the Collector only if:

(i) a notice of demand is served upon him requiring him to pay the amount mentioned therein within the time and at the place mentioned in the notice;

(ii) the assessee commits a default of the terms of the notice of demand;

(iii) a recovery certificate is issued to the Collector by the Sales Tax Officer; and

(iv) the exact amount recoverable is mentioned in the recovery certificate. If any of the steps enumerated above are not taken by the Sales Tax Officer the recovery proceedings cannot be regarded to be valid.

44. In the instant case admittedly no notice of demand was served upon the assessee requiring him to pay the interest which is now being sought to be recovered by the Collector and the two recovery certificates forwarded to the Collector by the Sales Tax Officer do not mention the amount of the interest. This being the situation the recovery proceedings impugned by the assessee in the two writ petitions are plainly unauthorised.

45. Now I shall deal briefly with the contentions raised on behalf of the opposite parties. The first contention is that the legal fiction has been enacted only to enable the interest to be recoverable as arrears of land revenue. This contention is obviously not tenable. I have already pointed out above that Sec. 8(8) which deals with the recovery of Government dues as arrears of land revenue is not restricted to the sales tax only. But it comprehends 'other dues' payable to the Government. The term 'other dues' would obviously include interest also. That being the position, there was no necessity at all for the Legislature to have enacted the legal fiction for the purposes of realising interest as arrears of land revenue because that purpose could be achieved by the already existing provision in Section 8(8). The second contention is that the legal fiction would operate only at the time when the Sales Tax Officer commences proceedings for the recovery of sales tax as arrears of land revenue. This contention is again unsound and, if accepted, would lead to anomalous result. For instance, in a case where the tax has already been paid,

there will be no occasion for the Sales Tax Officer to commence recovery proceedings and the legal fiction would become inoperative with the result that the interest which might have been payable by the assessee by reason of his having delayed the payment of the tax for more than six months, would not be recoverable as arrears of land revenue. That would defeat the very purpose for which the legal fiction is said to have been created.

46. The same anomalous position would arise in a case where the recovery certificate in respect of the tax has already been issued and the interest starts accruing afterwards. It must not be forgotten that liability to pay tax and interest is not co-extensive in point of time. The tax becomes payable as soon as the assessment is made and the notice of demand is served but interest becomes payable only if the tax remains in arrears for six months and more. In such a case also the legal fiction would not operate because the recovery proceedings would have been commenced by the Sales Tax Officer before the interest became payable by the assessee. In such a situation, it will have to be conceded that the Sales Tax Officer will have to issue a fresh recovery certificate in respect of the interest and in that case the argument that the legal fiction operates only when the proceedings for recovery of tax start, would fall to the ground.

47. It was next urged that although interest could be recovered under Section 8(8) as arrears of land revenue without the legal fiction, yet the legal fiction had to be created in order to make the newly added provision relating to interest as self-sufficient. Now when one looks minutely at Section 8(1-A), one finds that there are no express words in that provision which talk of the interest being recoverable as arrears of land revenue so that the interest leviable under Section 8(1-A) would not be recoverable as arrears of land revenue as a result of anything contained in that section. The interest would still be recoverable as arrears of land revenue by virtue of Section 8(8). It follows, therefore, that Section 8(1-A) is not self-contained because for the recovery of interest as arrears of land revenue, aid has still to be taken of from the already existing provision contained in Section 8(8).

48. Now reverting to the main question as to the scope and effect of a legal fiction, the position is settled beyond doubt. In the first place, the word "deem" is apt to include obvious, uncertain and impossible. Secondly, the legal fiction has to be carried to its logical conclusion but only within the field of the definite purpose for which the legal fiction is created.

49. Now, interest and tax are two different concepts. When the law declares that they should be deemed to be the same, the purpose of the legal fiction is that something which is unreal, is treated to be real and all facts necessary for the operation of such a legal fiction must be deemed to exist and the consequences which ensue as a result of such a fiction must also be given effect to. In this connection reference may be made to the following observations of Lord Asquith of Bishopstone in *East End Dwellings Co., Ltd. v. Finsbury Borough Council*, (1952) AC 109 at page 130:—

"If you are forbidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of those in this case is emancipation from 1939 level of rents. The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

This observation of Lord Asquith of Bishopstone has become classical and has been cited with approval by the Supreme Court in cases which are a legion. To quote some of such cases under the Income Tax Act, reference may be made to the following where this passage of Lord Asquith of Bishopstone has been reproduced and approved:

(a) *M. K. Venkatachalam v. Bombay Dyeing & Manufacturing Co., Ltd.*, (1959) 34 ITR 143 at p. 146—(AIR 1958 SC 875 at pp. 877-878).

(b) *Commr. of Income Tax, Delhi v. Teja Singh*, (1959) 35 ITR 408 at p. 413—(AIR 1959 SC 352 at p. 355).

(c) *Narayan Row v. Ishwarlal Bhagwandas*, (1965) 57 ITR 149 at p. 162—(AIR 1965 SC 1818 at p. 1824).

(d) *Commr. of Income Tax v. Godawari Sugar Mills Ltd.*, (1967) 63 ITR 310 at p. 315—(AIR 1967 SC 556 at p. 558).

In the *Commissioner of Income Tax v. Teja Singh* (supra) the Supreme Court observed at page 413, "it is a rule of interpretation well settled that in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate."

50. Now, the language in which the legal fiction in question is couched is indeed very wide. It says that interest shall be deemed to be tax for all purposes. The expression 'all purposes' obviously means more than one purpose. It would, therefore, be manifestly wrong to suggest that the legal fiction had only one

purpose to achieve, namely, to enable the interest to be realised as arrears of land revenue. I have already shown that really that was not the purpose. One of the purposes, to my mind, was to apply to the imposition and collection of interest, the procedure prescribed for the levy of collection of tax. The tax is imposed by means of an order quantifying the tax which is popularly known as assessment order. Such an order is to be followed by a notice of demand. Non-compliance with the term of the notice of demand brings into play coercive machinery contained in Section 8(8) and the arrears of tax become recoverable as arrears of land revenue. This attracts Section 33 of the Act under which the Sales Tax Officer issues to the Collector a recovery certificate specifying therein the amount due from the assessee which the Collector is to recover as arrears of land revenue. As a result of the legal fiction in question, this procedure becomes applicable to the levy and collection of interest. This is one consequence that flows from the legal fiction.

51. The second consequence that flows from the legal fiction is that the statutory remedies available to an assessee, who is aggrieved with the levy or quantum of tax, by way of appeal, revision or a reference to the High Court as also the provision for rectification of an apparent error under Section 22, become available in respect of interest also. Yet another result which would ensue would be to attract the provisions contained in Sections 3-C and 7-C of the Act and the partners of a dissolved firm or the legal representative of a deceased assessee would be liable to interest also in the same manner as they would be liable for the payment of the tax. I cannot persuade myself to believe that it could have been the intention of the legislature to prevent these consequences ensuing from the legal fiction.

52. On behalf of the opposite parties it is contended that the levy of interest is automatic requiring no assessment or any other order inasmuch as the rate of interest being fixed and the arrears of sales tax being known, ascertainment of the quantum of interest would involve merely a simple arithmetical calculation.

53. I find no substance in this argument. The word 'assessment' is a comprehensive word, at least it is so understood under the Income-tax Act. It may mean either the entire process of determination of the income and the assessment of tax or it may mean only the calculation of tax. The fact that rate of interest is fixed is of no consequence, because even the rate of tax is also fixed. It is true that in some cases the levy of interest may not require an elaborate

order, but the same can be the position with regard to the tax itself where the turnover is not disputed. There also the rate of tax being fixed, there would be no necessity of passing an elaborate order. But the fact remains that an order of assessment is necessary and cannot be dispensed with in order to quantify the assessee's liability. It is again true that an assessment order relating to tax is preceded by quarterly returns. No such returns are necessary in the case of interest. But that again makes no difference. The two types of orders, one levying tax and the other levying the interest are passed at different stages and under different circumstances. As a result of the legal fiction an order levying interest would be regarded as a supplementary or an additional order levying tax and would become a part of the order of assessment under Section 7. Be that as it may, some sort of order is contemplated by the Act under which the amount of interest payable by an assessee is determined. The only difference is that if such an order is not an order of assessment, the assessee may not be able to avail of the remedy of appeal under Section 9, but the remedies by way of revision under Section 10 and rectification under Section 22 would still be open to him.

54. In the instant case the petitioner disputes its liability to interest at least for the period during which the realisation of the tax remained stayed. Interest is admittedly payable by a defaulter and it is the petitioner's contention that so long as the payment of the tax remained stayed, it could not be regarded a defaulter and therefore no interest was payable by it. The interest might be payable from the date the stay order was discharged to the date of the final payment of the tax. Therefore in the present case the Sales Tax Officer had to determine as to whether the petitioner was liable to pay interest and, if so, from what date. Such a controversy cannot be disposed of by mere subjective and unilateral calculation of interest by the Sales Tax Officer or by the Collector. The controversy raised by the petitioner is of a substantial nature and certainly the petitioner must have some forum to have it decided. The legal fiction, in my opinion, makes available to him such a forum, as already discussed above.

55. In reply it was suggested that no forum was necessary because interest being directly linked with the amount of the tax, the assessee would automatically get relief, if the amount of tax is reduced in appeal or other proceedings. That argument, is plainly wrong. There might be cases where there may be no dispute about the tax at all and the dispute may relate only to levy of interest. The instant case is an example of that type.

The petitioner has not disputed the quantum of tax which in fact it has already paid up. It disputes the levy of interest only.

56. It was then suggested that a remedy under Section 22 may be open to an assessee in case there is a mistake in the calculation of interest. There is no substance in that contention either. Section 22 applies only where an order is sought to be rectified and if according to the contention of the opposite parties, no order levying interest is contemplated, Section 22 goes out of the picture. The same is true about the argument that a revision under Section 10 may lie. That section also applies where the revising authority has to satisfy itself as to the legality or propriety of any order passed by a subordinate sales tax authority (Section 10(3)). Like Section 22, Section 10 also applies only when there is any order to be revised.

57. Lastly it was suggested that the Collector may be approached by an aggrieved assessee. Section 33 provides in categorical terms that "the certificate shall be conclusive evidence of the existence of the liability, of its amount, and of the person who is liable". The Collector, therefore, has absolutely no power to grant any relief to the assessee.

58. Such being the situation, it is difficult to believe that the legislature could have intended that an assessee should be left without any remedy even if there is a serious dispute between him and the revenue with regard to the liability and the quantum of interest.

59. It was then pointed out on behalf of the State that interest being a recurring liability, its amount cannot be specified in a notice of demand or in the recovery certificate. There are two answers to this argument. In the first place, such a difficulty which to my mind, is more imaginary than real, would arise where the default in making payment of the tax is continuing because the total amount of interest payable by an assessee would depend upon the date when the tax is paid. No such difficulty can, however, arise in the present case because the assessee has already paid up the tax. Nothing could have been simpler for the Sales Tax Officer than to have calculated the amount of interest and to have issued a fresh certificate specifying therein the amount of interest. Secondly, an argument of this nature is an argument of despair and cannot override the legal requirements. If the law requires the amount of interest to be specified in the recovery certificate, it is imperative that the same should be done. In the case of a continuing default of payment of tax, it is always open to the Sales Tax Officer

to determine the amount of interest on a particular date and to forward to the Collector a certificate for that amount, in case the assessee does not pay that amount when called upon to do so. There is no bar in issuing successive certificates after regular intervals and the Sales Tax Officer can repeat that process as often as necessary until the entire amount of tax and interest is realised. At this stage, it would be appropriate to dispel a misunderstanding under which the learned counsel for the State appears to have been labouring throughout when he argued that as the interest runs from day-to-day, the Sales Tax Officer will be required to issue a notice of demand everyday in order to make the assessee liable for interest. That is not so. There is a distinction between the liability of an assessee to pay interest and the mode in which it is recovered. The liability to pay interest is imposed by the statute and it continues just as in the case of any other creditor, until the debt is paid. In order to create such a liability, it is not necessary to issue any notice of demand. But the necessity of issuing a notice of demand arises when the interest is sought to be recovered through the coercive machinery provided under the Act. There are several modes in which the interest may be realised from an assessee. S. 8(8) is not exhaustive but provides only one of such modes which is of a summary nature. The State may enforce the liability by means of a suit or by other means open to it under the general law. In such a case it would not be necessary for the State to issue any notice of demand, but if the State wishes to enforce the liability through the summary mode provided in Section 8(8), the procedure outlined by me above, becomes necessary. In other words, when the assessee fails to pay interest of his own accord and it becomes necessary for the State to proceed against him under Sec. 8(8), it is imperative that the assessee must be served with a notice of demand and on his failure to comply with it, a recovery certificate should be issued to the Collector specifying therein the amount of interest which is sought to be realised.

60. In the end it may be useful to draw an analogy from the corresponding provisions under the Income Tax Act. The Income Tax Act of 1961 also contains several provisions for the imposition of interest when the assessee defaults in making payment of advance or regular tax. Under Section 156 of the Income Tax Act, "when any tax, interest, penalty fine or any other sum is payable in consequence of any order passed under the Act, the Income Tax Officer has to serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable."

61. Sections 220 and 222 deal with the collection and recovery of tax, interest and penalty etc. The following portion of Section 220 is material for our purpose:

"220. When tax payable and when assessee deemed in default:— (1) Any amount, otherwise than by way of advance tax, specified as payable in a notice of demand under S. 156 shall be paid within thirty five days of the service of the notice at the place and to the person mentioned in the notice:

Provided that, where the Income Tax Officer has any reason to believe that it will be detrimental to revenue if the full period of thirty-five days aforesaid is allowed, he may with the previous approval of the Inspecting Assistant Commissioner, direct that the sum specified in the notice of demand shall be paid within such period being a period less than the period of thirty-five days aforesaid, as may be specified by him in the notice of demand.

(2) If the amount specified in any notice of demand under Section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at four per cent, per annum from the day commencing after the end of the period mentioned in sub-section (1): (underlining here in ' ') is mine).

Provided that, where as a result of an order under Section 154, or Section 166, or Section 250 or Section 264, the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded.

(3) Without prejudice to the provisions contained in sub-section (2), on an application made by the assessee before the expiry of the due date under sub-section (1) the Income-tax Officer may extend the time for payment or allow payment by instalments, subject to such conditions as he may think fit to impose in the circumstances of the case.

(4) If the amount is not paid within the time limited under sub-section (1) or extended under sub-section (3), as the case may be, at the place and the person mentioned in the said notice the assessee shall be deemed to be in default." Section 222 reads:

"222. Certificate to Tax Recovery Officer— (1) When an assessee is in default or is deemed to be in default in making payment of tax, the Income-tax Officer may forward to the Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assessee, and the Tax Recovery Officer on receipt of such certificate, shall proceed to

recover from such assessee, the amount specified therein by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule—

(a) attachment and sale of the assessee's movable property;

(b) attachment and sale of the assessee's immovable property;

(c) arrest of the assessee and his detention in prison;

(d) appointing a receiver for the management of the assessee's movable and immovable properties.

(2) The Income-tax Officer may issue a certificate under sub-section (1) notwithstanding that proceedings for recovery of the arrears by any other mode have been taken."

62. The scheme under the Income-tax Act as revealed by the provisions quoted above, is that an assessee has to be served with a notice of demand in respect of any tax, interest or penalty payable by him and if he fails to comply with the terms of the notice of demand, he is treated to be an assessee in default and can then be proceeded against under sub-section (2) of Section 220 under which the Income-tax Officer has to issue a recovery certificate to the Tax Recovery Officer specifying therein the amount sought to be recovered. Any omission on the part of the Income-tax Officer to comply with any of the requirements mentioned above vitiates the recovery proceedings.

63. In (1964) 52 ITR 538 = (AIR 1964 SC 1473), the Supreme Court quashed the recovery proceedings because a fresh notice of demand had not been served upon the assessee after his tax liability had been reduced in appeal. This Court has applied the proposition enunciated in this case in *Ram Autar Agarwal v. Sales Tax Officer*, Writ No. 1659 of 1967, D/-13-9-1968 (All) holding that "we see no reason why that principle should not be adopted in cases under the U. P. Sales Tax Act". In *Vimlaben Khimji v. Manivikar*, (1964) 51 ITR 29 (Bom); *Sriramiah v. Income-tax Officer*, (1965) 52 ITR 408 (Mys) and *Collector of North Arcot v. Kannan*, (1967) 65 ITR 302 = (AIR 1967 Mad 249); recovery proceedings were quashed because the real amount of tax had not been specified therein.

64. Plainly the scheme under the Income-tax Act is more or less analogous to the scheme under the U. P. Sales Tax Act. If under the Income-tax Act a notice of demand has to be served upon the assessee in respect of the interest payable by it on arrears of tax, there appears to be no good reason why the same procedure should not be practicable under the U. P. Sales Tax Act. There is, however, one difference so far as the recovery is concerned. It would be noticed that under

Section 222 recovery certificate is issued when the assessee is in default in making a payment of the tax. Interest, penalty or other dues are not mentioned therein. From this omission it might appear that recovery proceedings can be taken against an assessee only in respect of the arrears of tax. But this omission has been made good by the legislature in Section 229 which says:

"229. Recovery of penalties, fine, interest and other sums.— Any sum imposed by way of interest, fine, penalty, or any other sum payable under the provisions of this Act, shall be recoverable in the manner provided in this Chapter for the recovery of arrears of tax."

The procedure under the Income-tax Act for the levy and collection of interest is, therefore, completely identical with the procedure prescribed under the U. P. Sales Tax Act and no one has ever contended that under the Income-tax Act, the Income-tax Officer can proceed to recover the interest from an assessee without following the procedure for the recovery of Income-tax.

65. The last distinction that was pointed out between the schemes of the two Acts was that under Section 156 of the Income-tax Act a notice of demand is required to be served in respect of all dues including interest, while under the U. P. Sales Tax Act, R. 45, which corresponds to Section 156 of the Income-tax Act requires a notice of demand in respect of the tax only. It is forgotten that as a result of the legal fiction created in Section 8 (1-A), the interest is deemed to be tax for all purposes and therefore, it would be tax for purposes of Rule 45 also so that a notice of demand shall have to be issued in respect of interest also. Moreover, if one examines closely the scheme under the U. P. Sales Tax Act prior to its amendment in 1964, it becomes obvious that a notice of demand was necessary even then in the case of penalty and interest because penalty and interest were also recoverable as arrears of land revenue under Section 8 (8). If in the case of tax, Section 8 (8) becomes operative only when the assessee commits a default of its payment there is no reason to suppose that it would be applicable in the case of interest and penalty even if the assessee is not in default. And as assessee can be said to be in default only if he fails to make the payment when called upon to do so which means when a notice of demand is served upon him.

66. Under the Income-tax Act, there is, of course, no appeal provided against the levy of interest under Section 222 (2) but an order imposing interest under Section 156 is open to revision by the Commissioner under Section 264 and is also liable to rectification under Sec-

tion 154. In this regard, the U. P. Legislature has gone a step further inasmuch as by equating the interest with the tax, it has automatically made available to the assessee all the remedies which are open to him with regard to the levy of the tax.

67. Although I have discussed and tried to prove that the entire procedure for the levy and collection of tax would be applicable in the case of interest also, yet for purposes of the present case it was not really necessary to have gone to that extent. The writ petition is directed against the recovery proceedings. Those proceedings suffer from two infirmities: (1) the proceedings have been commenced without issuing a notice of demand to the petitioner and (2) the amount of interest has not been mentioned in the recovery certificates. The petitioner is entitled to succeed on either of the two grounds. Therefore, even if one was to assume everything else against the petitioner, the petitioner would still be entitled to succeed on the simple ground that the amount of interest not having been specified in the recovery certificates the recovery proceedings are bad in law. Looking at the matter from that view, the question which has been referred to the Full Bench to my mind is rather hypothetical, couched as it is in an abstract form divorced from the facts of the case and in any case is too widely stated. I would, therefore, prefer to reframe the question to read:

"Whether on the facts and circumstances of the case the proceedings for the recovery of interest from the petitioner by the Collector are valid?" and would answer it in the negative.

68. The wider proposition of law embodied in the question referred is comprehensive and goes beyond the scope of the controversy which arises in this and the connected cases. However, as I have dealt with it quite exhaustively, I would not hesitate to answer the question referred to the Full Bench. My answer is:

"In order to recover the interest under Section 8 (1-A) of the U. P. Sales Tax Act as arrears of land revenue, it is necessary for the Sales Tax Officer to serve upon the assessee a notice of demand in pursuance of an order quantifying the amount of interest (even though it may not be an order of assessment) and on the assessee's failure to comply with the notice of demand to issue a recovery certificate to the Collector specifying therein the amount of interest sought to be recovered."

69. As admittedly, this procedure has not been followed in this and the connected writ petitions the recovery proceedings are unauthorised and are liable to be quashed.

70. BY THE COURT:—In view of the majority judgment, we answer the ques-

tion referred to us by saying that it was not necessary for the Sales Tax Officer to make an assessment order in respect of interest and to issue a notice of demand in respect of the same.

Reference answered accordingly.

AIR 1970 ALLAHABAD 344 (V 57 C 52)

FULL BENCH

S. D. KHARE, B. B. MISRA AND
M. N. SHUKLA, JJ.

Bikarma Singh and others, Appellants v. The State of U. P. and others, Respondents.

Special Appeal No. 472 of 1966, D/- 29-4-1969. Decided by Full Bench on order of reference made by Mathur, J., D/- 4-4-1966.

Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 5 (as it stood in the year 1961) — Section 4 and S. 49 (as amended upto 1958) — Scope of S. 5 — Effect of stay order under S. 5 — Notification under S. 4 during pendency of civil appeal — Fact of notification brought to notice of Court — Appellate Court holding that S. 5 did not apply to facts of case and deciding appeal — Decision allowed to become final between parties — Decree passed by Civil Court held was not a nullity — Assumption of jurisdiction by erroneous decision of jurisdictional facts can be set aside in appeal or revision — Even under S. 49, jurisdiction of Civil Court is not absolutely barred — (Civil P. C. (1908), Ss. 9 and 115).

Where a Civil Court in its appellate jurisdiction had given a decision that the provisions of Section 5 of the U. P. Consolidation of Holdings Act did not apply to the facts of the case and that decision had been allowed to become final between the parties, the decree passed by the Civil Court after the publication of the notification under Section 4 of that Act and after that fact had been brought to the notice of the Court is not a nullity. Case law discussed. 1968 All LJ 570 & 1964 All LJ 1049, Rel. on. (Para 29)

From the language of Section 5 of the Act it is clear that the Legislature did not take away the jurisdiction of the Civil Court completely. It merely directed the stay of the proceedings to avoid conflict of decisions by two competent authorities on one and the same point between the same parties. If the matter had already been finally disposed of between the parties by a competent Court that decision had to be accepted by the consolidation authorities. However the scheme of the Act is that if no such decision had been given

or if the matter was still pending before any civil or revenue Court it was to stay its hands and ultimately at the end of the consolidation proceedings, to record its decision in accordance with the decision of the consolidation authorities.

(Para 15)

Even under Section 49 of the Act the jurisdiction of the Civil Court was not absolutely barred. It was barred only in respect of matters for which a proceeding could or ought to have been taken under the Act.

(Para 17)

After the publication of the notification under Section 4 of the Act the stay of the proceedings as provided under Section 5 cannot be automatic for one more reason. The Court before which the suit or the appeal or the proceedings are pending will have to decide whether or not the provisions of Section 5 of the Act would apply to the case. A Civil Court has inherent power to decide the question of its own jurisdiction. The assumption of jurisdiction by erroneous decision of jurisdictional facts can be questioned in a revision application filed under Section 115, Civil P. C. Case law discussed.

(Paras 24, 26)

A Court having jurisdiction can decide a matter rightly or wrongly. If it decides a matter wrongly it is open to the appellate or the revisional Court to correct the mistake. However, if no appeal or revision is filed and the decision becomes final between the parties it will be difficult to say that the wrong decision on jurisdictional facts relating to its suspension of jurisdiction renders the decision in the appeal a nullity.

(Para 27)

Cases Referred: Chronological Paras
(1968) 1968 All LJ 77 = 1968 All WR

(HC) 305, Gokul v. Deputy Director Consolidation 24

(1968) 1968 All LJ 570 = 1968 All WR (HC) 425, Tribeni v. State of U. P. 11, 21

(1967) AIR 1967 SC 1386 (V 54) = 1967 All LJ 593, Mulraj v. Murti Raghunathji Maharaj 18

(1964) 1964 All LJ 1049 = ILR (1965) 1 All 152, Lakhpat Singh v. Dal Singh 11, 20

(1963) AIR 1963 All 186 (V 50) = 1962 All LJ 817, Bahadur v. Bachai 23

(1960) ILR (1960) Ker 528 = 1960 Ker LT 264, C. Alikutty v. T. Alikutty 18

(1959) AIR 1959 SC 492 (V 46) = 1959 Supp 1 SCR 733, Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi 26

(1954) AIR 1954 SC 340 (V 41) = 1955 SCR 117, Kiran Singh v. Chaman Paswan 25

(1954) AIR 1954 Punj 46 (V 41) = ILR (1954) Punj 639, Din Dayal v. Union of India 18

(1953) AIR 1953 SC 16 (V 40) = 1953 SCR 185, Bhatia Co-operative Housing Society Ltd. v. D. C. Patel 24

(1953) AIR 1953 SC 65 (V 40) = 1953 SCR 377, Mohanlal v. Benoy Kishna 24

(1952) AIR 1952 Nag 275 (V 39) = ILR (1952) Nag 534, Laxmichand Nanhulal v. Mt. Sundarabai 27

(1951) AIR 1951 Pat 130 (V 38) = ILR 30 Pat 1018 (SB), Liakat Mian v. Padampat Singhania 18

(1927) AIR 1927 All 401 (V 14) = 25 All LJ 430 (FB), Parsotam Saran v. Brahma Nand 18

(1918) AIR 1918 Mad 391 (V 5) = ILR 41 Mad 151 (FB), Venkata-chelapati Rao v. Kameshwar-amma 18

(1906) ILR 33 Cal 927 = 3 Cal LJ 67, Hukum Chand v. Kamalanand Singh 18

(1897) 1 Cal WN 226, Besseswari Chowdhurany v. Horro Sundar Mozumdar 18

R. B. Misra, Radhey Shyam, R. S. Misra, Ambika Pd. and Krishna Pd., for Appellants; Ram Surat Singh, for Respondents.

S. D. KHARE, J.:— This reference to a Full Bench arises out of a Special Appeal filed against an order of a learned single Judge of this Court, dismissing the writ petition. The Division Bench, which heard the Special Appeal, was of the opinion that the case of Tribeni v. State of U. P., 1968 All LJ 570 affirming the view taken in Lakhpat Singh v. Dal Singh, 1964 All LJ 1049 required reconsideration. It has, therefore, referred the following question for the consideration of this Full Bench:—

"Whether the judgment and decree of the learned Additional Civil Judge was a nullity when a notification under Sec. 4 of the U. P. Consolidation of Holdings Act in respect of the land in dispute in the appeal before him was made during the pendency of the appeal and that fact had been brought to his notice."

2. Considering all the facts of the present case we would slightly modify the point for reference by adding one more clause (underlined (here in ' ') towards the end so that it will read as follows:—

"Whether the judgment and decree of the learned Additional Civil Judge was a nullity when a notification under Sec. 4 of the U. P. Consolidation of Holdings Act in respect of the land in dispute in the appeal before him was made during the pendency of the appeal and that fact had been brought to his notice 'and he had recorded a decision that the provisions of Sec. 5 did not apply in the facts of the case'."

3. The facts leading to the Special Appeal, out of which this reference has arisen, might be briefly stated as follows.

4. Originally Dalai Singh, Daljit Singh and Hanuman Singh were the fixed rate tenants of plot No. 10, situate in village Chanchalia, pargana Kiriyaat Sikhar, district Mirzapur. They mortgaged that plot in favour of Jokhu Singh, father of the respondents Nos. 4 to 6. Subsequently Dalai Singh executed a sale deed in respect of his one-third share in favour of the aforesaid Jokhu Singh. The equity of redemption in the remaining two-thirds share of the property vested in Daljit Singh and Hanuman Singh. On 11th December, 1907, they also executed a sale deed in respect of their two-thirds share in that plot in favour of Vikrama Singh (appellant). The plaintiff's case was that it had been agreed between Jokhu Singh and Vikrama Singh that Jokhu Singh will remain in possession over his one-third share of the plot No. 10 in dispute towards the north while Vikrama Singh will remain in possession over the two-thirds share of the same plot towards the south.

5. There was litigation between Jokhu Singh and Vikrama Singh and the latter was directed to deposit Rs. 300 in Court. He could not do so and, therefore, he executed a usufructuary mortgage deed on 14th February, 1928, in favour of one Sitaram Tiwari with the condition that the mortgagee should pay Rs. 300 to Jokhu Singh. This mortgage was in respect of two-thirds southern share of plot No. 10 and certain other plots. Sitaram Tiwari deposited Rs. 300 in Court and redeemed the two-thirds share of plot No. 10. Later on, as a result of an agreement between Vikrama Singh and Sitaram Tiwari, the two-thirds share in plot No. 10 came into possession of Vikrama Singh.

6. After the death of Sitaram Tiwari, his son Lakshmi Shanker filed a suit against Vikrama Singh and the aforesaid two-thirds share in plot No. 10 was put to sale in execution of the decree. Respondent No. 4 claimed to be an adhvasi and sirdar of the land in dispute on the allegation that Sitaram Tiwari had sublet the land to him. The Judicial Officer in whose Court the decree was being executed held by his order dated 6th April, 1959, that respondent No. 4 had failed to prove any sub-letting in his favour. His objection was dismissed and he, therefore, filed a suit in the Court of the Munsif for declaration that his two-thirds share in plot No. 10 was not liable to sale in execution of the aforesaid decree. By his judgment dated 24th May, 1961, the learned Munsif decreed the suit. While the appeal against the decision of the learned Munsif was pending in the Court of the Additional Civil Judge a notification under Section 4 of the U. P. Consolidation of Holdings Act (hereinafter referred to as the Act) was published in the U. P. Gazette on May 27, 1961, and the

fact was brought to the notice of the Court. The learned Additional Civil Judge, however, held that Section 5 of the Act could not apply to a suit of that nature and, therefore, he heard and allowed the appeal on 12th October, 1961.

7. When the Consolidation proceedings started the petitioner-appellant filed an objection before the A. C. O. for expunction of the names of respondents Nos. 4 to 7, and the said respondents also filed a cross objection claiming themselves to be sirdars of the land in dispute. The Consolidation Officer on 30th April 1962, allowed the objection of the present appellant and dismissed the objection of respondents Nos. 4 to 7. Respondents Nos. 4 to 7 filed an appeal against the decision of the Consolidation Officer. The appeal against the order of the Consolidation Officer was dismissed. Respondents Nos. 4 to 7 filed a second appeal before the Deputy Director of Consolidation who, without referring to the order passed by the Additional Civil Judge, allowed the appeal and declared respondents Nos. 4 to 7 to be the tenure holders.

8. Thus respondent No. 4, whose suit for declaration under O. 21, R. 63, C. P. C. had been dismissed by the Civil Court was successful before the Deputy Director of Consolidation, who allowed the second appeal against the order of the Settlement Officer.

9. It was against that order of the Deputy Director of Consolidation passed on 30th March, 1963, that the writ petition was filed by the present appellant. The learned single Judge who heard the writ petition, dismissed it on the ground that the matter was concluded by a finding of fact, based on evidence, recorded by the consolidation authorities, as between the same parties regarding one and the same property.

10. It has been contended on behalf of the respondents that the effect of the notification under S. 4 of the Act is automatic and as soon as the notification is published in the Gazette the jurisdiction of Courts other than the consolidation Courts is suspended and, therefore, any decree passed by the Civil Court in its appellate jurisdiction after the issue of the notification under Section 4 of the Act without taking into consideration the final decision of the consolidation authorities, must be considered to be a nullity.

11. The contention of the learned counsel for the appellant, on the other hand, is that the decree passed by the civil appellate Court cannot be considered to be a nullity because that Court, and no other Court, had the jurisdiction to dispose of the appeal. It is further contended that the decision given by the appellate Court, even, though it might have been erroneous on the point that the stay as contemplated under Section 5 of the

Act did not apply to that appeal, could have been questioned only by way of an appeal or a revision.

12. Section 5 of the Act, as it stood in the year 1961, read as follows:—

"Upon the publication of the notification under Section 4 in the official gazette, the consequences, as hereinafter set forth, shall, subject to the provisions of this Act, from the date specified thereunder till the publication of notification under Section 52 or sub-section (1) of S. 6, as the case may be, ensue in the area to which the declaration relates, namely—

(a) the district or part thereof, as the case may be, shall be deemed to be under consolidation operations and the duty of maintaining the record of rights and preparing the village map, the field book and the annual register of each village shall be performed by the District Deputy Director of Consolidation, who shall maintain or prepare, them, as the case may be, in the manner prescribed.

(b) (i) all proceedings for correction of the records and all suits for declaration of rights and interests over land, or for possession of land, or for partition pending before any authority or Court whether of first instance, appeal or reference or revision, shall stand stayed, but without prejudice to the right of the persons affected to agitate the right or interests in dispute in the said proceeding or suits before the consolidation authorities under and in accordance with the provisions of this Act and the rules made thereunder.

(ii) the findings of the consolidation authorities in proceedings under this Act in respect of such rights or interest in the land, shall be acceptable to the authority or Court before whom the proceeding or suit is pending which may on communication thereof by the parties concerned, proceed with the proceedings or suit, as the case may be.

(c)

13. Section 5 of the Act is couched in general terms and it was for the Courts, where proceedings of the nature which could be disposed of by consolidation Courts were pending, to decide whether or not the proceedings were of such nature to which the bar of Section 5 of the Act could apply. Therefore, even in cases where the notification under Section 4 of the Act came to the notice of the Court the Civil Court, where the proceedings were pending could, after hearing the parties, arrive at a decision that the bar of Section 5 of the Act did not apply to the proceedings before it and that the same could be disposed of by it. All the proceedings before the Civil Court were not to be stayed merely because consolidation proceedings had been started and a notification under Section 4 of the Act had been issued. The bar of Section 5 could apply only to those proceedings where any

matter could be finally disposed of by the consolidation authorities. If the Civil Court before which any proceeding was pending wrongly arrived at the conclusion that, considering the nature of the proceedings pending before it, the bar of Section 5 did not apply to it, the mistake could be corrected either by the appellate Court or by the revisional Court. It is obvious that in a case like the present one no application under Section 151, Civil P. C. for vacating the order could be filed and it was only for the appellate Court or the revisional authority to correct the mistake, if any.

14. On the point of the jurisdiction of the learned Additional Civil Judge to dispose of the appeal the following facts are not disputed:—

(1) The Civil Court had the initial jurisdiction to entertain the appeal and the Additional Civil Judge could hear it and dispose it of.

(2) After the stay period provided under Section 5 of the Act was over the appeal could be heard and finally disposed of by the Additional Civil Judge.

(3) No other Court or authority was competent to hear and dispose of the appeal.

The contention, however, is that—

(i) the operation of stay under Sec. 5 of the Act was automatic and the stay took effect from the date the notification under S. 4 was published, and

(ii) the effect of the notification under Section 4 of the Act was that the jurisdiction of the Civil Court was suspended so that any disposal of the case or appeal made during the period the jurisdiction remained suspended, was without jurisdiction and, therefore, a nullity.

15. In our opinion there is no force in the contention that the effect of the stay under Section 5 of the Act was automatic. From the language of Section 5 of the Act it is clear that the legislature did not take away the jurisdiction of the Civil Court completely. It merely directed the stay of the proceedings to avoid conflict of decisions by two competent authorities on one and the same point and between the same parties. If the matter had already been finally disposed of between the parties by a competent Court that decision had to be accepted by the consolidation authorities. However, the scheme of the Act is that if no such decision had been given or if the matter was still pending before any civil or revenue Court it was to stay its hands and ultimately, at the end of the consolidation proceedings, to record its decision in accordance with the decision of the consolidation authorities (vide Section 5 of the Act). The consolidation authority, while giving its decision, was to be deemed to be a Court of competent

jurisdiction (vide Sections 10 and 11 of the Act).

16. Section 49 of the Act (as amended up to the year 1958) reads as follows:—

"No person shall institute any suit or other proceeding in any Civil or Revenue Court with respect to any matter arising out of consolidation proceedings or with respect to any other matter in regard to which a suit or application could be filed under the provisions of this Act."

17. Even under Section 49 of the Act the jurisdiction of the Civil Court was not absolutely barred. It was barred only in respect of matters for which a proceeding could or ought to have been taken under the Act.

18. The law relating to the stay of proceedings by a superior Court was considered and clarified by the Supreme Court in the case of *Mulraj v. Murti Raghunathji Mahraj*, 1967 All LJ 593 = (AIR 1967 SC 1386). Till then there was good deal of difference of opinion between the High Courts in India on the question of the effect of the stay order, particularly with a reference to execution proceedings. The High Courts of Calcutta (vide *Hakum Chand Bold v. Kamalanand Singh*, (1906) ILR 33 Cal 927. *Patna* (vide *Lakot Mian v. Padampat Singhania*, AIR 1951 Pat 130 (SB) and *Punjab* (vide *Din Dayal v. Union of India*, AIR 1954 Punj 46) had held that in such a case the stay order takes effect from the moment it is passed and the fact that the Court executing the decree has no knowledge of it makes no difference and all proceedings taken in execution after the stay order has been passed are without jurisdiction. On the other hand, the view taken by the Calcutta High Court in an earlier decision (vide *Bessesswari Chowdhurany v. Horro Sundar Mazumdar*, (1897) 1 Cal WN 226) and the High Courts of Madras (vide *Venkatachalapati Rao v. Karneswararamma*, ILR 41 Mad. 151 = (AIR 1918 Mad 391) (FB)) and Kerala (vide *C. Alikutti v. T. Alikutti*, ILR (1960) Ker 523) was that the executing Court does not lose its jurisdiction from the moment the stay order is passed and that the order being in the nature of a prohibitory order, the Court carrying on execution does not lose its jurisdiction to do so till the order comes to its knowledge and that the proceedings taken in between are not a nullity.

The Allahabad High Court took an intermediate view in the Full Bench case of *Parsotam Saran v. Brahma Nand*, 25 All LJ 530 = (AIR 1927 All 401) (FB) and held that where the rights of third parties, like a stranger auction purchaser, have intervened, the fact that the executing Court had no knowledge would protect third parties. The Supreme Court, in the case of *Mulraj* (Supra) arrived at the con-

clusion that the view of the Madras High Court and of the Calcutta High Court taken in its earlier decision (vide (1897) 1 Cal WN 226 (Supra)) was correct and that the order of stay in an execution matter was in the nature of a prohibitory order and is addressed to the Court that is carrying out execution and that a mere order of stay of execution does not take away the jurisdiction of the Court. In that connection the Supreme Court observed:—

"An order of stay..... Is not of the same nature as an order allowing an appeal and quashing execution proceedings. That kind of order takes effect immediately it is passed, for such an order takes away the very jurisdiction of the Court executing the decree as there is nothing left to execute thereafter. But a mere order of stay or execution does not take away the jurisdiction of the Court. All that it does is to prohibit the Court from proceeding with the execution further, and the Court unless it knows of the order, cannot be expected to carry it out. Therefore, till the order comes to the knowledge of the Court its jurisdiction to carry on execution is not affected by a stay order which must in the very nature of things be treated to be a prohibitory order directing the executing Court which continues to have jurisdiction to stay its hands till further orders. It is clear that as soon as a stay order is withdrawn, the executing Court is entitled to carry on execution and there is no question of fresh conferment of jurisdiction by the fact that the stay order has been withdrawn. The jurisdiction of the Court is there all along. The only effect of the stay order is to prohibit the executing Court from proceeding further and that can only take effect when the executing Court has knowledge of the order".

19. From what has been stated above it is clear that the Supreme Court in the case of *Mulraj*, (1967 All LJ 593) = (AIR 1967 All 1386) (Supra) not only affirmed the Allahabad view but went one step further in affirming the view held by the Madras High Court.

20. The question whether or not the Civil Court lost its jurisdiction from the date of the notification under Section 4 of the Act was considered by Hon'ble Jagdish Sahal and Hon'ble G. C. Mathur, JJ. in the case of 1964 All LJ 1049 and it was held that if an appeal is decided on merits in ignorance of the fact that a notification under Section 4 of the Act has been issued the judgment would not be a nullity but it would be a case of the Court acting with material irregularity in the exercise of its jurisdiction. It was further held that the effect of the notification under Section 4 of the Act is that even though the Court has jurisdiction to entertain and hear the appeal it cannot pass an order

in derogation of the provisions of sub-clauses (i) and (ii) of Cl. (b) of Section 5 of the Act. The Court has, therefore, to stay the hearing of the appeal until the consolidation authorities have decided the matter and thereafter to pass an order in accordance with the decision of the consolidation authorities.

21. The same view was reiterated in the case of 1968 All LJ 570 (Supra) decided by a Division Bench of this Court. It was held by Hon'ble Jagdish Sahai and Hon'ble Gangeshwar Prasad, JJ. that—

"It is clear from the language of the unamended Section 5 (b) (i) and (ii) of the Act that merely because a village came under consolidation operations, the Court seized of a suit or an appeal was not divested of the jurisdiction to hear and decide it. All that the law required was that the proceedings before it should be stayed and after the matter had been decided by the consolidation authorities the decision was to be communicated to the Court who shall 'proceed with the proceeding or suit, as the case may be'. It is, therefore, clear that the effect of Section 5 (b) (i) of the Act was not to destroy or take away the jurisdiction of the court before whom a suit or an appeal was pending. It remained seized of the case throughout and ultimately it had to pass a judgment or order or decree in the case. It was that court and that court alone which had the jurisdiction to and could finally dispose of the matter. Therefore it cannot be said that a decree or order or judgment passed by such a court would be nullity even though it alone had the jurisdiction to pass the order or the decree of the judgment."

22. We respectfully agree with the view taken by a Division Bench of this Court in the above mentioned case.

23. In the case of Bahadur v. Bechal, 1962 All LJ 817=(AIR 1963 All 186), a Division Bench of this Court held that an appeal decided in ignorance of the notification under Section 4 of the Act could be reviewed and the order recalled under the provisions of Section 151, C.P.C. but not under Order 47, Rule 1, C.P.C., so that the appeal could remain pending till the consolidation proceedings were over. The decision in the case of 1962 All LJ 817=(AIR 1963 All 186), is hardly of any help for determining this reference for the simple reason that the court has always the power in the interest of justice to recall its own order under the provisions of Section 151, C.P.C.

24. After the publication of the notification under Section 4 of the Act the stay of the proceedings as provided under Section 5 cannot be automatic for one more reason. The Court before which the suit or the appeal or the proceedings are pending will have to decide whether

or not the provisions of Section 5 of the Act would apply to the case. A civil Court has inherent power to decide the question of its own jurisdiction, vide *Gokul v. Deputy Director of Consolidation*, 1968 All LJ 77, *Bhatia Co-operative Housing Society Ltd. v. D. C. Patel*, AIR 1953 SC 16 and *Mohanlal v. Benoy Kishna*, AIR 1953 SC 65.

25. It is well settled law that a decree passed without jurisdiction is a nullity—vide *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340.

26. It was held in the case of *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492, that there are two classes of cases dealing with the power of tribunal: (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the preliminary state of facts on which the exercise of its jurisdiction depends exists, and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. It was further observed that the difference between these two kinds of cases is that in the former case the tribunal has the power to determine the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists. It was further held that the assumption of jurisdiction by erroneous decision of jurisdictional facts could be questioned in a revision application filed under Section 115, C.P.C.

27. There can be no doubt that an erroneous decision of a jurisdictional fact can be set aside in an appeal or revision. The question before us is what can be done if a court having both initial and ultimate jurisdiction has given a wrong decision on a jurisdictional fact relating to its suspension of jurisdiction. In our opinion the answer to that question is a simple one. A court having jurisdiction can decide a matter rightly or wrongly (vide *Laxmichand Nanhulal v. Mt. Sundrabai*, AIR 1952 Nag 275.) If it decides a matter wrongly it is open to the appellate or the revisional Court to correct the mistake. However, if no appeal or revision is filed and the decision becomes final between the parties it will be difficult to say that the wrong decision on jurisdictional fact relating to its suspension of jurisdiction renders the decision in the appeal a nullity.

28. We have refrained from expressing any opinion on the point as to what the consolidation authorities should have done after the appeal had been disposed of by the learned Additional Civil Judge and the decision had become final between the parties, because this will be a matter for the consideration of the Division Bench, which will now hear and dispose of the Special Appeal. We are also

not expressing any opinion on the point as to whether or not the decree passed in appeal by the learned Additional Civil Judge would be a nullity if the appeal was heard and decided (i) after the notification under Section 4 of the Act had been published and brought to the notice of the Court and (ii) the Court had taken no notice of such publication without specifically holding that the bar of Section 5 of the Act did not apply to a case of this nature.

29. Our answer to the question referred to the Full Bench (and as subsequently modified by us) is as follows:—

"Inasmuch as the learned Additional Civil Judge had given a decision that the provisions of Section 5 of the Act did not apply to the facts of the case and that decision had been allowed to become final between the parties, the decree passed by the learned Additional Civil Judge after the publication of the notification under Section 4 of the Act, and after that fact had been brought to the notice of the Courts, is not a nullity."

Reference answered in negative.

AIR 1970 ALLAHABAD 350 (V 57 C 53)

FULL BENCH

JAGDISH SAHAI, YASHODANANDAN AND J. S. TRIVEDI, JJ.

Samharu, Defendant-Appellant v. Dharamraj Pandey and others, Plaintiffs-Respondents.

Second Appeal No. 4063 of 1962, D/- 25-8-1969.

Tenancy Laws — U.P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951), Ss. 21 (1) (d), 18 and 19 — Expression "mortgagee" in S. 21 (1) (d) — Not confined to valid mortgages only — 1963 RD 288 & 1964 RD 410 & 1965 RD 23 & AIR 1965 All 504 & AIR 1955 NUC (All) 4171 & F.A.F.O. No. 227 of 1966, D/- 9-12-1968 (All) & 1968 RD 456, Overruled.

The word "mortgagee" in S. 21 (1) (d) of the Act has been used therein in a comprehensive or a loose sense and the expression is not confined only to valid mortgages. This view is based on an analysis of the provisions of Ss. 18 and 19 of the Act. Therefore, a mortgagee who is in possession under an invalid mortgage prior to the date of vesting can claim to be an asami by virtue of S. 21 (1) (d) of the Act. 1963 RD 288 & 1964 RD 410 & 1965 RD 23 & AIR 1965 All 504; AIR 1955 NUC (All) 4171 & F.A.F.O. No. 227 of 1966, D/- 9-12-1968 (All) & 1968 RD 456, Overruled. (Para 13)

It can be said that a hereditary tenant under the provisions of Section 18 of the Act must possess the right to transfer the

holding by sale. No such restriction is imposed upon a hereditary tenant under Section 19 of the Act. The result that follows from this is that if a hereditary tenant who is not subject to the restrictions contained in Clause (d) of Section 18 has made a mortgage, which is not valid, then the mortgagee would come to acquire rights under Section 21 (1) (d) of the Act. (Para 12)

Cases Referred: Chronological Paras

(1968) 1968 All WR (HC) 182, Sukh-nandan v. Board of Revenue	14, 16
(1968) 1968 RD 456, Sri Ram Sakal Singh v. Dy. Director of Consolidation	14
(1968) F.A.F.O. No. 227 of 1966, D/- 9-12-1968 (All), Budhu Ahir v. Budhram Komhar	14
(1965) AIR 1965 All 504 (V 52) = 1965 All LJ 255, Jagat Narain v. Laljee	14
(1965) 1965 RD 23, Bodhan v. Bhundal Singh	14
(1964) 1964 RD 410, Harkhoo v. Bindeshwar	14
(1963) 1963 RD 288, Hamid Hussain v. R. N. McIlhah	14, 15
(1955) AIR 1955 NUC (All) 4171 (V 42), Juchisther Prasad v. Shanti Prasad Shukla	14

K. P. Singh, for Appellant; Bharatiji Agarwal, for Respondents.

JAGDISH SAHAI, J.:— This defendant's appeal has come to us on a reference made by our brothers W. Broome and G. C. Mathur.

2. The suit giving rise to this appeal was filed by the plaintiffs-respondents for the ejectment of the defendants from certain plots of agricultural land on the allegation that they (the plaintiffs-respondents) were the Sirdars of the plots in suit. It was alleged that about thirty years next preceding the date of the filing of the suit the ancestors of the plaintiffs-respondents had borrowed a sum of Rs. 200/- from the ancestors of the defendants and had executed an unregistered mortgage deed for the same and on the basis of that transaction the defendants' ancestors were put in possession over the land in suit. It has been pleaded that the entire mortgage debt has been satisfied through the receipt of profits of the disputed land by the ancestors of the defendants and thereafter the defendants themselves. Relief of rendition of account and delivery of possession was claimed by the plaintiffs.

3. The suit was contested by the defendants inter alia on the ground that they were sub-tenants of the plots in dispute by virtue of the provisions of U.P. Act XX of 1954 and had by the operation of law become Sirdars of the same.

4. The trial Court dismissed the suit. On appeal by the plaintiffs the first appellate Court decreed the suit, subject to the plaintiffs depositing a sum of Rs. 200/- on the finding that the amount of debt had not been satisfied from the usufruct.

5. The defendant appellant then filed the instant second appeal which came up for hearing before one of us (Yashodanandan, J.), who referred it to a larger Bench which referred it to us.

6. The sole question that requires consideration and that has been canvassed at the bar before us is whether the defendant-appellant is a mere licensee of the plots in dispute or he has become an Asami thereof.

7. We have heard Mr. K. P. Singh for the defendant-appellant and Mr. Bharatji Agarwal for the plaintiffs-respondents.

8. Section 21 (1) (d) of the U.P. Zamin-dari Abolition and Land Reforms Act (hereinafter referred to as the Act) reads:

"21(1). Notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as—

... ..

(d) a mortgagee in actual possession from a person belonging to any of the classes mentioned in clauses (b) to (e) of sub-section (1) of Section 18 or clauses (i) to (vii) and (ix), Section 19,

... .. shall be deemed to be an asami thereof."

9. Sri K. P. Singh has contended that the word "mortgagee" as occurring in clause (d) of Section 21 (1) of the Act must not be confined in its meaning to valid or legal mortgages only, but should also include cases in the nature of mortgages or akin to mortgages which, even though not valid, have been entered into as transactions of mortgages. Learned counsel relies upon Clause (iv) of Sec. 19 of the Act which reads:—

"19. All land, held or deemed to have been held on the date immediately preceding the date of vesting by any person

... .. as—

(iv) a hereditary tenant,

... .. shall, save in cases provided for in clause (d) of sub-section (1) of Section 18, be deemed to be settled by the State Government with such person, who shall,

... ..

(d) held as such by
(i) an occupancy tenant,
(ii) a hereditary tenant,
(iii) a tenant of patta
davami or istamarari
referred to in Sec. 17.

subject to the provisions of this Act, be entitled except as provided in sub-section (2) of Section 18, to take or retain possession as a Sirdar thereof."

It is significant to note that this provision does not require a hereditary tenant to possess the right of sale as is required by Section 18. Sri K. P. Singh contends that clause (d) of Section 21(1) of the Act should be read as "a mortgagee in actual possession from a person who is a hereditary tenant".

Learned counsel contends that under the provisions of the U. P. Tenancy Act, 1939 (hereinafter referred to as the 1939 Act) a hereditary tenant could not create a mortgage of his holding and if the legislature, even after knowing that legal position, has used the word "mortgagee" in relation to a transaction made by a hereditary tenant, it is obvious that the word "mortgagee" has been used in a loose sense so as to include even mortgages which are not valid in the eye of law.

10. On the other hand Mr. Bharatji Agarwal has forcefully contended that in the absence of the word "mortgage" or "mortgagor" or "mortgagee" having been defined in the Act, we must give to these terms the same meaning which they had in the Transfer of Property Act with the result that the expression "mortgagee" as used in clause (d) of Section 21(1) of the Act can only mean a person who is a mortgagee on the basis of a valid mortgage. Mr. Bharatji Agarwal submits that the Court must so interpret the word as to uphold only valid transactions and that normally a Court should discountenance transactions which are invalid in the eye of law. The argument in a general way can be considered to have some force, but it is well known that the Act has in several instances given protection even to trespassers or to persons whose only claim to the plots claimed by them is the entry of their names in respect thereof.

11. The Act is not a conventional legislation, but has taken in view practical and pragmatic considerations also.

12. We would have found force in the submissions of Sri Bharatji Agarwal if we had not been cognisant of the provisions of Section 18(1)(d) of the Act. That provision reads:—

"18(1). Subject to the provisions of Sections 10, 15, 16 and 17 all lands—

possessing the right to
transfer the holding by
sale.

It is clear that a hereditary tenant under the provisions of Section 18 of the Act must possess the right to transfer the holding by sale. No such restriction is imposed upon a hereditary tenant under Section 19 of the Act. The result that follows from this is that if a hereditary tenant who is not subject to the restrictions contained in clause (d) of Section 18 has made a mortgage, which is not valid, then the mortgagee would come to acquire rights under Section 21(1)(d) of the Act.

13. It is true that under the provisions of Act II of 1901 as also under the provisions of the Agra Tenancy Act, 1926 an occupancy tenant or a non-occupancy tenant (we are not concerned with exproprietary tenant) cannot transfer his holding with the result that he could not execute mortgage deeds or enter into transactions which resulted in the mortgage of the holding. This bar continued also under the provisions of the 1939 Act (See Section 33 of that Act). Reading sub-section (2) of Section 33 of the 1939 Act along with Section 251 of the same Act, Mr. Bharatji Agarwal contended that under certain circumstances a hereditary tenant could sell or mortgage his holding and therefore only mortgages by the persons who could so hold be saved under the provisions of sub-section (2) of Section 33 read with Section 251 of the 1939 Act. Section 251 of the 1939 Act does not deal with a voluntary transfer, but only with auction sales. Sub-sec. (2) of Section 33 of the 1939 Act no doubt permits transfers under certain circumstances, but having examined the language of clause (d) of Section 21(1) of the Act we are of the opinion that the word "mortgagee" has been used therein in a comprehensive or a loose sense and the expression is not confined only to valid mortgages. This view of ours is founded upon an analysis of the provisions of Sections 18 and 19 of the Act which we have made earlier in this judgment.

14. Learned counsel for the parties have placed reliance upon certain decisions in support of their respective contentions. Mr. K. P. Singh has placed reliance upon *Sukhnandan v. Board of Revenue*, 1968 All WR (HC) 182. Mr. Bharatji Agarwal has placed reliance upon *Har-khoo v. Bindeshwar*, 1964 RD 410, *Bodhan v. Bhundal Singh*, 1965 RD 23, *Jagat Narain v. Laljee*, 1965 All LJ 255—(AIR 1965 All 504), *Judhister Prasad v. Shanti Prasad Shukla*, AIR 1955 NUC (All) 4171, an unreported decision of *Rafeshwar Prasad and A. K. Kirty, JJ. in Buddhu Ahir v. Budhram Komhar*, F.A.F.O. No. 227 of 1968, D/- 9-12-1968 (All), *Sri Ram Sakal Singh v. Dy. Director of Consolidation*, 1968 RD 456 and *Hamid Hussain v. R. N. Mallah*, 1963 RD 288.

15. The main decision in favour of Mr. Bharatji Agarwal's contention is 1963 RD 288 (supra) where a Division Bench of this Court took the view that the word "mortgagee" means a person who is a mortgagee by virtue of a valid mortgage deed. That decision has been followed in other cases relied upon by Mr. Bharatji Agarwal. With great respect to the learned Judges who decided 1963 RD 288 (supra) we find ourselves in disagreement with the view that they have taken. We may point out that the provisions of Sections 18 and 19 of the Act were not brought to the notice of the learned Judges and the point that has been canvassed before us that a mortgage deed executed by a hereditary tenant though not valid in the eye of law has been accepted by the legislature in clause (d) of Section 21(1) of the Act was not raised before the learned Judges. Inasmuch as in the other cases on which Mr. Bharatji Agarwal has placed reliance this aspect of the matter was not placed, we are unable to agree with those decisions also.

16. Coming to *Sukhnandan's* case, 1968 All WR (HC) 182 (supra), we would like to say that we do not wish to base our decision only on the authority of that case. In the first place there was no categorical finding on the basis of the language of Section 21(1)(d) of the Act by Desai C. J. that even a person who has become a mortgagee by virtue of an invalid transaction of mortgage would be comprehended in the word "mortgagee" as used in clause (d) of Section 21(1) of the Act. Secondly Desai C. J. was considering whether or not a mistake apparent on the face of the record had been committed, when a contrary view was taken, in the order impugned before him.

17. For the reasons mentioned above we are of the opinion that in the instant case the defendant-appellant is an Asami and not a mere licensee of the plaintiffs-respondents. In that view of the matter the suit of the plaintiffs-respondents is bound to fail. We, therefore, set aside the decree passed by the first appellate Court and restore that of the trial Court, but in the circumstances of the case we direct the parties to bear their own costs.

18. We would like to add that the dismissal of the suit would not bar the plaintiffs-respondents, if so advised, from seeking any other remedy either for the recovery of a sum of Rs. 200/- or for an order or decree under Section 202 of the Act. Our decision rests on the circumstance that the suit was not maintainable.

Appeal allowed.

and proceedings other than revisional in respect of debts not existing on or before the notified date under Section 11 of the Act, pending in any Civil or Revenue Court involving the questions as set out in that section."

The matter was then placed before a Division Bench consisting of Satyanarayana Raju and Kumarayya JJ. The learned Judges thought that the matters involved important questions which should be decided by the Full Bench, and therefore referred the matter to a Full Bench.

44. Kumarayya, J., who spoke for the Full Bench, at the outset observed:

"The question proceeds on the assumption that the debts which are the subject-matter of execution proceeding or the debts which will not be in existence on the notified date i.e., 30th June, 1953. The correctness of this assumption, no doubt, has been challenged by Mr. R. V. Rama Rao, but since the whole case is not referred to us, the argument should not detain us."

The learned Judge then proceeded to answer the first question. Making a reference to the earlier Full Bench decision in 1958-1 Andh WR 387 = (AIR 1958 Andh Pra 361) (FB), the learned Judge observed:

"By this provision (Section 25 (1)) the position of the parties in pending legal proceedings has been equated to those who make a direct application under Section 11. But to come thus constructively within the ambit of Section 11, it is however necessary that the suit or other proceeding must relate to a debt in respect of which an application under Section 11 could be made to the Board. It is also necessary that it should be before the Court on the notified date for Section 11, contemplates an application before the notified date. Of course, if an application has been made to the Board under Section 11, subsequent filing of a suit or initiation of other proceedings in any Court will not affect the situation and such proceedings shall be transferred on the notice given by the Board. That in short seems to be the clear intendment of Section 25."

It was however argued that the expression "pending" occurring in Sec. 25 is of wider amplitude and covers all cases of debt whether incurred before or subsequent to the notified date. This contention was negatived. It was held:

"To attract this provision, therefore, it is essential that the debts should be such as can be dealt with by the Board under the provisions of the Act. Otherwise, the transfer would be of no avail. The requirement of an application under Section 11 to be necessarily made with due details of the debts before the notified date to the Board for taking cognizance of the matter, necessarily implies that debts subsequent to that date are not within the competence of the Board to be settled or scaled down. Such

limitation is consistent with the policy of an emergency measure which has for its object affording relief to the jagirdar-debtors to enable them to tide over the sudden and unexpected situation treated by the advent of the Regulations and to adjust themselves to the changed circumstances... The various provisions of the Act are replete with clear indications that the debts to be determined and scaled down by the Board are only such debts as were existing on the date of application under Section 11... Thus the entire scheme of the Act makes it abundantly clear that matters concerned with the debts prior to the date of application alone (which date, of course, cannot extend beyond the notified date under Section 11) are within the cognizance and competence of the Board. It follows that only cases relating to such debts and no other debts are liable to be transferred to it under Section 25 (1)." The learned Judge went on to observe:

"It follows therefore that in order to transfer a pending suit, it is necessary that the Board should be competent to deal with such questions in accordance with the Act. That is possible only when the case otherwise satisfies the requisites referred to above, to wit, that it is a pre-notification debt in respect of which the proceeding has been pending on the notified date."

45. It will be evident from the above said extracts that the Full Bench categorically found that the debts incurred after the notification prescribing the date before which application under Section 11 can be filed are not covered by the provisions of the said Act. That answer had to be given because the question itself was posed as to whether Section 25 applies to the pending suits, etc., in respect of debts not existing on or before the notified date. That question has been answered that the Act does not apply to such debt. If the question were to be as to whether the said Act applies to the debts incurred after the Act came into force, then the Full Bench had to consider that question and answer it. Since that question was not posed, it is natural that it was not answered. The Full Bench decision however substantially supports our conclusion at least to the extent that the debts incurred after the notified date are not governed by the provisions of the Act which as stated earlier are very much similar to the Jagirdars Debt Settlement Act. We have considered this question which directly arose in this case and have no hesitation in reaching the conclusion taking support from the Full Bench decision that the provisions of the Act do not apply to the debts incurred after the Act although they might have been incurred before the notified date. It will therefore not be correct to place reliance upon the Full Bench decision to support a proposition that although the Jagirdars Debt Settlement Act would not apply to debts incurred after the notified date, it would apply to debts after the commence-

ment of the Act but before the notified date. On the analogy and parity of reasons given by the Full Bench the debts incurred during that period also have necessarily to be excluded from the operation of the Act. In fact that position is clear from a decision of the Bombay High Court on which reliance was placed by the Full Bench, *Babibai Thakurji v. Fazluddin Usmanbhai*, I.R. (1954) Bom 535 = (AIR 1954 Bom 282). Chagla, C. J. who spoke for the Court, expressed himself thus:

"Section 19 (1) has been construed fairly often by this Court and what we have laid down is that only those suits are liable to be transferred which were pending at the date when an application for adjustment of debts could have been made under Section 4 (corresponding to Sec. 11). In other words, if a suit was filed after the time to make an application for adjustment of debts had expired such a suit would not be liable to transfer."

46. This decision makes it abundantly clear that the Act applies to the debts which were existing on the date when the Act came into force. An application for adjustment of such debts however can be made on or before the prescribed date. Suits and other proceedings pending on the date of the application actually filed or on the date when the application could have been filed, that is to say on or before the notified date, shall have to be transferred to the special Court because constructively the suits and other proceedings have been equated with an application filed either by the creditor or by the debtor under Section 4 for adjustment of debts. If no application under Section 4 is filed or no statement of account is furnished and no suit or other proceeding was pending on or before the notified date, Section 16 declares that the debts shall stand extinguished and it is obvious that any suit relating to an extinguished debt would be misconceived and consequently no question of transfer of such a suit can possibly arise.

47. What must necessarily follow from the abovesaid discussion is that the Full Bench accepts in principle the approach which we have made to this question and goes a long way in expressing the view which we have taken. Where it falls short of is that it does not decide as to whether the provisions of the Act are applicable to the debts incurred between the date when the Act came into force and the notified date. Whereas the Full Bench is silent on that matter, we have no shred of doubt that the provisions of the Act do not apply even to such debts.

48. Bearing in mind the principles enunciated above, if we look to the facts of the present case, it would be evident that since the debt was incurred for the first time on 18-10-1959, which date although was subsequent to the commencement of the Act

was before the notified date. This debt therefore is not governed by the provisions of the Act. In that view of the matter, no question of transfer of such a suit can arise. The conclusion of the lower Court therefore appears to us to be correct, although we have reached that conclusion (by) altogether a different route.

49. The revision petition therefore is dismissed with costs.

Petition dismissed.

AIR 1979 ANDHRA PRADESH 210
(V 57 C 39)

GOPAL RAO EKBOTE AND RAMA-
CHANDRA RAO, JJ.

Mohd. Abdus Samad, Petitioner v. Mahboobunnisa Begum, Respondent.

Civil Revn. Petn. No. 1216 of 1969 D/-
11-6-1969.

Civil P. C. (1008), O. 41, R. 5 (3) (c) — Rule is mandatory — What it provides is that order on application cannot be made unless security is filed and not that application itself would not be maintainable.

The language of sub-rule (3) is emphatic and imperative, which categorically lays down that no order for stay of execution shall be made unless the Court is satisfied that security has been given by the applicant for the due performance of a decree which may ultimately be binding upon him; in other words, the decree under appeal. This provision is couched in mandatory language and unless the Court finds that security has been furnished by the applicant, no order of stay of execution can be made under sub-rule (1) by the Appellate Court. AIR 1935 Mad 43 and AIR 1947 Nag 28, Rel. on. (Para 4)

This is far from saying that the application under O. 41, R. 5, Civil P. C., would not be maintainable unless security is filed. It is not that the application is not maintainable, but no order on any such application can be made by the Court before any such security is given. (Para 5)

Cases Referred: Chronological Paras

(1947) AIR 1947 Nag 28 (V 34) =

ILR (1948) Nag 49, Dadoo Balaji v. Kanhaiyalal Dhanaram

(1935) AIR 1935 Mad 43 (V 22) =

ILR 58 Mad 116, Sundaram Chettiar v. Valli Ammal

Mirza Munawar Ali Balgh, for Petitioner; S. Mazhar Hussain, for Respondent.

GOPAL RAO EKBOTE, J.: This revision petition arises out of an order passed by the First Additional Chief Judge, City Civil Court, Hyderabad, on 23-8-1967, in I. A. No. 545 of 1967 in A.S. No. 45 of 1967.

2. The necessary facts are that the respondent-plaintiff filed O.S. No. 8 of 1966 on the file of the Second Assistant Judge,

BM/JM/E429/69/RSK/D

City Civil Court, Hyderabad. It was alleged by her in the plaint that the defendant, her husband, had divorced her. She, therefore, sought to recover her meher, some jehaz, articles or their value and also maintenance amount for the period of Iddat. The defendant, who is the petitioner before us, contested the suit. The suit was ultimately decreed on 21-12-1966. The defendant thereupon preferred A. S. No. 45 of 1967. Along with the appeal, he filed I.A. No. 545 of 1967 under O. 41, R. 5, Civil P. C. He sought the execution of the decree to be stayed till the appeal was disposed of. This petition was resisted by the wife, who was the respondent in that appeal. Her contention was that since the husband has not furnished security as is required under O. 41, R. 5 (3) (c), Civil P. C., the petition was not maintainable. The learned Judge accepted this contention and held that the petition was not maintainable as the petitioner had not complied with the mandatory provisions of Order 41, R. 5 (3) (c), Civil P. C. Consequently, the petition was dismissed. It is this order that is now challenged in this revision petition.

3. The civil revision petition first came before Basi Reddy, J. (as he then was). By his order dated 21-2-1968 the learned Judge directed the C.R.P. to be posted before a Bench and that is how it has come before us.

4. Now, O. 41, R. 5, Civil P.C., relates to the stay of the execution of the decree by an appellate Court. In so far as it is relevant, it reads as follows:—

“(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from, except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may, for sufficient cause, order stay of execution of such decree, and may, when the appeal is against a preliminary decree stay, the making of the final decree in pursuance of the preliminary decree or the execution of any such final decree, if already made.

x x x x
x x x x

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

x x x x

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.”

A careful reading of sub-rule (1) and sub-rule (3) of Rule 5 of Order 41, Civil P.C., can leave no one in doubt that the appellant would not be entitled to have an order of stay without furnishing security for the due performance of the decree that may be ultimately binding upon him. The language of sub-rule (3) is emphatic and imperative, which categorically lays down that no order

for stay of execution shall be made unless the Court is satisfied that security has been given by the applicant for the due performance of a decree which may ultimately be binding upon him; in other words, the decree under appeal. This provision is couched in mandatory language and unless the Court finds that security has been furnished by the applicant, no order of stay of execution can be made under sub-rule (1) by the Appellate Court. This view is supported by the following decisions: Sundaram Chettiar v. Valli Ammal, AIR 1935 Mad 43 and Dadoo Balaji v. Kanhaialal Dhanaram, AIR 1947 Nag 26. It is thus clear that the Appellate Court without being satisfied that the security has been given as is required under sub-rule (3), clause (c) of the said rule will not be empowered to make an order for stay of the execution of the decree under sub-rule (1) of that Rule.

5. This is far from saying that the application under Order 41, Rule 5, Civil P.C., would not be maintainable unless security is filed. The application can be filed by the appellant under that rule. What the rule says is that before any order for the stay of execution is made, the Court ought to satisfy itself that proper security is given by the appellant. In other words, it is not that the application is not maintainable, but order on any such application can be made by the Court before any such security is given. The lower Court, therefore, in our view, went wrong in holding that the application itself was not maintainable. The lower Court could have directed the appellant to furnish the security as is required under Order 41, Rule 5 (3) (c), Civil P.C., before the application could be considered on its merits under that rule. No such opportunity was given to the appellant. Since we are of the opinion that the application cannot be summarily rejected on the ground that it is not maintainable, we would allow the revision petition, set aside the order of the Court below and direct it to give a reasonable opportunity to the petitioner to furnish security. After the security is furnished, it is open to the Court to consider the application filed under Order 41, Rule 5, Civil P.C., in the light of the objections raised by the decree-holder and decide it in accordance with law. In the circumstances of the case, however, we make no order as to costs.

Petition allowed.

AIR 1970 ANDHRA PRADESH 211
(V 57 C 31)

KUMARAYYA AND

MADHAVA REDDY, JJ.

Conugunta Subbarayudu, Petitioner v.
Eluri Brahmanandan and others, Respondents.

Civil Revn. Petn. No. 615 of 1963, D/-
6-8-1968, from order of Principal Sub.J.
Ongole, D/- 23-2-1963.

JL/KM/E419/68/LGC/M

(A) Civil P. C. (1908), S. 146, O. 22, R. 10 and O. 23, R. 3 — Scope of — Settlee pendente lite of one of items of suit properly not coming on record as party to suit — Application by settlee to be brought on record in appeal — On next day appellant and settlor filing compromise memo — Settlee can take benefit of S. 146 — Filing of compromise memo is no bar to entertaining application or inquiry into its merits — Application can be entertained under S. 146 notwithstanding that the truth and validity of settlement was disputed. (1951) 2 Mad LJ 26, Overruled.

The scope of Or. 22, R. 10, C. P. C. is not wide enough so as to permit a settlee during pendency of suit to apply to be impleaded as a party in the appeal, because the transfer was not effected pending that proceeding but prior thereto. But the settlee can take benefit of Section 146 and apply to be brought on record, for such a course is not prohibited by any other provision of the Code. Section 146 being a beneficent provision should be construed liberally so as to advance the cause of justice and not in a restricted or technical sense. The expression "claiming under" is wide enough to include cases of devolution and assignment mentioned in O. 22, R. 10. AIR 1958 SC 394 & AIR 1955 SC 376 Rel. on. Case law discussed. (Paras 8, 11)

The filing of compromise memo on the next day of making the application by settlee to be brought on record as a person interested in appeal by reason of settlement deed, is no bar to entertaining the application or inquiry into its merits. Filing of a compromise per se does not terminate the proceedings before the appellate Court. The petitioner who has filed his petition earlier than the compromise memo, has a right to object to the compromise and the Court has a duty to inquire into it once he is added as a party. Though addition as a party is discretionary with the Court, it is a discretion which is to be exercised judicially after duly considering the petition. The application of the settlee pendente lite in such a case is one under S. 146 and it would be entertained notwithstanding that the truth and validity of the settlement was disputed. AIR 1960 Andh Pra 32, Approved. AIR 1954 Mad 592 Foll. (1951) 2 Mad LJ 26, Overruled. Case law discussed. (Para 16)

(B) Civil P. C. (1908), S. 151, O. 1, R. 10, O. 22 R. 10 and O. 41, R. 20 — R. 20 is not exhaustive — Inherent powers can be exercised in adding parties to appeals.

Apart from the provisions of O. 41, R. 20 C. P. C. the appellate Court has inherent powers to permit parties to be added to appeals in suitable cases and the language of Rule 20 of Or. 41 is not

exclusive or exhaustive so as to deprive the appellate Court of the inherent powers in this behalf. When once it is clear that R. 20 of Or. 41 is not exhaustive of the powers of the appellate Court for impleading or adding parties to the appeal, certainly powers under Or. 1, R. 10 C. P. C. read with Section 107 (2) C. P. C., and under other appropriate provisions including Section 151 C. P. C. in proper cases can be availed of even in appeals. A transferee during the pendency of an appeal can be added as a party to the appeal under the express provisions of Or. 22, R. 10 C. P. C. That could not have been possible if Or. 41, R. 20 C. P. C. was intended to be exhaustive of the powers of the appellate Court. (Para 11)

Cases Referred: Chronological Paras

- (1960) AIR 1960 Andh Pra 32
(V 47) = (1958) 2 Andh WR 291,
Venkata Narasimha Raju v. Kot-
teboyina Yellamanda 2, 3, 15
(1959) AIR 1959 Punj 277 (V 46) =
ILR (1959) Punj 1066 (FB), Noti-
fied Area Committee, Buria v.
Gobind Ram Lachman Dass 11
(1958) AIR 1958 SC 394 (V 45) =
1958 SCJ 743, Sella Bala Dass
v. Nirmala Sundari Dass 10, 11
(1955) AIR 1955 SC 376 (V 42) =
1955 SCJ 371, Jugalkishore Saraf
v. Raw Cotton Co. Ltd. 11
(1954) AIR 1954 Mad 592 (V 41) =
1954-1 Mad LJ 530, Nanjammal
v. Eswaramurthi 14
(1951) 1951-2 Mad LJ 26, Doraikannu
Asari v. Nataraja Chetty 2, 3, 12,
13, 14, 15
(1941) AIR 1941 FC 16 (V 28) =
1940 FCR 110, United Provinces
v. Atiqah Begum 11
(1934) AIR 1934 Mad 337 (V 21) =
66 Mad LJ 517, Seethai Achi v.
Meyappa Chettiar 3, 13
(1932) AIR 1932 All 478 (V 19) =
1932 All LJ 650, Laraiti v. Shlam
Sunder Lal 12, 13
(1926) AIR 1926 Cal 173 (V 13) =
90 Ind Cas 267, Surendra v. Niten-
dra 13
(1926) AIR 1926 Mad 341 (V 13) =
50 Mad LJ 59, Sethupathi v.
Secy. of State 12, 13
(1924) AIR 1924 Cal 188 (V 11) =
27 Cal WN 755, Lakshan Chunder
v. Nikunjamonil Dass 12, 1:
(1919) AIR 1919 Cal 323 (V 6) =
29 Cal LJ 362, Enday v. Binodini 1:
(1919) AIR 1919 Mad 755 (2)
(V 6) = ILR 41 Mad 510, Sitarama-
swami v. Lakshmi Narasimha 11

M. B. Ramasarama, for Petitioner; R.
V. Vidyasagar, for Respondent No. 1.

KUMARAYYA, J.: This petition which, on reference, is before us raises a short point, whether a settlee pendente lite of one of the items of suit property can be added as a party to an appeal brought by the plaintiff, as a person interested in the result thereof.

2. It may be expedient to make a brief statement of facts which are in a narrow compass. Gonugunta Subbarayudu (petitioner-plaintiff) laid an action in the year 1959 for partition of joint family properties against his brother Srisailam, his mother Viramma, and two other persons, alienees of items 5 of the suit property. The brother did not survive long. He died leaving his mother as his only heir, who had already claimed in the suit that items 1 to 6 of the suit schedule property constituted her separate properties and hence could not be made available for partition. Her claim eventually was accepted but only in relation to item 1 and also item 6, which she had already settled on May 17, 1960, on her daughter's son, Eluri Brahmanandam. The settlee did not choose to come on record as a party to the suit. The decision in the suit went favourable to his interest. The plaintiff preferred his appeal in 1961. Some time thereafter the settlee thought it necessary in his interest to come on record. On April 6, 1962, he accordingly made an application to be brought on record as a person interested in the appeal by reason of the settlement deed in his favour. On the following day i.e. on April 7, 1962, the appellant (plaintiff) and the settlor (2nd defendant) filed a compromise memo wherein the latter gave up her claim to item 6 as her separate property. Then both of them opposed the petition of the settlee on the ground that the settlement relied on was vitiated by fraud and undue influence and was not binding having been obtained at a time when the settlor was highly grief-stricken on account of the demise of her son and was not in a position to understand the nature of the transaction. The Principal Subordinate Judge nevertheless allowed the application following the dictum in *Venkata Narasimha Raju v. Katteboyina Yellamanda*, (1958) 2 Andh WR 291 = (AIR 1960 Andh Pra 32) in preference to that in *Doraikannu Asari v. Nataraja Chetty*, (1951) 2 Mad LJ 26 and directed that he be added as a party to the appeal. Aggrieved by that order the appellant has filed this revision petition.

3. It is the conflict in the above decisions that has given occasion to reference of the matter to this Bench. Perhaps the conflict would not have arisen if the Divisional Bench case in *Seethai Achi v. Meyappa Chettiar* 66 MLJ 517, which was followed in (1958) 2 Andh WR 291 =

(AIR 1960 Andh Pra 32) (supra), were cited before the learned Judge who decided 1951-2 Mad LJ 26 (supra). Curiously enough, of the two decisions in question, the earlier was not brought to the notice of the learned Judge who decided the later case. Be that what it may, the question now for consideration is whether the Principal Subordinate Judge had jurisdiction to add Eluri Brahmanandam as a party to the appeal.

4. It must always be borne in mind that addition of parties to a pending proceeding is not a matter of substantive right but only one of procedure. Procedure being handmaid of justice, rules of procedure are always designed to advance the cause and subserve the ends of justice. The right application thereof must necessarily rest on the discretion of the Court which has to be exercised on principles of equity, justice and good conscience of the Court having regard to the facts and circumstances of each case. There are several provisions made in the Civil Procedure Code for the addition of parties in various contingencies and at various stages. We may refer in this behalf to some of the provisions of the Civil Procedure Code contained in Or. 1 R. 10, O. 22, Rules 10 to 12, O. 41, R. 20 and Section 146 C. P. C. The policy underlying these provisions is that the parties necessary to the very constitution of the suit i.e., persons in whose absence the suit cannot be determined or persons whose presence is essential in order to effectively and completely adjudicate upon and settle all questions involved in the suit or who will be prejudiced by their not being joined as parties may, consistent with the principles of equity and justice, be added as parties. Thus, it all turns upon facts and circumstances of each case and demands of equity and justice having regard to the relevant procedural rule.

5. We, therefore, propose to notice whether the third party is interested in the result of the appeal, whether he will be prejudiced by his not being joined as a party, whether the provisions of the Code permit his joinder and circumstances of the case warrant the same.

6. Eluri Brahmanandam, who seeks to be added as a party, is no other than the 2nd defendant's daughter's son. The settlement deed, on the strength of which he has made his application, was registered on May 17, 1960, when the suit for partition was still pending. The subject-matter of settlement is item 6 of the plaint schedule property, which was claimed in the suit to be the separate property of the settlor and was eventually found so. It is plain the transfer was pendente lite and the right of the settlee was therefore governed by the provisions

of Section 52 of the Transfer of Property Act, which reads thus:

"During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose.

Explanation: For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

7. It is manifest from the above provision that transfer of right or interest in the suit property effected by any of the parties to a suit during the pendency of the suit or proceeding, without the authority of the Court, shall not defeat the object or prevail over the result of that suit or proceeding. The case would be different if the suit or proceeding, during the pendency of which the transfer was effected, is collusive. No such limitation would then arise. It is also manifest that this provision in order to remove all uncertainty as to duration of the limitations placed on the right of the transferee, determines in no uncertain terms the duration of the suit or proceeding in the Explanation to that provision.

8. It is therefore clear that the settlement in favour of Eluri Brahmanandan, which was effected during the pendency of the suit, by reason of Section 52 of the Transfer of Property Act, was subject to the final result of the suit. Bound as he was by the result of the suit it was open to the settlor to come on record under O. 22, R. 10 C. P. C. with the leave of the Court, at any time till the final decree in the partition suit is passed and take part in the proceedings safeguarding the interests of the settlor under whom he claims title to the particular property. He did not apply to the trial Court to be made a party to the suit. He allowed the suit to continue as ever

against his settlor alone and eventually a preliminary decree was passed, which was favourable to his interests. Obviously enough, he was entitled to the benefit thereof. There was no occasion for him therefore to carry the matter in appeal as a person claiming under the settlor. After the aggrieved party, i.e. the plaintiff, had gone in appeal, the dispute with regard to the right to the particular property was again at large. Thus, he was interested in the result of the appeal for the right that he got in the settled property was subject to the result of that appeal as well. The scope of O. 22, Rule 10, C. P. C. is not wide enough so as to permit him to apply to be impleaded as a party in the appeal, because the transfer was not effected pending that proceeding but prior thereof. Nor does Order 22, Rule 11, C. P. C. which provides that in the application of O. 22, to appeals, so far as may be, the word 'suit' shall be held to include an appeal, can confer that right on him. But that does not mean that bound as he is by the result of the appeal, he is left without any remedy of safeguarding his interests. We have already noticed that in the interests of justice, the Civil Procedure Code has sought to make provision in relation to various contingencies. We have, therefore, to examine what is the relevant provision applicable to this contingency. Order 1, Rule 10 and Section 146 are some of the other provisions whereunder third parties may come on record. Order 1, Rule 10 applies to suit but read with Section 107 (2), C. P. C. may even be applicable to appeals:

9. Section 146, C. P. C., reads thus:—

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him".

10. Two conditions are to be fulfilled before a proceeding be taken or an application be made by or against any person under Section 146, C. P. C. It is firstly essential that the Civil Procedure Code does not provide otherwise in any of its provisions. Then again, the person who seeks to make an application must be claiming under one who could make such application. If these two requirements are satisfied, the third party can apply for being brought on record in order that the appeal be continued against him. As declared by the Supreme Court in *Saila Bala Dassi v. Nirmala Sundari Dassi*, 1958 SCJ 743 at p. 746 (AIR 1958 SC 394 at p. 397), Section 146 being a beneficial provision should be

construed liberally so as to advance the cause of justice and not in a restricted or technical sense. There is little doubt that the settlor was a necessary party to the appeal. The settlee in relation to one of the suit items is her representative in interest. As such he claims that item of property under her. Under the provisions of Section 146, he can make an application to be brought on record so that the appeal may be continued against him. The only further requisite condition for the exercise of such a right is that the Code should not provide otherwise. The question that would arise then is whether any provision in the Code is expressly against or inconsistent with this procedural privilege. In this connection the only provision that requires to be examined or considered in that behalf is Order 41, Rule 20, C. P. C. It reads thus:

"Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent".

11. This provision is concerned with a party to the suit who was not made a party to the appeal though interested in the result of the appeal. The Court then in exercise of its discretion may direct that he be made a respondent. Cases where the party sought to be impleaded in the appeal was not *eo nomine* a party to the suit are outside the purview of this provision. So also are the cases where persons seek to be added as co-appellants. Indubitably the rule contained therein is based on the salutary principle that no person should be prejudiced by modification made behind his back in the decree on appeal. That rule being of universal application is wide in its scope and is not limited to the language of this provision. This provision having regard to its language being limited to only certain contingency, does not appear to be exclusive or exhaustive of the powers of the appellate Court in relation to appeals before it. Indeed there has been some divergence of views in this behalf. The conflict of decisions between the High Courts of Calcutta and Patna on one hand and the High Courts of Allahabad, Bombay, Lahore and Rangoon on the other, seems to have been set at rest by the decision of the Federal Court in *United Provinces v. Atiq Begum*, AIR 1941 FC 16. A Full Bench of the Punjab High Court in *Notified Area Committee Buria v. Gobind Ram Lachhman Dass*, AIR 1959 Punj 277 (FB) has held inter

alia that apart from the provisions of Order 41, Rule 20, C. P. C. the appellate Court has inherent powers to permit parties to be added to appeals in suitable cases and the language of Rule 20 of O. 41, is not exclusive or exhaustive so as to deprive the appellate Court of the inherent powers in this behalf. When once it is clear that Rule 20 of Order 41 is not exhaustive of the powers of the appellate Court for impleading or adding parties to the appeal, certainly powers under Order 1, Rule 10, C. P. C. read with Section 107 (2), C. P. C., and under other appropriate provisions including Section 151, C. P. C., in proper cases can be availed of even in appeals. A transferee during the pendency of an appeal can be added as a party to the appeal under the express provisions of Order 22, Rule 10, C. P. C. That could not have been possible if Order 41, R. 20 C. P. C. was intended to be exhaustive of the powers of the appellate Court. It is obvious that a person who was not *eo nomine* a party to the suit also can be added as a party to the appeal under the provisions of the Code. In other words, the Code permits such addition of parties. The transferee can, therefore, take benefit of Section 146 and apply to be brought on record, for such a course is not prohibited by any other provision of the Code.

In fact, in 1958 SCJ 743 = (AIR 1958 SC 394), where it was contended on behalf of the appellant that the application made to the appellate Court under Order 22, Rule 10, C. P. C. was unsustainable as the transfer in favour of the applicant had been made prior to the filing of the appeal and not during its pendency, the Supreme Court, having accepted this contention, observed that the application filed by the appellant fell within Section 146, C.P.C. and she was entitled to be brought on record under that Section. It is obvious that the appellant before the Supreme Court was not a party to the suit even though the transfer was made pending suit. The application was made pending appeal. Relying on *Sitaramaswami v. Lakshmi Narasimha*, ILR 41 Mad 510 = (AIR 1919 Mad 755 (2)), it was held that appeal was a proceeding for the purpose of the section. It was also held referring to the dictum in ILR 41 Mad 510 = (AIR 1919 Mad 755 (2)) (*supra*) which was approved in *Jugalkishore Saraf v. Raw Cotton Co. Ltd.*, 1955 SCJ 371 = (AIR 1955 SC 376), that the expression "claiming under" is wide enough to include cases of devolution and assignment mentioned in Order 22, Rule 10, C. P. C. In view of this high authority it is clear that the application of the settlee to be brought on record is maintainable under

Section 146, C. P. C. and the Court below has committed no error of law in entertaining this petition and granting the same.

12. It was then argued that inasmuch as the plaintiff (appellant) and the 2nd defendant (settler) had filed a compromise memo adjusting their claims the Court had no power to consider the application of the third party and bring him on record as Rule 3 of Order 23 is mandatory in character and enjoins on the Court the duty of recording the compromise and passing a decree in terms thereof. In support of this contention reliance has been placed on (1951) 2 Mad LJ 26. That was a case where the transferee of the suit property from one of the parties to the suit between the date of the decree and the filing of the appeal to the District Court by the aggrieved party, had applied to be brought on record a day after the compromise memo filed by the parties to the appeal was recorded though the decree in terms was not passed immediately. The application of the transferee was resisted by all the parties to the appeal on the ground that the assignment was not true and further it was vitiated by fraud and collusion. The alienee was nevertheless directed to be impleaded as a party to the appeal. When the matter came up in appeal Chandra Reddy J. (as he then was) relying *inter alia* on the decisions in *Laraitl v. Shiamsunderlal*, AIR 1932 All 478 and *Setupathi v. Secy. of State*, (1925) 50 Mad LJ 59 - AIR 1926 Mad 341 and distinguishing the ruling in *Lakshan Chunder v. Nikunjamoni Dass*, AIR 1924 Cal 183 allowed the appeal and held that the alienee could not be impleaded as a party to the appeal after the compromise memo was recorded though his interests might be prejudiced by the compromise reached between the parties. It was also observed that the inquiry into the genuineness and validity of the assignment was foreign to the scope of the appeal and could not, therefore, be gone into.

13. Of course, in the case with which we are concerned, the memo of compromise was filed a day later and not earlier than the date of the petition of the alienee. It is, therefore, obvious that on the date of the application the question whether there was a compromise in the appeal did not fall for consideration. It was subsequent thereto that the compromise memo was filed. No action was taken thereon by the Court. Having regard to the provisions of Rule 3 of Order 23, it is only where it is proved to the satisfaction of the Court that the suit or appeal has been adjusted by a lawful agreement or compromise that

the Court has to record the said compromise. In other words, whether the compromise memo is lawful or not cannot be a mere matter of assumption. It is left to the satisfaction and decision of the Court after due inquiry, if need be. So then the filing of the memo by itself does not warrant the recording of the compromise; much less passing a decree in terms of the compromise. There is still a long way off between the two stages. The petition filed earlier by the third party must necessarily receive prior consideration. The right to apply implies a right to have an adjudication on the application, for otherwise the right would be merely illusory or nugatory. Of course, the granting of leave by the Court for addition of the party is discretionary with the Court but it is a discretion which is to be exercised judicially after due consideration of all the circumstances of the case. It cannot be rejected in limine without consideration of the circumstances simply because a compromise memo has been filed subsequently. Nor can the petition be rejected simply on the ground that the transferor had denied the genuineness of the assignment or the parties' alleged fraud or collusion.

The language of Order 22, Rule 10 places no such limitation that for its application, assignment, creation or devolution referred to therein should be an admitted or undisputed fact. It is always open to the Court, as held in *Enday Ali v. Binodini*, (1910) 29 Cal LJ 362 = (AIR 1919 Cal 323) and *Surendra v. Nityendra* AIR 1926 Cal 173, to enquire into such dispute and pass the necessary order. The dictum of a Division Bench of the Madras High Court, consisting of *Sundaram Chetty and Pandrang Row, JJ.* in 66 Mad LJ 517 = (AIR 1934 Mad 337) also is to the same effect. Unfortunately that case was not brought to the notice of the learned Judge who decided, (1951) 2 Mad LJ 26. The rulings cited in the later case, referred to above, were considered by the said Division Bench. The learned Judges followed the decision in AIR 1924 Cal 183 (supra) in preference to the dictum in 50 Mad LJ 59 = (AIR 1926 Mad 341) (supra) and AIR 1932 All 478 (supra). In the above-mentioned Calcutta case even after the parties actually on record had reported the terms of settlement and the Court ordered that a decree should be drawn up accordingly, an assignee was added under Order 22, Rule 10, C. P. C. to enable him to impeach the settlement. On the question whether Order 22, Rule 10 is confined only to cases of undisputed assignment, creation or devolution of interest, the Division Bench, following the view taken in 29 Cal LJ 362 = (AIR 1919 Cal

323) and Surendra v. Nitendra, AIR 1926 Cal 173, observed that no such limitation is contained in that order. We believe that the view expressed in (1951) 2 Mad LJ 26 would not have been the same had this Divisional Bench case been brought to the notice of the learned Judge who decided that case.

14. In Nanjammal v. Eshwaramurthi, (1954) 1 Mad LJ 530 = (AIR 1954 Mad 592) a Divisional Bench of the Madras High Court, consisting of Satyanarayana Rao and Balakrishna Ayyar, JJ., held that the transferee pendente lite on being brought on record as a party to the litigation, is not bound by the compromise between his transferor and the opposite party and is entitled to object to a decree being passed in terms of such a compromise. If the application to be brought on record is filed prior to the filing of the compromise memo, his right to object can in no way be defeated. Nor can the filing of compromise memo per se terminate the proceeding. It was also held that merely because the settlement deed is disputed by one party or the other the jurisdiction of the Court to inquire into the truth or genuineness of the deed is not taken away, nor can such inquiry be deemed to be foreign to the scope of appeal in which application is made. The learned Judges then practically overruled the decision in (1951) 2 Mad LJ 26 (supra) as being erroneous in law and referred to earlier cases in support of their dicta.

15. The view taken by this Court in (1958) 2 Andh WR 291 = (AIR 1960 Andh Pra 32) accords with the settled view of the Madras High Court already discussed above. It has been held there that till a compromise decree is passed under O. 23, Rule 3, C. P. C., the litigation cannot be regarded to have terminated and an alienee pendente lite is entitled to object to a decree being passed under Order 23, Rule 3 in terms of compromise between the alienor and the opposite party after he is brought on record. With due deference to the learned Judge, we are of the view that (1951) 2 Mad LJ 26 (supra) was not correctly decided and that (1958) 2 Andh WR 291 = (AIR 1960 Andh Pra 32) (supra), if we may say so with respect, correctly states the law consistent with the view taken by the earlier Division Benches on the points discussed above.

16. It follows from the above discussion that the application of the settlee pendente lite was one under Section 146, C. P. C., that it could be entertained notwithstanding that the truth and validity of the settlement was disputed, that the inquiry into the truth and validity of the settlement cannot be deemed to be foreign to the scope of

the appeal, that filing of a compromise memo was no bar to entertaining the application or inquiry into its merits, that filing of a compromise per se does not terminate the proceedings before the appellate Court, that the petitioner who has filed his petition earlier than the compromise memo, has a right to object to the compromise and the Court has a duty to inquire into it once he is added as a party, that though addition as a party is discretionary with the Court, it is a discretion which is to be exercised judicially after duly considering the petition that the Court below did not err in entertaining the petition or deciding it on merits for the petitioner being made a party.

17. This Revision Petition, therefore, fails. It is dismissed with costs.

Petition dismissed.

AIR 1970 ANDHRA PRADESH 217

(V 57 C 32)

OBUL REDDI AND

MADHAVA REDDY, JJ.

G. Raghavareddi, Appellant v. Government of A. P. Home (Transport II) Department by its Secretary, Hyderabad and others, Respondents.

Writ Appeal No. 215 of 1966, D/- 23-9-1969, against order of High Court in Writ Petn. No. 1732 of 1966, D/- 1-12-1966.

(A) A. P. Motor Vehicles Rules (1969), R. 212 (1) (iv) (a) — Grant of stage carriage permit — Applicant must have place of business at either terminus of the route applied for — Whether applicant has such place of business — Relevant date to be taken into consideration is date on which application is made — Rule does not contemplate that applicant should have a valid permit on date when application is considered by Regional Transport Authority. Writ Petn. No. 1732 of 1966 D/- 1-12-1966 (A. P.), Reversed.

(Paras 5, 6)

(B) Constitution of India, Art. 226 — Writ of certiorari — Jurisdiction of High Court to issue — Decision of competent authorities based on misconstruction of provision of law and not on erroneous finding of fact — Writ can be issued. AIR 1964 SC 477 Rel. on. (Paras 10, 11)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 477 (V 51) =

1964-5 SCR 64, Syed Yakoob v.

Radhakrishnan

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K. Amareswari and P. Rajagopalachari, for Petitioner; 4th Govt. Pleader, for Respondents Nos. 1 to 3; P. Babul Reddy, for Respondent No. 4.

AN/BN/A337/70/YPB/M

OBUL REDDI, J.: The question involved in this writ appeal is whether the appellant was having a place of business at Venkatagiri one of the termini of the route applied for.

2. The facts necessary for determination of this question are these: In June 1964, the appellant was one of the applicants for stage carriage permit on the route Balireddipalem to Venkatagiri in Nellore district. The Regional Transport Authority, Nellore at its meeting held on 2-11-1964, after considering the applications of all the applicants before it, granted a stage-carriage permit to Badri Rajalah the 4th respondent herein. That order was taken up in appeal to the appellate authority by four of the unsuccessful applicants among whom was the appellant. The appellate authority, in its proceedings A No. 287/A1/64, dated 7-4-1966, set aside the order of the Regional Transport Authority and granted the permit to the appellant herein. It is against that order that the matter was carried in revision to the Government and the Government set aside the order of the appellate authority and granted the permit to Bhadri Rajalah, the 4th respondent herein, restoring the order of the Regional Transport Authority. It is against this order passed by the Government in revision that the appellant filed the writ petition on the ground that the Government misconstrued the scope of Rule 212 (1) (iv) (a) of the Motor Vehicles Rules, Narasimham, J. dismissed the writ petition on the ground that "the place of business in the context must be understood as the place of bus business which, in its very nature, depended on the petitioner having a valid permit on that date to run a bus or buses". According to the learned Judge, the material date for considering whether the appellant had a place of business or not is the date on which the Regional Transport Authority took up the applications for consideration and on that date i.e. 2-11-1964, the appellant did not have any permits and, therefore, it cannot be said that he had a place of business at Venkatagiri, although he might have run buses previous to the date when the Regional Transport Authority took up the applications for consideration.

3. Srimathi Amareswari, the learned counsel appearing for the appellant, contended that all that is required under the relevant rule (Rule 212(1)(iv)(a)) is that the applicant must have a place of business or residence at either terminus of the route applied for and that the appellant had his place of business at Venkatagiri, one of the termini, as evidenced by the certificate issued by the Tahsildar, Venkatagiri, and that the fact that, on the date (2-11-1964) when the Regional

Transport Authority took up the applications for consideration, the appellant did not have a valid stage carriage permit, is not at all relevant for deciding the question whether the appellant had his place of business at either terminus of the route applied for.

We may now notice the relevant rule, Rule 212(1)(iv)(a):

"Sector of residential qualification.— (1) Four marks may be awarded to the applicant who has his place of business or residence at either terminus of the route applied for, and two marks may be awarded to the applicant who resides on the route (but not at either terminus) or within 8 kilometres from the route."

4. In order to entitle the applicant to four marks, he must have either residence at either terminus of the route applied for or he must have place of business at either of the points i.e., the starting point or the terminus. It was not the case of the 4th respondent or the lower authorities that the appellant did not have his place of business at Venkatagiri. They only proceeded on the footing that, on the relevant date when his application came up for consideration, he had no running business and not that Venkatagiri was not his place of business. The appellant applied for the route on 16-6-1964 giving his address as "Bazar Street, Venkatagiri Town, Nellore District." In support of his case that his place of business is Venkatagiri he obtained a certificate from the Tahsildar, Venkatagiri dated 24-7-1964. This certificate reads:

"Certified that Sri Gudur Raghava Reddi (the appellant) of Jayampu village is running an office and bus-shed at No. 13-1-16 Velampalem of Venkatagiri Town from 16-10-63 for the bus A. P. G. No. 4147 which was running from Venkatagiri to Kalahasti and back".

5. This certificate, as may be seen from the date, was issued subsequent to the date of the application of the appellant and before the Regional Transport Authority took up the matter of granting a stage-carriage permit on the route in question Balireddipalem to Venkatagiri, for consideration. So what is required under the said rule is that the applicant must have a place of business at either terminus of the route applied for. So, the relevant date to be taken into consideration as to whether an applicant had a place of business at either terminus of the route applied for is the date on which the application is made for the grant of a stage carriage permit. The rule, as we read it, does not require that, on the date when the applications came to be considered by the Regional Transport Authority, the applicant must be

actually holding any stage carriage permit. It is not in dispute that the appellant had a temporary permit till 13-9-1964 on the route Nellore to Tirupathi and that he was again granted a stage carriage permit on 24-12-64. The certificate issued by the Tehsildar shows that on 24-7-64 he was running a bus under a permit between Venkatagiri and Kalahasti and back. Before the expiry of the temporary permit and before the expiry of the permit which enabled A. P. G. No. 4147 to ply between Venkatagiri and Kalahasti, the appellant had made the application in respect of the route in question.

6. The learned Judge, Narasimham, J., was of the view that the place of business must mean that, on the date when the Regional Transport Authority took up the subject of granting a stage carriage permit for consideration, an applicant must have had a valid permit. We are unable to agree with the learned Judge that the rule in question is capable of such construction. The only dispute before the lower authorities was whether, on the relevant date when the matter came up for consideration by the Regional Transport Authority, the appellant had a valid permit so as to say that he had a place of business at either termini and not that he had no place of business at Venkatagiri one of the termini. All that is required under the rule is that he must have a place of business and not that he must have a valid permit so as to call his office as a place of business on the date when the matter came up for consideration by the Regional Transport Authority.

7. Mr. Babul Reddy, the learned counsel appearing for the 4th respondent, strenuously contended that, in exercise of this Court's extraordinary jurisdiction under Article 226 of the Constitution, it ought not to interfere unless the authorities below act wholly without jurisdiction or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record and such act, omission, error, or excess has resulted in manifest injustice. According to Mr. Babul Reddy, it is on appreciation of the material placed before the lower authorities that they came to the conclusion that the appellant did not have a place of business at Venkatagiri so as to entitle him to four marks and that being a finding of fact, this Court cannot interfere with that finding, even if, on the material placed, it may be possible for us to come to a different conclusion.

8. The question before us is not whether the conclusion reached by the au-

thorities below is one of fact, but whether the construction given by Narasimham, J., to the words "place of business" is a proper construction. The relevant portion of the learned Judge's order may, therefore, be noticed:

"The material date is the date when the matter of issuing the permit was considered by the Regional Transport Authority namely 2-11-1964. If, so, it cannot be said that the petitioner had a business of running the bus at the material time. He might have run buses previously. The place of business in the context must be understood as the place of business which, in its very nature, depended on the petitioner having valid permit on that date to run a bus or buses."

9. The rule does not, as already pointed out, contemplate that the appellant should have a running business at the time of the consideration of the applications by the Regional Transport Authority. All that is required is that he must have a place of business at either termini of the route applied for and it is not in dispute that, though, on 2-11-1964 when the subject of granting a stage carriage permit came up for consideration, the appellant did not have a valid permit to ply a bus, he still had his place of business at Venkatagiri. Whether, on that date when the Regional Transport Authority took up the matter for consideration, the appellant had a permit to run a bus or not, is not relevant for determining the question whether the appellant had his place of business at either termini of the route applied for. Since, indisputably, the appellant had his place of business at Venkatagiri, the terminus of the route applied for, he would be entitled to four marks under the rule.

10. Mr. Babul Reddy relied upon the decision of the Supreme Court in Syed Yakoob v. Radhakrishnan, AIR 1964 SC 477 to impress upon us that a writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals and is not meant to interfere with decisions on questions of fact. As already pointed out by us, it is not a case where we are seeking to reverse the finding of fact, but where the scope of the provision has been misconstrued by the authorities below and the learned Judge. As has been pointed out by Gajendragadkar, J. (as he then was) in the same decision:

"Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious mis-interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the

said conclusion can be corrected by a writ of certiorari.

11. We, therefore, set aside the order under appeal and quash the order of the State Government in G. O. Ms. No. 2214, dated 10-10-1966 reversing the order of the appellate authority.

12. In the result, the writ appeal is allowed with costs. Advocate's fee Rs. 100.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 220

(V 57 C 33)

SAMBASIVA RAO AND
KUPPUSWAMI JJ.

The Motor Workers Union by its Secretary, Petitioner v. Rayapwaddi Apparao and others, Respondents.

Writ Appeal No. 125 of 1966, D/-13-8-1969, against order of Gopalakrishna Nair J. in W. P. No. 212 of 1964 D/- 7-4-1966.

Motor Vehicles Act (1939), S. 64A — Andhra Pradesh Motor Vehicles Rules, (1964), R. 195(1) — Power of Government to correct orders and proceedings of lower authorities — Filing of unmaintainable application by aggrieved party does not fetter Government's power to act suo motu — Use of word "or" between 'of its own motion' and 'on application made to it' shows that Government can act in either case — Rule 195(1) only prescribes limitation for filing of petition by aggrieved party.

There is nothing in Section 64-A or in Rule 195, which prevents the Government from taking suo motu action, when it comes to know of a defective order or proceeding of a lower authority, through a petition filed by an aggrieved party though it is not maintainable on account of bar of limitation or is otherwise irregular. Obviously, the main intention of the legislature is to confer on the Government power to correct orders and proceedings of the lower authorities and officers. The power is conferred on the Government and for the exercise of that power no limitation is prescribed. What Rule 195(1) imposes is only a limit on the aggrieved parties' right to file a petition. It does not in any way interfere with or restrict the power of the Government to correct an incorrect order of a lower authority. If the petition filed by the aggrieved party is not maintainable for any reason, it could only mean that there is no application made to the Government. Such a situation cannot be worse than there being no application at all. The filing of an unmaintainable application by an aggrieved party cannot alter the situa-

tion and take away the power of the Government to act suo motu. After all, the application which is irregular and not maintainable for some reason or other could be a source of knowledge for the Government of the incorrect order. Once it comes to know of an order, either through the application of an aggrieved party or in some other way, the Government can exercise its power suo motu.

(Para 7)

The absence of any period of limitation for exercise of suo motu power by the Government is very significant and revealing. That can lead to the only inference that even if the right of an aggrieved party to file an application before it is time barred, the Government can none the less, proceed in the matter suo motu.

(Para 9)

Moreover, S. 64-A uses the word 'or' between 'of its own motion' and 'on application made to it' which shows that the Government can act in either case and set right the order or proceeding. If the latter method is not available, the first one is certainly open to the Government. The use of the word 'or' certainly imports into the section the meaning 'that the Government's power to correct orders covers each of the two contingencies viz., 'acting on its own motion' or 'on application made to it' by an aggrieved person. To argue that the existence of one contingency excludes the other is clearly violating the meaning and intention of the section. It can therefore be said that even if an application is filed before the Government which is not maintainable on account of bar of limitation or for some other reason, the Government nevertheless continues to have the power to act suo motu. AIR 1955 Mad 660 and AIR 1962 SC 1135 and AIR 1964 SC 264, Rel. on.

(Paras 8, 9)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 SC 264 (V 51) = | |
| 1964 (1) Cri LJ 156, Afzal Ullah v. State of U. P. | 13 |
| (1962) AIR 1962 SC 1135 (V 49) = | |
| 1962 Supp (1) SCR 728, Nilkanth Prasad v. State of Bihar | 12 |
| (1955) AIR 1955 Mad 660 (V 42) = | |
| JLR (1956) Mad 498, A. M. Transport v. State of Madras | 12 |
| D. V. Reddi Pantulu, for Appellant; C. V. Subba Rao, for P. Ramachandra Rao, for Respondent No. 1; 3rd Govt. Pleader for Respondents Nos. 2 and 3. | |

SAMBASIVA RAO J.: This Writ Appeal is directed against the order of Gopalakrishna Nair, J. in W. P. No. 212 of 1964. The third respondent in the writ petition is the Appellant.

2. The dispute in the appeal relates to the permit of a stage carriage MDV 1947 which was subsequently renumbered as

A. P. V. 482, which belonged to the Motor Works Union of Bheemunipatnam in Visakhapatnam District, which is the third respondent appellant. One Babulal, claiming to be a member of the Union, purported to have sold the vehicle to the first respondent in the appeal (petitioner in the writ petition). The first respondent and a person by name J. V. Ramanaiah, who purported to be the Secretary of the Union filed in 1958, a joint application to the Regional Transport Authority, Visakhapatnam, for transfer of the stage carriage to the 1st respondent (the petitioner). That application was notified by the Regional Transport Authority calling for objections. The appellant Union, represented by its Secretary, K. Ramanaiah, (different from J. V. Ramanaiah) who signed the Joint application for transfer filed its objections two days beyond time prescribed for filing the objections. The objections raised are Babulal had no right to sell the stage carriage belonging to the Union, that J. V. Ramanaiah had no locus standi or any capacity to sign the transfer application on behalf of the Union, as he had been removed from the post of Secretary on 15-2-1952, and removed from the membership of the Union itself on 30th of July, 1952, i.e., years before the application for transfer was filed. Since the objections were filed two days late, the Regional Transport Authority transferred the vehicle to the first respondent.

Felt aggrieved by this order recognising the transfer, the Union represented by its Secretary, K. Ramanaiah filed a revision petition before the Government of Andhra Pradesh under Section 64-A of the Motor Vehicles Act, 1939. The main contention in that petition was that the transfer application signed by J. V. Ramanaiah as representing the appellant Union is a rank forgery having no concern with the Union at all, that the Union was not at all represented at the meeting of the Transport Authority held on 19-7-60 (in which the transfer was recognised) as the notice of the meeting was not served on K. Ramanaiah, the real Secretary, of the Union; nor was a copy of the resolution communicated to the Union and that for these reasons the resolution of the Regional Transport Authority transferring the permit in favour of the first respondent was vitiated by fraud, collusion and mistake. The Government considered that the transfer of the permit made by the Regional Transport Authority, was void and should be set aside, because that authority was not in a position to conclusively decide as to who actually was the Secretary of the Union.

Having set aside the order of transfer, the Government remanded the case back

to the Regional Transport Authority, for fresh disposal according to law, having due regard to the representation of the Union. The first respondent filed W. P. No. 442 of 1961 questioning the correctness of this order. The principal contention in the writ petition was that the Government had passed the impugned order, without issuing any notice to the first respondent and giving him an opportunity to represent his case. The writ petition was allowed on that ground and the Government was directed to adjudicate upon the grievance of the Union, after giving due notice and opportunity to the first respondent. When the matter went back to the Government due notice was given to both parties including the first respondent and after hearing both sides, the Government passed an order on 15-1-64, once again setting aside the order of the Regional Transport Authority as illegal, improper and irregular and remanding the case back to that authority for fresh disposal according to law, having due regard to the representation of the appellant Union. While passing this order, the Government once again pointed out that the Regional Transport Authority allowed the transfer without deciding as to who actually was the Secretary of the Union in the interval of nearly two years period from the date of publication of the matter. Once again, the first respondent filed a writ petition in this court impugning the order of the Government. That is W. P. No. 212 of 1964. Gopalakrishna Nair, J. allowed the writ petition and quashed the order of the Government. This writ appeal has been filed by the Union which was the third respondent in W. P. No. 212 of 1964.

3. The ground on which the order of the Government was quashed in the writ petition was that the Government had no jurisdiction to entertain the revision petition, because it was time barred. A contention was put forward before the learned Judge that the Government must be deemed to have taken suo motu action under Section 64-A of the Motor Vehicles Act. This contention was repelled by the learned Judge, who said that:

"A reading of impugned order shows that the Government took action on the revision petition filed by the third respondent and that they passed the impugned order on it. It is, therefore, difficult to accept the contention of Mr. Reddipantulu that the Government took suo motu action under Section 64-A and that they totally disregarded the revision petition filed by the third respondent (appellant)".

4. The correctness of this view of the learned Judge is canvassed before us by Sri Srirama Sastry, appearing for the appellant. His contention is that under Sec-

tion 64-A power is conferred on the State Government to call for the records of any order passed by any authority or officer subordinate to it, either on its own motion or on application made to it. Simply because an application was made before it by an aggrieved party the Government does not cease to have the suo motu power to call for the records and examine the same. The learned counsel for the respondent, on the other hand, argues that once an aggrieved party files a revision petition, the Government loses all power to act suo motu. The point for decision in this appeal is which of these two contentions is correct and acceptable.

5. Section 64-A is in the following terms:—

"The State Government may of its own motion or on an application made to it call for the records of any order passed or proceeding taken under this Chapter by any authority or officer subordinate to it, for the purpose of satisfying itself as to the legality or regularity or propriety of such order or proceeding and after examining such records may pass such order in reference thereto as it thinks fit". It is to be seen that the section, by itself, does not impose any restriction as to limitation with regard to the filing of an application or exercise of the suo motu power by the State Government. That is, however, found in Rule 195 of the Andhra Pradesh Motor Vehicles Rules, 1964. Sub-Rule (1) of that Rule says:

"An application to the Government under Section 64-A shall be in the form of a memorandum setting forth concisely the purport of the petition and shall be presented to the Govt. within thirty days of the date of receipt by the person aggrieved of the order or proceedings against which the application is preferred. The application shall be accompanied by five additional copies of the same and the original or certified copy of the order or proceedings against which the application is preferred.

Provided if any doubt arises as to the date of receipt of the order or proceedings by the person aggrieved, the decision of the Government shall be final". Even Rule 195(1) does not limit the time within which the State Government can exercise its suo motu power. The rule prescribes a period of 30 days, as a period of limitation within which an aggrieved party can file an application before the Government. That period of 30 days has to be reckoned from the date of the receipt of the order by the person aggrieved. It is not disputed before us that the application before the Government was preferred by the appellant beyond 30 days, though the reason for the delay is stated to be the fact that J. V. Ramanani-

ah, masqueraded as the Secretary of the appellant Union and, therefore no copy of the resolution of the Regional Transport Authority allowing the transfer was communicated to the Union through its real Secretary. It is stated that for that reason, the filing of the petition before the Government was delayed. Whatever might be the reason for the delayed presentation of the petition, it is clear that it comes within the mischief of the limitation prescribed by Rule 195(1) and could not, therefore, be entertained by the Government. This much is conceded by the learned counsel for the appellant himself.

6. But, then, the question is whether under the circumstances, the Government was precluded from exercising its suo motu power also by virtue of the fact that the aggrieved party had filed before it a time barred petition. We have no doubt that the question is capable of only one answer and that is, that the Government still continue to have the power of acting suo motu. The language of the section does not lend any support to the contention of the respondent. It is impossible to construe the section as laying down that, if an application by an aggrieved party is made to it, the Government cannot exercise its suo motu power, but should only adjudicate on the application one way or the other. Neither the section nor any rules made under the Act prescribe the manner in which an order or proceeding of any authority or officer subordinate to the Government can be brought to its notice, so that it may of its own motion call for the records and examine them. It may come to know of an order by the lower authority or officer by way of such authority or officer sending it a copy of such order or proceeding or it may come to know of a proceeding, while it is examining some other connected matter. It is equally possible for the Government to come to know of an order or proceeding when the aggrieved party itself files a petition before it. Since the knowledge of the Government of any order or proceeding may arise at any time, it was thought necessary and desirable by the rule-making authority that no period of limitation should be prescribed for the exercise of suo motu power by the Government.

7. We fail to see anything either in Section 64-A or in Rule 195, which prevents the Government from taking suo motu action, when it comes to know of a defective order or proceeding of a lower authority, through a petition filed by an aggrieved party though it is not maintainable on account of bar of limitation or is otherwise irregular. Obviously, the main intention of the legislature is to confer on the Government power to correct

orders and proceedings of the lower authorities and officers. The power is conferred on the Government and for the exercise of that power no limitation is prescribed. What Rule 195(1) imposes is only a limit on the aggrieved parties' right to file a petition. It does not in any way interfere with or restrict the power of the Government to correct an incorrect order of a lower authority. If the petition filed by the aggrieved party is not maintainable for any reason, it could only mean that there is no application made to the Government. Such a situation cannot be worse than there being no application at all. It is admitted and indeed there cannot be any dispute that if there is no application at all and if the Government comes to know of an incorrect order at any time, it can call for the records and correct it. The filing of an unmaintainable application by an aggrieved party cannot alter the situation and take away the power of the Government to act suo motu. After all, the application which is irregular and not maintainable for some reason or other could be a source of knowledge for the Government of the incorrect order. Once it comes to know of an order, either through the application of an aggrieved party or in some other way, the Government can exercise its power suo motu.

8. It should also be noted that Section 64-A uses the word 'or' between 'of its own motion' and 'on application made to it' which shows that the Government can act in either case and set right the order or proceeding. If the latter method is not available, the first one is certainly open to the Government. The use of the word 'or' certainly imports into the section the meaning 'that the Government's power to correct orders covers each of the two contingencies viz., 'acting on its own motion' 'or' on application made to it by an aggrieved person. To argue that the existence of one contingency excludes the other is clearly violating the meaning and intention of the section. We can also test the same in another way. Suppose within 30 days, the Government of its own motion called for the records and found that there was no error in the order of the lower authority. Would it prevent the aggrieved party from presenting an application within 30 days from the date of receipt of the order. We do not think it would. It can as well happen that after re-examination of the records with the aid of the aggrieved party's representation, the Government may detect some error which should be rectified. Even then the Government will continue to have the power to correct such an order. It is thus clear that one method does not exclude the other.

9. In this context, the absence of any period of limitation for such exercise of suo motu power by the Government is very significant and revealing. That should necessarily mean that even if the right of an aggrieved party to file an application before it is time barred, the Government can none the less, proceed in the matter suo motu. We cannot, therefore, accede to the argument of the learned counsel for the respondent that, once an aggrieved party files an application, the Government loses all power to act suo motu. On a reading of Section 64-A and Rule 195(1) we have no hesitation to hold that even if an application is filed before the Government which is not maintainable on account of bar of limitation or for some other reason, the Government nevertheless continues to have the power to act suo motu.

10. It is then contended that the Government in its impugned order purported to adjudicate only upon the application of the appellant, though it was barred by time. The learned Judge observed that it is difficult to accept the contention that the Government took suo motu action under Section 64-A and that they totally disregarded the revision petition filed by the appellant. We do not think it is necessary that the application filed by the appellant should be totally disregarded. Perhaps in this case, the Government came to know of the order of the Regional Transport Authority only through the application of the appellant. Consequently, the application of the appellant could not be disregarded by the Government. It was thus referred not only in the preamble but also in the preliminary portions of the order. But the body of the main order does not refer to the revision petition filed by the aggrieved party nor does it purport to adjudicate on that petition. The order merely points out to the drawbacks in the decision of the Regional Transport Authority and records the conclusion that the transfer of the permit is void and should be set aside. Then the Government directed that the case should go back to the Regional Transport Authority for fresh disposal according to law having due regard to the representation of the revision petitioner. No doubt it is true that the Government did not state that it was exercising its suo motu power. It was only exercising the obvious power it had of correcting an order of the lower authority conferred on it under Section 64-A. It should also be noted that the contention that the revision petition was barred by time was not raised before the Government; at any rate it was not argued before it. Had it been argued perhaps, the Government would have specifically stated that it was exercising its suo motu power. Having failed to argue

the point before the Government and thus to create an occasion for the Government to specifically state the power it was exercising, the first respondent cannot now turn round and say that the Government passed the order only on the revision petition filed by the appellant.

11. That apart, as we have stated, it is indisputable that the Government had power under Section 64-A to correct an incorrect order passed by a lower authority. When it had undisputed authority to pass the order which it did, in our view it is immaterial whether the nature of the power it exercised was stated or not. Further, even supposing that the impugned order was stated to be on the revision petition alone it is not vitiated by the mistaken reference in it as an order on the revision petition. The crux of the problem is whether the Government had power to pass such an order. Undoubtedly it has and, therefore, the impugned order is a valid one, passed in exercise of that power.

12. This view of ours finds support from the following decisions. In *A. M. Transport v. State of Madras*, AIR 1953 Mad 660 a contention was urged that:

"No appeal lay to the Government against the order of the Central Road Traffic Board passed through its Secretary, refusing the variation, and the order of the Government did not disclose that their revisional jurisdiction (under Section 64-A) was invoked or that they intended to exercise such revisional powers."

The argument was the aggrieved party sought to file an appeal which did not really lie, and nevertheless, the Government entertained and allowed it. Finding that the Government had ample revisional power under Section 64-A to interfere in the matter Rajamannar, C. J. speaking for the Division Bench, observed in paragraph 9 of the judgment:

"The other contention that was urged was that no appeal lay to the Government against the order of the Central Road Traffic Board passed through its Secretary, refusing the variation, and that the order of the Government did not disclose that their revisional jurisdiction was invoked or that they intended to exercise such revisional powers. We do not consider that there is much substance in this objection because if the authority had the power to pass the order such an order could not be held to be vitiated by the caption given to it".

In *Nilkanth Prasad v. State of Bihar*, AIR 1962 SC 1135 the Supreme Court held that the appeal Board was entitled, when the record was before it, to revise the order of the Regional Transport Authority even if the appeal was incompe-

tent in view of the vast powers of revision under Section 64-A.

13. In *Afzal Ullah v. State of Uttar Pradesh*, AIR 1964 SC 264 certain bye-laws were prepared by the Municipal Board, but it purported to have made them under a wrong provision of the Act. The Supreme Court finding that the provision of law invoked by the Municipal Board in making bye-laws was wrong and that the impugned bye-laws could be justified under other provisions of the Act, then held that mention of wrong provision under which bye-laws were purported to be made was not sufficient to declare the bye-laws invalid. It was held that once it was shown that the Municipal Board had the competence to make bye-laws, the fact that the preamble to the bye-laws mentioned clauses which were not relevant, would not effect the validity of the bye-laws. It was observed—

"The validity of the bye-laws must be tested by reference to the question as to whether the Board had the power to make those bye-laws. If the power is otherwise established, the fact that the source of the power has been incorrectly or inaccurately indicated in the preamble to the bye-laws would not make the bye-laws invalid."

We have, therefore, no doubt that the Government was fully competent to pass the order dated 15-1-64, which was impugned in W. P. No. 212 of 1964 and it cannot be quashed for the reason that the appellant had filed a revision petition before it after the period of limitation.

14. We must also note that the learned 4th Government Pleader appeared for the State of Andhra Pradesh and the Secretary of the Regional Transport Authority, who are respondents 2 and 3 in the appeal, supported the appellant.

15. For these reasons the order of Gopalakrishna Nair, J. in W. P. No. 212 of 64 is liable to be set aside. Accordingly the appeal is allowed. The order in W. P. No. 212 of 64 is set aside and that of the Government dated 15-1-1964 in G. O. Ms. No. 67 is restored. The appellant will have his costs from the first respondent. Advocates fee Rs. 100.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 225
(V 57 C 34)

VENKATESAM AND VAIDYA, JJ.

Maturi Umamaheswara Rao and others,
Appellants v. Pendyala Venkatrayudu and
others, Respondents.

Appeal No. 269 of 1963, D/- 1-7-1968.

(A) Companies Act (1956), Section 10 — Company Court has no exclusive jurisdiction in matters falling outside Companies Act such as suits on contracts or mortgage bonds executed by companies — (Civil P. C. (1908), Section 9.)

On a plain reading of the provisions contained in Section 2 (11) and Section 10 it is clear that the High Court or the District Court, where the jurisdiction had been transferred to it, is the Court having jurisdiction under this Act, i.e., to deal with matters provided for by the Act, and it is not correct to say that the Company Court has exclusive jurisdiction in matters falling outside the Companies Act, e.g., suits on contracts or mortgage bonds executed by Companies. Where the suit on a mortgage executed by the company was filed by the plaintiff-mortgagee under Order 34, R. 1, C. P. C. in the Subordinate Judge's Court:

Held, that the suit could be entertained by that Court. The contention that only the District Court had the jurisdiction to entertain the suit but not the Subordinate Judge's Court, was without substance. (Para 10)

(B) Companies Act (1956), Section 125 — Specific charge and floating charge — Distinction between — (T. P. Act (1882), Section 100).

A specific charge is one that without more fastens on ascertained or definite property capable of being ascertained and defined, whereas a floating charge is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect, until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp. When the charge is fixed, it affects the title of the property and transfer of interest takes place immediately and the company can only deal with the property affected, subject to the charge. But when the charge is a floating one, the company may, in the ordinary course of business, deal with the property covered by the charge mortgaging, selling, disposing of it or using it up as the business requires, at any time before the charge attaches. A liability in floating

charge for the recovery of money from the general assets is contingent, i.e., on the occurrence of some event a fixed sum of money becomes recoverable from the specific assets which are in existence at the time. When the contingency arises, the charge is crystallized and then becomes a fixed charge. 1904 AC 355, Foll. (Para 12)

(C) Companies Act (1956), Section 125 — Mortgage of property by company — Mortgage not registered under section — Purchase of mortgaged property in execution of money decree against Company — Suit by mortgagee for realisation of mortgage debt — Purchaser cannot contend that mortgage was nullity and not enforceable against him.

The mortgaged property of a company was sold in execution of a money decree against the company and was purchased by D. The company subsequently went into liquidation and after the conclusion of the winding up proceedings its name also was struck off the register of Companies. In a suit filed by the mortgagee against D for recovery of the mortgage amount, D contended that as the mortgage was not registered under Section 125, the mortgage was void and not enforceable against him.

Held, that the failure to have the mortgage registered under Section 125 did not in any way invalidate it as against the company when it was a going concern, and its only effect was that the security created by the mortgage was rendered void against the liquidator and the creditor in winding up proceedings. Even though the mortgage was not registered, a person claiming to have purchased the mortgaged property in execution of a money decree, could not contend that his purchase was free from the mortgage, nor was Section 125 a bar to the mortgagee enforcing his mortgage as against the transferee of the company. Hence, it was not open to D to contend that the mortgage was a nullity, or that the properties purchased by him were not subject to the rights of the mortgagee. AIR 1927 Rang 288 and AIR 1963 Assam 56, Foll. (Paras 13 and 14)

(D) Limitation Act (1908), Article 132 — Mortgage for term certain with default clause — Money does not become due within meaning of Article 132 until both mortgagor's right to redeem and mortgagee's right to enforce his security has accrued — Mortgagor cannot take advantage of his own default and contend that suit must be filed within 12 years from default — Suit filed within twelve years from date fixed for redemption is in time — AIR 1932 PC 207, Foll. (Para 25)

Cases Referred: Chronological Paras	
(1963) AIR 1963 Assam 56 (V 50) =	
ILR (1963) 15 Assam 257, Bhramar Lal v. Promode Ranjan	14
(1932) AIR 1932 PC 207 (V 19) =	
59 Ind App 376, Lasa Din v. Mt. Gulab Kunwar	25
(1927) AIR 1927 Rang 288 (V 14)	
= ILR 5 Rang 585, Aung Ban Zeya v. Chettiar Firm	13, 14
(1915) 1915-1 Ch 643 = 84 LJ Ch 134, Monolithic Building Co., Tacon v. The Company	13
(1904) 1904 AC 355 = 73 LJ Ch 739, Illingworth v. Houldsworth	12

K. B. Krishna Murthy, for T. Raman, for Appellants; B. Ramalingeswara Rao, for Respondents.

VENKATESAM, J.: This is an appeal preferred by defendants 1 to 7 against the judgment and decree of the learned Subordinate Judge, Rajahmundry, in O. S. 9/61 on his file.

2. The relevant facts may be stated as follows: Gopal Glass Works Ltd. a company registered under the Indian Companies Act of 1913 having its registered office at Rajahmundry, borrowed Rs. 60,000/- from late P. S. R. V. K. Rangarao on 19-1-1948 and for its due repayment, executed a mortgage-cum-debenture deed (Ex. A9) dated 5-6-1948 agreeing to repay the same with interest at 7-1/2% per annum on the terms and conditions set out therein. The bond provided for the issue of debentures, but eventually they were not issued. Though some attempts were made to have the bond registered with the Registrar on the Joint Stock Companies under Section 109 of that Act, the bond was also not registered.

3. The plaintiffs' case is that the plaintiffs who are fourteen in number, are the legal representatives of late Rangarao (hereinafter referred to as the mortgagee) and they have agreed that by virtue of a registered partition deed, the 1st plaintiff alone became entitled to the money due under this deed and prayed for a decree in his favour and if that is not possible, in favour of all the plaintiffs. As per the terms of the bond, the interest has to be paid every year and the principal shall be repayable on or before 5-6-1954, and in default of payment of interest in any year, the entire principal money as well as the interest accrued shall become immediately payable and security became enforceable after the expiry of 30 days from such due date. The Company having committed default in payment of even the first year's interest, (which was due by 5-6-1949) the entire principal and interest became payable by 5-7-1949. One Boda Venkataratnam obtained a decree against the Company

In O. S. 39/49 on the file of the District Munsif's Court, Rajahmundry which was transmitted to District Munsif's Court, Peddapuram for execution and in E. P. 87/50, some of the suit mortgaged properties were sold in auction on 26-7-1951 and purchased by the 1st defendant for Rs. 3045/-, subject to the debt due under Ex. A9. The sale was confirmed on 1-9-1951 as evidenced by the sale certificate Ex. A25. The 1st defendant applied in E. A. 38/52 for delivery of the property purchased by him to one Palakurti Kameswararao on behalf of Kotha Suryanarayana, on the ground that the said Kotha Suryanarayana agreed to purchase the properties from the 1st defendant for Rs. 3100/- under the agreement dated 15-1-1952. On that application the Court passed an order that the property may be delivered to Palakurti Kameswararao instead of the 1st defendant. The property was accordingly delivered to Kameswararao on 17-1-1952 as per the delivery receipt Ex. B3.

It may be mentioned here, that on the date the sale took place, the Company was a going concern. Subsequently as the Company had sustained losses it went into voluntary liquidation by resolution of the Directors dated 17-5-1958, and the resolution of the Extraordinary General body dated 10-6-58 (Ex. A-15). After the completion of the liquidation proceedings, the name of the Company was also struck off by the Registrar of the Companies and the Company ceased to exist. After the death of the mortgagee, the plaintiffs issued notices to the defendant No. 1 demanding repayment of the mortgage debt but he failed to do so, and hence they filed the present suit on 20-3-1961.

4. The suit was resisted by the 1st defendant as well as by defendants 2 to 7, the legal representatives of Kotha Suryanarayana, on several grounds. The 1st defendant contended that the Subordinate Judge's Court, Rajahmundry had no jurisdiction to entertain the suit as per Section 10 of the Indian Companies Act, 1956 (hereinafter referred to as the Act). The debentures and debenture certificates not having been issued as per the mortgage deed, the mortgage itself is void and unenforceable, and the mortgage deed as well as the debentures not having been registered with the Registrar of Joint Stock Companies, the mortgage became void and unenforceable under Section 125. As the mortgage itself was void, even though the properties were sold subject to the mortgage, the 1st defendant is not liable to discharge the same. The properties purchased by the 1st defendant having been delivered through Court to Kameswararao, the remedy of the plaintiffs is only to proceed against Kotha Suryanarayana, who,

it was contended, was a bona fide purchaser for value without notice of the mortgage. The 1st defendant did not undertake to discharge the mortgage liability. He did not sell any of the items of the machinery mortgaged under Ex. A-9 nor realised any substantial sums thereby and that he is not a trustee nor personally liable. He never gave any personal undertaking to discharge the mortgage debt. Some of the mortgaged properties were subject to the first charge in favour of one Chauhan as stated in the deed itself. As the mortgage deed was not registered under the Companies Act the amount thereunder became immediately payable under the provisions there, and the suit is barred by limitation.

5. Defendants 2 to 7 were impleaded as parties to the suit on 16-2-1962 by an order on I. A. 789/61. They substantially adopted the contentions of the 1st defendant and also raised the plea of limitation. It was averred that as per the terms of the mortgage deed executed on 5-6-1948 both the principal and interest became due on the failure of payment of one year's interest, and as the first year's interest itself due on 5-6-1949 was not paid the suit should have been filed within 12 years hereafter, i.e., 5-6-1961, but inasmuch as they were impleaded on 16-2-62, the suit as against them was time barred.

6. On these contentions, the learned Subordinate Judge framed appropriate issues and he rejected all the material contentions of the defendants and granted a preliminary mortgage decree directing the defendants to pay on or before 29-3-1963 or any extended date Rupees 70,076-34 with interest at 5-1/2% per annum on 60,000/- from the date of the decree. In default of such payment, he directed that the plaintiffs may apply for a final decree for sale of the mortgage property and on such application, the mortgage property or sufficient part thereof shall be directed to be sold and the money realised by such sale shall be paid to the 1st plaintiff under this decree. The 1st plaintiff was also given the liberty to take such further proceedings as are open to him against the 1st defendant, if any part of the plaintiff schedule property did not exist.

7. Aggrieved by this judgment and decree, this appeal was preferred by the defendants.

8. Sri T. Raman, the learned counsel for the appellants raised before us the following contentions:

(1) The Subordinate Judge's Court, Rajahmundry had no jurisdiction to entertain the suit;

(2) The mortgage deed Ex. A-9 is void and unenforceable under Section 125 of the Companies Act and as such the suit is not maintainable;

(3) Kotha Suryanarayana, the predecessor-in-title of defendants 2 to 7, was a bona fide purchaser for value without notice, and the properties purchased by him not subject to the mortgage debt;

(4) The suit is barred by limitation. After hearing Sri Raman and the counsel for the respondents we posted the case for judgment today, giving leave to Mr. Raman to cite any authorities which he wanted. To-day Sri K. B. Krishnamurthy, appears for Mr. Raman raises a few more contentions, viz.,

(i) Ext. A-9 had only created a floating charge but not a fixed charge, and therefore the only remedy of the plaintiffs was to sue for specific performance of the contract Ex. A-9 for the issue of debentures;

(ii) The Several clauses in Ex. A-9 provided only for redemption of the debentures and for payment of the interest due thereunder but not for payment of interest or principal under the mortgage deed, and as the mortgage debt became immediately payable and the suit filed beyond 12 years from 5-6-1948 is barred by limitation.

9. We shall now consider the validity of all these contentions. The first contention of the appellants is that it is only the District Court, Rajahmundry that had the jurisdiction to entertain the suit, but not the Subordinate Judge's Court. In order to appreciate this contention, it may be relevant to note that the suit was filed, as is evident from paragraph 14 of the plaint, to enforce the mortgage by sale of the mortgaged properties under Order 34 Rule 1 C. P. C. and for recovery of the suit amount Rs. 60,000/- with interest at 5-1/2% per annum and costs by sale of the mortgaged properties or a sufficient part thereof. The suit was filed only against the 1st defendant purchaser of the suit properties, subject to the mortgage debt. By way of abundant caution, defendants 2 to 7 were also impleaded as the 1st defendant contended that he sold the properties in favour of Kotha Suryanarayana, their predecessor-in-title. The relevant provisions of the Act, may now be referred to.

10. Section 2 (11) defines 'Court' to mean, with respect to any matter relating to a Company, the Court having jurisdiction under this Act with respect to that matter in relation to that Company, as provided in S. 10. Section 10 lays down that the Court having jurisdiction under this Act shall be — (a) the High Court having jurisdiction in relation to the place at which the registered

office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court under sub-section (2). On a plain reading of these provisions it is clear that the High Court or the District Court, where the jurisdiction had been transferred to it, is the Court having jurisdiction under this Act, i.e., to deal with matters provided for by the Act, and it is not correct to say that the Company Court has exclusive jurisdiction in matters falling outside the Companies Act, e.g., suits on contracts or mortgage bonds executed by Companies. As already stated, the present suit is filed for recovery of the mortgage amount by sale of the mortgaged properties under Order 34 Rule 1 C. P. C. and we fail to see how the Subordinate Judge's Court at Rajahmundry which is the Original Court with unlimited jurisdiction cannot entertain the suit. We accordingly reject this contention.

11. The next argument is that the mortgage deed Ex. A-9 is void and unenforceable under S. 125 of the Companies Act. Section 125, omitting unnecessary words, is in the following terms:

"Subject to the provisions of this part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created is filed with the Registrar for registration in the manner required by this Act within twenty-one days after the date of its creation."

The Registrar is given the power to register it in seven days thereafter. If he is satisfied that there is sufficient cause for not filing the instrument within the particular period. Sub-section (2) lays down that:

"Nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge."

Sub-section (3) provides that

"When a charge becomes void under this Section, the money secured thereby shall immediately become payable."

According to sub-section (4), this section applies to the following charges:

(a) a charge for the purpose of securing any issue of debentures;

(b) a charge on uncalled share capital of the company;

(c) a charge on any Immovable property, wherever situate, or any interest therein;

(d) a charge on any book debts of the company;

(e) a charge, not being a pledge, on any movable property of the company;

(f) a floating charge on the undertaking or any property of the company including stock-in-trade;

(g) a charge on calls made but not paid;

(h) a charge on a ship or any share in a ship;

(i) a charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

Sub-section (8) provides the holding of debentures entitling the holder to a charge on immovable property shall not, for the purposes of this section, be deemed to be an interest in immovable property. Section 141 provides for rectification of register of charges on the ground of any mistake having crept in, and Section 142, the penalties for non-compliance with these provisions.

12. The distinction between a specific charge and a floating charge is well settled in law and may be stated at the outset. A specific charge is one that without more fastens on ascertained or definite property capable of being ascertained and defined, whereas a floating charge is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect, until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp. (Per Lord Macnaghten in *Illingworth v. Houldsworth* 1904 A. C. 355). Debentures may create a fixed or floating charge or both. When the charge is fixed, it affects the title of the property and transfer of interest takes place immediately and the company can only deal with the property affected, subject to the charge. But when the charge is a floating one, the company may, in the ordinary course of business, deal with the property covered by the charge mortgaging, selling, disposing of it or using it up as the business requires, at any time before the charge attaches. A liability in floating charge for the recovery of money from the general assets is contingent, i.e., on the occurrence of some event a fixed sum of money becomes recoverable from the specific assets which are in existence at the time. When the contingency arises, the charge is crystallized and then becomes a fixed charge. In other words, a floating charge is an agreement by which the creator of the charge stipulates that in the event of certain contingency an interest in the property, which happens to be in his possession at the time, shall be conveyed to the holder of that charge.

13. The scope of Section 125 (corresponding to section 109 of Companies Act, 1913) is well settled by authorities. Its non-compliance only makes the security void, not against everybody but as against the liquidator and any creditor of the Company. It leaves the security to stand as against the company while it is a going concern, but does not make the security binding on the liquidator as successor of the company. In *Aung Ban Zeya v. Chettiar Firm*, AIR 1927 Rang. 288 the suit was filed for recovery of a sum of money as being due on a mortgage of the company mill and other properties. The mortgagors admitted the debt and the mortgage but pleaded that the mortgagees were not entitled to a mortgage decree because under Section 109 of the Indian Companies Act of 1913, the security on the company's property was void against the liquidator or any creditor of the company, since the prescribed particulars of the mortgage and a copy thereof were not filed with the registrar. That contention was rejected by the trial Court on the ground that there was no question in that case of any claim by a liquidator or any creditor of the company, and gave the respondents a mortgage decree. On appeal the same contention was repeated and a Bench of the Rangoon High Court rejected that contention summarily. An application for leave to the Privy Council was rejected by the Bench of that High Court quoting with approval the observations of the Master of the Rolls and Phillimore L. J. in *In Re Monolithic Building Co., Tacon v. The Company*, (1915) 1 Ch. 643, which construed Section 93 of the corresponding provisions of the English Companies Consolidation Act of 1908. With regard to a deed which is not registered, the Master of the Rolls observed:

"Of course the deed is not void to all intents and purposes. 'It is a perfectly good deed against the company as long as it is a going concern'."

Phillimore L. J. observed:

"We have to construe section 93 of the Statute. It makes void a security; not the debt, not the cause of action, but the security and not as against every body, 'not as against the company while it is a going concern.'" (Italics (here in ' ') ours).

These two cases are authority for the position that the failure to have the mortgage registered under Section 125 of the Act does not in any way invalidate it as against the company when it is a going concern, and its only effect is that the security created by the mortgage is rendered void against the liquidator and the creditor in winding up proceedings. In the instant case, as already noticed,

even before the Company went into liquidation the mortgaged property was sold in execution of a money decree against the company and the property was purchased by the 1st defendant, subject to the mortgage. We also noticed that the company subsequently, not only went into liquidation but after the conclusion of winding up proceedings its name was struck off the register of Companies.

14. The next case where the facts are similar is a decision of a Bench of the Assam High Court in *Bhramar Lal v. Promode Ranjan*, AIR 1963 Assam 56. In that case a company executed a mortgage in respect of its properties but it was not registered with the registrar of companies. Pursuant to the mortgage, the mortgagee was also put in possession of the property. The mortgaged property was subsequently brought to sale and purchased by a third party, who contended that the possession of the mortgagee was illegal and was that of a trespasser, because the mortgage not having been registered, it was void. On a review of the case law by Mehrotra, C. J. and C. S. Nayudu J. rejected this contention. The position was summed up by the learned Chief Justice thus:

"To our mind on the plain reading of S. 109 it cannot be said that the failure to register the mortgage renders the mortgage invalid and a nullity. The effect of the section is that if the mortgage is not registered, the liquidator is not to take notice of it as a mortgage. The debt will survive and it will be treated on a par with other debts. The property which is the subject-matter of the security will be available as the assets of the company to the liquidator for payment to the creditors. The creditors in liquidation will not be affected by the mortgage. This section does not take away the right of the company to deal with its property; If the company can validly deal with its property, any transfer made by the company will be binding on the company. If the company mortgages certain property, any person who subsequently purchases the property from the company will take it subject to the mortgage and Section 109 is no bar to the mortgagee enforcing his mortgage as against the transferee of the company simply because it has not been registered under Section 109."

In the present case there is no evidence to show that the company has gone into liquidation. It is not the liquidator who in the course of the liquidation proceeding is contending that the mortgage is not binding on him. It is the creditor of the company who in execution of his decree has purchased the property and is contending that his purchase is free from the mortgage. Section 109 does not warrant such an interpretation.

The question of the liquidator's avoiding it would only arise if the Company has gone into liquidation. So far as the creditor is concerned, the right to avoid would also arise in liquidation. The purpose of Section 109 in calling upon a company to register the charge or mortgage is for the benefit of the liquidator and the creditors in liquidation. 'A creditor who has no interest in the property cannot put any restraint on the powers of the company to mortgage its property.' Neither the language of section 109 nor the purpose behind it can justify such an interpretation. In effect the contention of the plaintiff is that from the date of the auction purchase he became the owner of the property free from encumbrance. The possession of the mortgagee or his lessee became illegal. What he purchased was the property and not only the right of redemption." (Italics here in 'ours.') The learned Chief Justice extracted the observations of Phillimore, L. J. in the case already cited, and followed the decision of the Rangoon High Court in AIR 1927 Rang. 288. This case is an authority for the position that even though the mortgage is not registered under the Companies Act, a person claiming to have purchased the mortgaged property in execution of a money decree, cannot contend that his purchase is free from the mortgage, nor is Section 109 a bar to the mortgagee enforcing his mortgage as against the transferee of the company. We follow this decision and hold that in the case before us, the mortgaged property having been purchased by the 1st defendant subject to the mortgage, it is not open to him to contend that the mortgage is a nullity, or that the properties purchased by him are not subject to the rights of the mortgagee. In this view, this contention also has to be rejected.

15. One of the contentions raised before us by Mr. K. B. Krishnamurthy is that the remedy of the plaintiffs is only to ask for specific performance of the contract embodied in Ex. A-9 for the issue of debentures within the prescribed period, but not to sue for sale of the mortgage properties. Though this contention was not raised in the lower Court, since it goes to the root of the matter, we shall decide that question also. There is no substance in the contention, as we have held that the right to obtain debentures is not the only right conferred on the plaintiff. In our judgment, Ex. A-9 created both a specific as well as a floating charge, and the right to obtain debentures, and the mere fact that the debentures were not issued, would not take away the rights, otherwise conferred on the mortgagee.

16. We shall now consider the plea of limitation. In doing so, it may be helpful to dispose of this contention in relation to defendants 2 to 7 first. As already stated, their plea was that they were impleaded as defendants on 16-2-1962. According to Ex. A-9 both the principal and interest become due on the date of the default in paying the first year's interest on 5-6-49, and the suit should have been filed against them within 12 years i. e., on or before 5-6-61, and since they have been impleaded on 16-2-62, the suit is barred by limitation. This contention is on the assumption that defendants 2 to 7 were the purchasers of a portion of the mortgage property. The trial Judge found issue No. 3 viz., "whether the sale to Kotha Suryanarayana by defendant is true", in the negative and held that by the date the suit was filed or even by now the legal title continued to remain in the name of the first defendant, and if the suit was in time against the first defendant, it would also be within time against defendants 2 to 7.

The question incidentally for consideration is, whether there was a valid sale by the 1st defendant in favour of Kotha Suryanarayana. There are a number of circumstances which lead to an irresistible conclusion to the contrary. The first and foremost circumstance is that the property in question consists of land, buildings and also machinery, embedded in earth which constitute immovable property, and any title therein can only be conveyed by means of a registered instrument. Admittedly there was no registered sale-deed. The 1st defendant only stated that there was an agreement entered into between him and Suryanarayana for the sale of the property purchased by him, but an agreement by itself would not convey any title. From the evidence of D. W. 1, Kotha Venkataratnam, son of Suryanarayana, (3rd defendant), it is evident that their family had no property except a small Kirana shop in Pithapuram, which they were running till one year after the death of Suryanarayana. It is unimaginable that Suryanarayana, would in those circumstances have ventured to purchase the suit properties subject to the discharge of the mortgage debt. The evidence of D. W. 1 reveals that he was absolutely ignorant of any details of the property, which would not have been the case, if his father was the purchaser. It is also an admitted fact that the 1st defendant and Suryanarayana married the daughters of sisters. It is therefore, clear that the 1st defendant hit upon the idea of creating, if possible, a semblance of title in Suryanarayana in order to evade the discharge of the mortgage liability.

For all these reasons, we agree with the learned Subordinate Judge that there was no sale in favour of Kotha Suryanarayana and the device of making Kameswara Rao, take delivery of the property on behalf of Suryanarayana on the ground that he agreed to purchase the properties, was only a vain attempt to evade the mortgage liability. We have no doubt that the legal title as well as possession of the suit property always remained in the 1st defendant, and even if any of the defendants 2 to 7 are in possession of the mortgage property, it is only on behalf of the 1st defendant. It therefore, follows that the plea of limitation has to be considered only from the standpoint of the 1st defendant.

17. In the written statement of the 1st defendant, he pleaded that inasmuch as Ex. A-9 was not registered under Section 125 of the Companies Act, it became void and the money secured became immediately payable. But as already stated the contention of Sri K. B. Krishna Murthi, now is different, viz., that there is no clause in Ex. A-9 creating a fixed charge and all the clauses only provide for a floating charge. His further contention is that none of the clauses contemplated the payment of interest or the principal advanced under Ex. A-9, apart from the redemption of the debentures. For appreciating this contention, it is necessary to construe the several terms of Ex. A-9. Before doing so, it may be as well to state briefly what preceded the execution of Ex. A-9. By a resolution dated 2-12-47 (Ex. A-1) the company had first authorised the Managing Agents to raise a loan to the extent of Rs. 50,000/- on the first charge of the assets of the company and then on 12-1-48 (Ex. A-4) there was another resolution whereby it resolved that Rangarao, should advance Rs. 60,000/- as against Rs. 50,000/- previously resolved to be borrowed, and that should carry interest $7\frac{1}{2}\%$ per annum and that debentures that may be sanctioned at the ensuing General Body meeting be allotted in full to the value of the loan and that in failure of the issue of such debentures, the Directors shall create a first charge on the assets of the company by a registered mortgage deed.

Thereafter there was an agreement entered into between the company and Rangarao (Ex. 9-A) on 19-1-48, by which the company requested him to grant a loan of Rs. 60,000/- for the working capital of the company, and that the Directors would summon a special General Body meeting authorising the issue of debentures of that value to be allotted to the creditor or his nominee and that the debentures will carry interest of $7\frac{1}{2}\%$ per annum, and that they will have the

first charge on all the assets of the company viz., land, buildings, plant and machinery, manufactured goods, stock in trade, raw materials, debts owing to the company, and bank balances. It also provided that if within one month from that date the necessary resolution authorising the issue of debentures was not forthcoming, the company agreed to give a registered mortgage deed covering all immovable properties of the company to the creditor: Pursuant to that agreement, Rangarao paid Rupees 60,000/- by a cheque dated 19-1-48. Thereafter a special General Body resolution was passed authorising the Directors to borrow not exceeding Rs. 60,000/- at $7\frac{1}{2}\%$ per annum and to issue debentures of the denomination of Rs. 100/- each. The Board of Directors passed a resolution on 17-2-48 stating that as no application having been received from any share-holder for debentures in response to the notice dated 7-2-48, the managing Agents were authorised to allot and issue all the debentures of the value of Rs. 60,000/- to Rangarao or his nominees.

18. Pursuant to these resolutions, Ex. A-9 was executed on 5-6-48. This document is styled a debenture deed and executed by the company in favour of Rangarao who was described as the mortgagee. It acknowledges the receipt of the sum of Rs. 60,000/- from the mortgagee and recites that it is executed to secure the repayment of the principal monies and the payment of interest thereon for the time being accrued and payable in the manner appearing therein, and that the mortgagee had consented to the terms therein. Ex. A-9 states that 'Debenture Holder' means the said mortgagee Sri Rangarao, his heirs or his legal representatives or administrators for the time being. The important recital is that the company granted and assigned the mortgagee as security for the debentures all and singular the lands premises described in the first schedule annexed thereto, with all buildings annexed to or erected thereon or on some parts thereof and all trees, fences, hedges, ditches, ways, sewers, drains, water-courses, liberties, privileges etc., and to the security of the mortgagee for the purpose therein mentioned and concerning the same. The Company also assigned as security to the mortgagee the machinery, plant, engines, boilers, mill etc., set out in the second schedule which now are or shall from time to time during the continuance of this security be in or upon or about the premises to hold the same premises unto to mortgagee as security.

It also recites that there was a first charge in favour of one H. V. Chauhan,

in respect of some of the engines, dynamos, air compressors etc., mentioned in the 3rd schedule and that the mortgagee will have only the rights of a second mortgagee in respect of the same. Clause IX of the deed provides that the principal monies and interest payable in respect of the debentures shall be a first mortgage charge on the premises and plant and machinery and also first charge on the properties detailed under schedules 1 and 2 and shall be a second mortgage charge ranking next to the first charge in respect of the property in the third schedule. The relevant portion in Clause X may be usefully extracted.

"The principal money as well as the interest accrued and payable upto date shall immediately become payable and the security hereby constituted shall after the expiry of 30 days of grace from such due date become enforceable.

(a) If the company makes default in the payment of interest on the stipulated date in any year;

(b) If the company makes default in the payment of the principal amount at the time stipulated therein.

(c) If a distress or execution is levied upon any part of the mortgaged premises or if a Receiver of the Company's undertakings or property or any part thereof is appointed by any Court and such distress or execution is not satisfied or such Receiver is not discharged within fifteen days from the date of the levy or the appointment of the Receiver as the case may be;

(d) If the company commits a breach of any of the presents or provisions herein contained and on its part to be observed and performed;

xx xx xx xx".

19. Clause XI then provides, that when and so soon as the principal money secured shall have become immediately payable, the registered holder was entitled to appoint a Receiver of the premises charged and such receiver shall conform to all lawful directions given to him by the mortgagee and the mortgagee may in writing under his hand, remove any Receiver and appoint another. Clause XIV recites that the debentures shall be redeemed in accordance with the contingency mentioned therein, *inter alia*, that (a) the company will on the 5th day of June, 1954 or on such earlier day as the principal money hereby secured becomes payable in accordance with the conditions therein mentioned, pay the registered debenture-holder hereof for the time being the full and entire sum of Rs. 60,000/-. It also provides that the company will during the continuance of this security pay such registered holder interest on the said principal sum

of Rs. 60,000/- or such less amount as is unpaid at the rate of Rs. 7½ per cent per annum subject to deduction of income-tax by annual payments on the 5th day of June in every year.

20. To this document, were attached three schedules as already referred to. The first schedule consists of land, site factory office, buildings etc., the second and third schedules described the machinery. It is needless to point out that the machinery described in schedules 2 and 3 were those in existence on the date of the mortgage, and were embedded in or attached to the earth and therefore, formed part of the factory itself, and immovable property along with the site and buildings. Clause IX of Ex. A-9 already referred to, created a first charge for the repayment of Rs. 60,000/- advanced by the mortgagee on the properties described in schedules 1 and 2 and a second charge on the property described in schedule No. 3. In addition to the said first charge the document also created a charge on the items mentioned in Clauses III to V and a floating charge on the machinery which may be brought in future on the premises, its uncalled capital, its goodwill, and undertaking, the monies now standing or hereafter carried to the reserve fund, depreciation fund etc. There can therefore, be little doubt that in addition to creating a specific charge on the existing immovable properties, Ex. A-9 also created a floating charge. This is also made clear in Clause V which says that the charge created by way of floating charge, is in addition to the specific charge.

21. Sri Krishnamurthi, the learned counsel relying upon some clauses of the deed, dealing with the issue of debentures and the other ancillary matters contends that Ex. A-9 only created a floating charge for the debentures intended to be issued and that the debentures could be redeemed only as per the clauses mentioned therein, and that a specific charge was not created by it, though the counsel concedes that a specific charge in addition to a floating charge can also be created.

22. Having referred to the several clauses of Ex. A-9 extracted above, we have no doubt in our mind that a floating charge was created in addition to the specific charge on the properties described in the schedules. It follows that the rights which the mortgagee may have in respect of the specific charge would not be destroyed or impaired by reason of additional rights intended to be conferred as the holder of the floating charge. We therefore, agree with the learned Subordinate Judge that this action for the sale of the properties which were specifically charged under Ex. A-9 would lie

even though a floating charge was also created under Ex. A-9.

23. The next argument of Sri Krishna-murthi is that granting for the sake of argument that a specific charge was also created, there is no period of redemption provided therefor in Ex. A-9, and the suit for enforcement of the charge, should have filed within 12 years thereof i.e., on or before 5-6-1960 and the present suit filed in 20-3-61, is barred by limitation. We are unable to accept this contention, for the following reasons. As already noticed, the mortgagee is the person to whom all the 600 debentures were intended to be allotted, but in fact never allotted. The rights as a debenture holder as well as mortgagee, were all vested only in Rangarao, and it is for that reason that the phrase 'mortgagee' and registered holder of the debentures were used as interchangeable terms. The undisputed fact is that the entire sum of Rs. 60,000/- was advanced by Rangarao to the company, and a fixed charge, apart from the floating charge, was created as security for the discharge of that mortgage debt.

It is against this background that we have to construe the clauses in Ex. A-9 in this context. Clause X already referred to provides that the principal money as well as the interest accrued and payable upto date shall immediately become payable and the security hereby constituted shall after the expiry of 30 days of grace from such due date becomes enforceable, if the company makes default in the payment of interest on the stipulated date in any year. In order to ascertain the stipulated date, reference has to be made to Clause XIV (b) which provides that the company will during the continuance of this security pay such registered holder interest on the said principal sum of Rs. 60,000/- or such less amount as is unpaid at the rate of 7½ per cent per annum on the 5th day of June in every year. According to these two clauses, the first year's interest became payable on 5th June 1949 and admittedly that was not paid. The company had 30 days of grace and hence the right to enforce the security for the realisation of interest and principal accrued on 5th July, 1949, and suit could be filed on or before 5th June, 1961.

24. The present suit having been filed on 20-3-61 we have no hesitation in holding that it is filed within time. In another view also we must find that the suit is within time. Clause X (c) provides, that 'if a distress or execution is levied upon any part of the mortgaged premises or if a receiver of the company's undertakings of property or any part thereof is appointed by any Court and such dis-

tress or execution is not satisfied or such receiver is not discharged within fifteen days from the date of the levy or the appointment of the receiver as the case may be, the principal and interest became payable. In this case admittedly Venkataratnam filed E. P. 87/50 which resulted not only in execution but also a sale on 26-7-51 in favour of the 1st defendant. The Execution Petition was filed some time in 1950 and even assuming that it was filed on 2nd January, 1950 and was ordered the very day, a suit for enforcing the mortgage security could be filed within 12 years thereafter, i.e., on or before 2nd January, 1962.

25. There is yet another reason for holding that the suit is within time. It is no doubt true that the first year's interest due on 5-6-49 itself was not paid, and the mortgagor could not take advantage of its own default. The mortgage money does not become due within the meaning of Article 132 until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. As laid down by the Privy Council in *Lasa Din v. Mt. Gulab Kunwar*, AIR 1932 PC 207, the clauses which empower the mortgagee to enforce security for non-payment of interest of any particular year, would not entitle the mortgagor to rely upon Article 132 and contend that the mortgagor is bound to file the suit within 12 years from the date he committed default in paying interest. At page 211, Sir George Lowndes speaking on behalf of the Judicial Committee observed thus:—

"There can be no doubt that as pointed out by Lord Blanesburgh a proviso of this nature is inserted in a mortgage deed "exclusively for the benefit of the mortgagees" and that it purports to give them an option either to enforce their security at once, or, if the security is ample to stand by their investment for the full term of the mortgage. If on the default of the mortgagor — in other words, by the breach of his contract — the mortgage money becomes immediately "due" it is clear that the intention of the parties is defeated and what was agreed to by them as an option in the mortgagees is in effect converted into an option in the mortgagor. For if the latter after the deed has been duly executed and registered finds that he can make a better bargain elsewhere, he has only to break his contract by refusing to pay the interest and "eo instanti", as Lord Blanesburgh says, he is entitled to redeem. If the principal money is 'due' and the stipulated term has gone out of the contract it follows in their Lordships' opinion that the mortgagor can claim to repay it, as was recognized by Wazir Hasan, J., in his judgment in the Chief

Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default. They do not think that upon such default he would have the right to redeem and in their opinion the mortgage money does not 'become due' within the meaning of Article 132, Limitation Act, until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would of course, also be the position if the mortgagee exercised the option reserved to him".

Since we have already held that the registered holder of debentures means the mortgagee, the aforesaid clauses in Ex. A-9 are to be understood as giving an option to the mortgagee to enforce security in default of payment of the first year's interest, or wait till the period of redemption, i.e., 5-6-54, provided for in the document. A contrary construction is not only warranted by the terms of the deed, but would result in manifest injustice as pointed by the Privy Council. Once it is held that the date for redemption is 5-6-54, the mortgagee could file his suit at any time on or before 5-6-56. In this view also the suit is not barred by limitation against 1st defendant.

26. Sri Krishnamurthi, the learned counsel drew our attention to the several clauses in Ex. A-9 dealing with the rights of the debenture holder and contended, that what all was provided by A-9, was only redemption of the debentures but not redemption of the mortgage security on the fixed charge. His argument as already stated was that the only effect of Ex. A-9 was to create debentures with floating charge, and that all the other clauses have to be read as relating to debentures. But as already stated, we are unable to accept that contention especially in view of Clause V "that the additional securities are created in addition to the specific mortgage premises which means that the premises mentioned in schedules 1 to 3 were specifically mortgaged. For all these reasons, this contention has to be rejected.

27. Before we conclude we must advert to the submission of Sri Krishnamurthi, that Clause 5 of the decree of the trial Court is not correctly worded. What all was meant by that clause was that the first plaintiff was at liberty to take such further proceedings as are open to him against the 1st defendant if any part of the plaint schedule property purchased by him was not existing. We are making it clear that there can be no question of any such steps being taken by the plaintiff in respect of the property not purchased by the 1st defendant.

28. In the result all the contentions fail and the appeal is hereby dismissed with costs.

Appeal dismissed.

AIR 1970 ANDHRA PRADESH 234
(V 57 C 35)

SHARFUDDIN AHMED AND A. D. V. REDDY, JJ.

In re V. S. Metha and others, Petitioners.

Criminal Revn. Cases Nos. 312, 313, 333 to 335 of 1968 and Criminal Revn. Petns. Nos. 270, 271, 291 to 293 of 1968, D./ 6-9-1968, from order of Chief City Magistrate City Criminal Court, Hyderabad, in Criminal R. C. Nos. 27, 28 to 31 of 1968.

(A) Factories Act (1948), Section 106 — Period of three months — It means period of three calendar months — General Clauses Act (1897), Section 3 (35). (Para 5)

(B) Factories Act (1948), Section 106 — 'Within three months of the date' — It means within three calendar months after the commission of offence came to knowledge of the Inspector — General Clauses Act (1897), Section 9 (1). (Para 8)

Cases Referred: Chronological Paras
(1961) AIR 1961 All 151 (V 48) =
1961 (1) Cri LJ 338, Sita Ram v. State 3
(1951) AIR 1951 Cal 316 (V 38) =
54 Cal WN 926, Sashi Kumar v. Mrs. D. J. Hill 4
(1938) AIR 1938 Bom 447 (V 25) =
ILR (1938) Bom 734, Ramchandra Govind v. Laxman Savleram 6
(1935) AIR 1935 Lah 391 (V 22) =
38 Pun LR 124, Puran Chand v. Mohd. Din 8
(1906) ILR 29 Mad 75, Varna Dava Desikar v. Murugesu Mudali 4
Ramchandra Rao. (in Cri. R. C. Nos. 312 and 313 of 1968) and Monohar Pershad Mathur (in Cri. R. C. Nos. 333 to 335 of 1968), for Petitioners; Public Prosecutor on behalf of the State in all the Petitions.

A. D. V. REDDY, J.:— The point that arises for consideration in these revisions is what exactly is the period of limitation prescribed in S. 106 of the Factories Act for launching of prosecutions for offences under the Act.

2. In all these cases, the State, through the Assistant Inspector of Factories, had filed complaints in Criminal Courts for breach of certain provisions of the Act punishable under Section 92 of the said Act. Section 106 of the Factories Act reads as follows:—

"No Court shall take cognizance of any offence punishable under this Act unless

complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector:

Provided that where the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed".

3. In so far as the knowledge of the Inspector is concerned it is contended that in the first two of the revisions i.e., Nos. 312 and 313 of 68, the Inspector had visited the factory on 29-8-66 and the complaint was lodged on 29-11-66 and in the three other cases Cr. R. Cs. 333, 334 and 335 of 1968, he visited the factory on 21-8-66 and the complaint was lodged on 21-11-66. It has been contended that the prosecution is beyond time. Both the lower Courts have held against this contention. Hence these revisions.

4. The real question relates to the interpretation of the words "within 3 months of the date on which the alleged commission of the offence came to the knowledge of an Inspector". What has to be seen is whether the complaints had been laid within a period of three months from the date of knowledge. It is first contended that the word 'month' means a month of 30 days and therefore the complaint should be filed within 90 days from the date of knowledge. For this reliance is placed on *Vama Dava Desikar v. Murugesu Mudali*, (1906) ILR 29 Mad 75, wherein it was held that in a suit under Section 40 of the Madras Rent Recovery Act, of 1865, the period of limitation of 'one month' prescribed should be construed as meaning 30 days. If that interpretation is to be adopted, these proceedings should have been taken within 90 days from the date of knowledge and in every one of these cases, the complaint admittedly had been filed beyond time. But in *Sashi Kumar v. Mrs. D. J. Hill*, AIR 1951 Cal 316 it was held that the word 'month' in its ordinary acceptance, means a 'calendar month' and not a 'lunar month' except where in a particular place or business or trade the word 'month' has acquired a secondary meaning. In the above decisions, the provisions of the General Clauses Act of 1897 had not been considered. Section 3 of the said Act, which defines certain terms, says that in all Central Acts and Regulations made after the commencement of this Act (on the principles of this Act) unless there is anything repugnant in the subject or context, the definitions given thereunder would apply. Section 3 sub-clause (35) defines 'month' as:

"'month' shall mean a month reckoned according to the British calendar".

5. It therefore, follows that three months referred to in Section 106 of the Factories Act, which is a Central Act, means three calendar months and not 90 days calculated at the rate of 30 days per month. The Factories Act which had defined 'day' 'week' and 'year' had unfortunately not defined the term 'month', though in several of the provisions, including the important provisions relating to limitation, the word 'month' has come to be used. This necessitates having resort to the provisions of the General Clauses Act and as Section 3 (35) defines, 'month' as a calendar month, the term three months in Section 106 of the Factories Act would only mean a period of three calendar months.

6. The next contention is that the prosecutions will be within three calendar months only if the day of inspection has to be excluded from the calculation (as that is the date of knowledge) but if it is included in the calculation, all the prosecutions would be barred by one day. Under Section 12 (1) of the Limitation Act of 1908 in computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded. The first limb of Section 29 (2) reads as follows:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the First Schedule the provisions of Section 3 shall apply, as if such period is the period of limitation"

In *Sita Ram v. State*, AIR 1961 All 151, it is pointed out that a complaint referred to in Section 106 is an application within the meaning of Section 29 (2), Limitation Act, that since the Limitation Act prescribes no period of limitation for a complaint under Section 106, Factories Act, the period prescribed by Section 106 must be held to be different and the first limb of sub-section (2) of Section 29, Limitation Act would apply, and Section 12, Limitation Act, would therefore, apply because it has not been expressly excluded by the Factories Act, and therefore, the day of the knowledge should be excluded. It was further held that even in case that Section 29 (2) and Sec. 12 of the Limitation Act did not apply, under the common law the date on which the offence came to the notice of the Inspector must be excluded when computing the period of three months, that 'within three months' means within the whole course of three months i.e., before the end of the last day of three months and that anything that is done on the last day of the three months is 'within three months'. In *Puran Chand v. Mohd. Din*, AIR 1935 Lah 291, it was held that the words in

a decree 'within three months from today' should be reckoned as excluding the date of the passing of the decree. In *Rama chandra Govind v. Laxman Savleram*, AIR 1932 Bom 447, it was held that the direction to deposit a certain sum in execution of a decree within 15 days from a certain date, should be taken to exclude that date.

7. Section 9 (1) of the General Clauses Act provides that if in any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from', and for the purpose of including the last in a series of days or any other period of time, to use the word 'to'. But in Section 106 of the Factories Act, the word 'from' has not been used. It is not stated that the complaint thereof is to be made within three months from the date on which the commission of the offence came to the knowledge of the Inspector, "but within three months of the date". In Stroud's Judicial Dictionary at page 1964 it is stated that 'of' is sometimes the equivalent of after, e.g., the word "21 days of the execution" means '21 days after the execution'.

8. We therefore, find that the term 'within three months of the date' in Section 106 of the Factories Act means 'within three calendar months after the commission of the offence came to the knowledge of the Inspector'. This interpretation based on common law as well as on the provisions of the Limitation Act and the provisions of the General Clauses Act results in the exclusion of the day of the knowledge, i.e., the date of inspection and the "three months" being calculated as three calendar months. In this view all the prosecutions are within time.

9. These revisions are therefore, dismissed.

Revisions dismissed.

AIR 1970 ANDHRA PRADESH 236
(V 57 C 36)

CHINNAPPA REDDY, J.

P. Dharmiah and others, Petitioners v. The Chief Engineer, Panchayat Raj, Govt. of A. P. Hyderabad and others, Respondents.

Writ Petn. Nos. 2235, 3907 and 3962 of 1963, D./ 3-2-1969.

(A) Civil Services — Public Employment (Requirement as to Residence) Act (1957), Section 3 — Section 3 and the Andhra Pradesh Public Employment

IM/IM/D917/69/BNP/D

(Requirement as to Residence) Rules, 1959, framed thereunder, are ultra vires the power of Parliament under Article 16 (3) and violates Art. 16 (1) and (2) of the Constitution — Constitution of India, Article 16 (1), (2) and (3).

Section 3 of the Public Employment (Requirement as to Residence) Act is ultra vires the power given to Parliament under Article 16 (3) and is opposed to the fundamental rights guaranteed under Article 16 (1) and (2) of the Constitution as it prescribes, as a condition of employment, residence within Telangana region of Andhra Pradesh and, hence, is invalid. The Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959, framed under the section are also invalid. The fact that the Act remained unchallenged for years is of no weight to the validity of the enactment encroaching upon fundamental rights.

(Paras 21, 22)

Article 16 (3) does not permit the division, by Parliamentary Legislation of a State into regions for the purpose of employment under the Government of that State and the consequent mutilation of the unity of the State and the Unity of the Nation, solemnly desired in the Preamble to the Constitution. Article 16 (3) was introduced to promote efficiency of service without sacrificing the principle of equality of opportunity in the matter of Public Employment. It was introduced to secure uniformity. The law to be made by Parliament providing for requirement as to residence was to be uniform and was not to be designed to prevent persons of one State seeking employment under the Government of other States. The law was only to provide for some qualification regarding residence in regard to some classes of employment so as to promote efficiency of service in connection with that class of employment. The law to be made was to attract rather than to prevent, it was to invite officials to develop attachment to the places where they worked rather than to force them to go away. The law was certainly not meant to prescribe requirements as to residence within parts of a State, so as to prohibit residents of other areas of the State from seeking employment.

(Paras 16 and 21)

A comparison of Clause (3) of Article 16 with Clause (4) of Article 16 clearly shows that the 3rd Clause of Article 16 was never meant to safeguard alleged interests of residents of backward States or regions. Even if it was designed to protect interests of the residents of a backward State a further dissection of the State into regions is wholly unjustified by Article 16 (3). (Para 19)

It may be that the division of the State of Andhra Pradesh into the Telangana and non-Telangana areas is an eminently reasonable classification in the context of the historical developments which led to the disintegration of the erstwhile Hyderabad State and the formation of the State of Andhra Pradesh in 1956. Considerations of reasonable classification which may be relevant in deciding questions arising under Article 14 are entirely irrelevant in deciding questions arising under Article 16 (3). (Para 20)

(B) Civil Services — Public Employment (Requirement as to Residence) Act (1957), Section 3 — Validity of — Delegation of power under — Amounts to abdication of legislative function by Parliament — Constitution of India, Articles 16 (3) and 245.

Section 3 of the Public Employment (Requirement as to Residence) Act, is void as the legislative function of prescribing any requirement as to residence prior to employment has been delegated by Parliament to Central Government. It is Parliament and Parliament alone that can say that a person should be a resident within a certain State for a period of one, two, five or ten years as the case may be prior to his seeking employment under the Government of that State in regard to particular posts. That function cannot be delegated to any other authority since that would amount to an abdication of legislative power. AIR 1963 SC 649, Foll. (Para 27)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 649 (V 50) =
(1963) Supp 1 SCR 439, M. R. Balaji v. State of Mysore 25

(1950) AIR 1950 SC 27 (V 37) =:
1950 SCR 88 = 51 Cri LJ 1383,
A. K. Gopalan v. State 12

B. P. Jeevan Reddy, for Petitioners in W. P. No. 2235 of 1968; P. A. Chowdary, for M. Lakshmana Rao, for Petitioners in W. P. Nos. 3907 and 3962 of 1968; K. G. Kannabhiram, for Respondents in W. P. No. 2235 of 1968 and on behalf of Respondent No. 2 in W. P. Nos. 3907 and 3962 of 1968 and M/s. A. Raghuvir and A. Ananda Reddy, for Respondent No. 1 in W. P. No. 3907 of 1968 and V. Venkataramiah, for Respondents in W. P. No. 2235 of 1968.

ORDER:— The nine petitioners in W. P. No. 2235 of 1968 are temporary employees of the Government of Andhra Pradesh Panchayat Raj Department, working as supervisors under various Panchayat Samithis and Zilla Parishads in the region known as the Telangana Region of the State of Andhra Pradesh. All of them claim that they possess the qualification of residence mentioned in Rule 3 of the Andhra Pradesh Public

Employment (Requirement as to Residence) Rules. By an order dated 30-4-1968 the services of all the nine petitioners were terminated by the Chief Engineer Panchayat Raj Department. The petitioners allege that as many as forty-six supervisors belonging to the non-Telangana area in the employment of the Panchayat Raj Department are now working under Panchayat Samithis and Zilla Parishads in the Telangana Area and they claim that so long as even one Supervisor belonging to the non-Telangana area, that is to say, not satisfying the requirement as to residence is working in the Telangana area they cannot be retrenched. They assert that the appointment and continuance of those not satisfying the requirement as to residence is illegal. They seek a mandamus to enforce the Public Employment (Requirement as to Residence) Act and Rules and to direct the respondents to desist from retrenching them. I may mention here that the petitioners do not allege that any of them is senior to any of the non-Telangana employees or that any hostile discrimination has been practised against them.

2. Originally none of the non-Telangana Supervisors was impleaded as a party. Later some were impleaded as parties and some, though proposed to be impleaded, were given up. Those impleaded as parties have also not appeared before me but that does not relieve me of my responsibility in fact, it renders my responsibility the greater because their interests and rights cannot be jeopardised by their non-appearance which may perhaps be due to their incapacity to engage counsel. I considered it desirable to appoint an amicus curiae and I requested Mr. V. Venkataramaiah to assist me and he readily and very kindly agreed to do so. I am grateful to him for his able assistance.

3. In W. P. No. 3907 of 1968 there are 29 petitioners, of whom are teachers employed in various schools under Zilla Parishad, Nalgonda. They claim that they have been in the employment of the Zilla Parishad for over nine years after being selected by the Selection Committee constituted under prescribed rules. All of them have now been informed by the Chairman of the Zilla Parishad that their services are being terminated as they are 'non-mulki temporary candidates' who have been appointed without securing relaxation of Rule 3 of the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959. They question the order of the Chairman of the Zilla Parishad as illegal and the Public Employment (Requirement as to Residence) Act and Rules on which the Chairman's order is based as

ultra vires. They seek a writ under Article 226 to quash the proceedings of the Chairman, Zilla Parishad.

4. In W. P. No. 3962 of 1968 there are eight petitioners who, like the petitioners in W. P. No. 3907 of 1968, are teachers in the employment of the Zilla Parishad Nalgonda and whose services are sought to be terminated on the ground that they do not satisfy the requirement as to residence as contemplated by the Public Employment Act and the Rules. They also seek a writ to quash the proceedings of the Chairman, Zilla Parishad.

5. When the cases were opened on Friday, I did consider whether they may not more usefully be placed before a Division Bench. Having heard full arguments, I do not think that it is necessary to do so. The questions raised do not appear to be either involved or difficult to answer in the light of what I have heard from learned counsel. If I err in my decision the aggrieved party has a remedy by way of an appeal under CL 15 of the Letters Patent.

6. Sri Venkataramanalah, amicus curiae and Sri P. A. Chowdary, learned Counsel for the petitioners in W. P. Nos. 3907 and 3962 of 1968 contend that the Public Employment (Requirement as to Residence) Act is void as it offends Article 16 of the Constitution and also because it suffers from the vice of excessive delegation. They also contend that the Act which was to be in force for a period of five years from the date of commencement (21-3-1959) expired on 21-3-64 and the amending Act which came into force on 9-5-1964 could not revive a lifeless Act. These are the main contentions raised before me though learned Counsel have presented different facts of the same questions as different contentions. They have also raised some subsidiary points relating to the validity of the Rules.

7. Sri B. P. Jeevan Reddy, Learned Counsel for the petitioners in W. P. No. 2235 of 1968 and the learned Government Pleader contend that the Act is free from all constitutional disability and is within the competence of Parliament. They also contend that the delegation made to the Central Government is within permissible limits. They urge that Parliament could revive an Act which had expired without break or continuity even as it could make a law retrospective in operation.

8. Article 16 of the Constitution may be fully extracted here:—

"16. Equality of opportunity in matters of Public Employment:— (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them be ineligible for or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment.

(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination".

9. The Public Employment (Requirement as to Residence) Act, 1957 was enacted by Parliament in 1957. Before it was amended in 1964 it stood as follows:—

"THE PUBLIC EMPLOYMENT (REQUIREMENT AS TO RESIDENCE) ACT, 1957.

(Act XLIV of 1957)

7th December, 1957.

An Act to make in pursuance of Clause (3) of Article 16 of the Constitution special provisions for requirement as to residence in regard to certain classes of public employment in certain areas and to repeal existing laws prescribing any such requirement.

Be it enacted by Parliament in Eighth Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called the The Public Employment (Requirement as to Residence) Act, 1957.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette appoint.

2. Repeal of Existing laws prescribing requirements as to residence.

Upon the commencement of this Act, any law then in force in any State or Union Territory by virtue of Clause (b) of Article 35 of the Constitution prescribing, in regard to a class or classes of employment or appointment to an officer under the Government, of, or any local

or other authority within that State or Union Territory any requirement as to residence therein prior to such employment or appointment shall cease to have effect and is hereby repealed.

3. Power to make rules in respect of certain classes of public employment in certain areas. (1) The Central Government may, by notification in the Official Gazette, make rules prescribing, in regard to appointments to —

(a) any subordinate service or post under the State Government of Andhra Pradesh, or

(b) any subordinate service or post under the control of the Administrator of Himachal Pradesh, Manipur or Tripura, or

(c) any service or post under a local authority, (other than a cantonment board) within the Telangana area of Andhra Pradesh or within the Union Territory of Himachal Pradesh, Manipur or Tripura.

any requirement as to residence within the Telangana area or the said Union Territory, as the case may be prior to such appointment.

(2) In this section:—

(a) "subordinate service or post" means any service or post appointments to which are not notified in the Official Gazette but includes any service of thasildars.

(b) "Telangana area" comprises all the territories specified in sub-section (1) of Section 3 of the States Reorganisation Act, 1956.

4. Parliamentary security of rules—

All rules made under Section 3 shall, as soon as may be after they are made be laid for not less than thirty days before each House of Parliament and shall be subject to such modifications as Parliament may make during the session in which they are so laid or in session immediately following.

5. Duration of Section 3 and rules.

Section 3 and all rules made thereunder shall cease to have effect on the expiration of five years from the commencement of this Act but such cesser shall not affect the validity of any appointment previously made in pursuance of the said rules".

10. By a notification of the Central Government the Act came into force on 21-3-1959 and by effect of Section 5 of the Act is ceased to be in force on 21-3-1964. However on 9-5-1964 the Public Employment (Requirements as to Residence) Amendment Act 1964 was enacted. This Act is as following:—

"Short title.

1. This Act may be called the Public Employment (Requirement as to Residence) Amendment Act, 1964.

Amendment of Section 4.

2. For Section 4 of the Public Employment (Requirement as to Residence) Act, 1957 (hereinafter referred (44 of 57) to as the principal Act), the following section shall be substituted namely:—

4. * * * *

Amendment of Section 5.

3. In Section 5 of the principal Act, for the words "five years" the words "ten years" shall be substituted and shall be deemed always to have been substituted.

Validity of rules and action taken thereunder.

4. For the removal of doubts, it is hereby declared that all rules made under Section 3 of the principal Act and in force immediately before the 21st March, 1964 shall continue to be in force after that date until amended, varied or rescinded as if such rules were made under the Principal Act as amended by this Act and any action taken (including appointment made) in pursuance of those rules on or after the 21st March, 1964 and before the commencement of this Act shall be as valid and operative as if it had been taken in accordance with law."

11. Pursuant to Section 3 of the Act 1957 rules were made on 21-3-1957 and they are as follows:—

"The Andhra Pradesh Public Employment (Requirement as to Residence) Rules 1959.

1. Short Title:—

These rules may be called the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959.

2. Definitions:—

In these rules, unless context otherwise requires.

(a) "appointing authority" in relation to any post means an authority empowered for the time being to make appointments as to that post.

(b) "appointment" includes a permanent, quasi-permanent or temporary appointment but does not include an appointment of a casual nature.

(c) "post" means a post specified in the First Schedule.

(d) "Prescribed date" in relation to a post means the last date fixed for making applications for appointments to that post.

(e) "Schedule" means a Schedule to these rules.

3. Requirements as a residence prior to appointment:

A person shall not be eligible for appointment to a post within the Telangana Area under the State Government of Andhra Pradesh or to a post under a local authority (other than a cantonment board) in the said area unless —

(i) he has been continuously residing within the said area for a period of not

less fifteen years immediately preceding the prescribed date; and

(ii) he produces before the appointing authority concerned if so required by it, a certificate of eligibility granted under these rules;

Provided that in relation to posts in the Secretariat Departments and the Offices of the Heads of Departments of the State Government of Andhra Pradesh situated in the cities of Hyderabad and Secunderabad, the requirement as to residence laid down in the rule shall apply to the filing of only the second vacancy in every unit of three vacancies which are to be filled by direct recruitment;

Provided further that any period of temporary absence from the Telangana area for the purpose of prosecuting his studies or for undergoing medical treatment or any period of such temporary absence not exceeding three months for any other reason shall not be deemed to constitute a break in the continuity of such residence, but for the purpose of calculating said period of fifteen years any such period of temporary absence shall be excluded.

4. Eligibility certificate:—

xx xx xx

5. Relaxation of Rule 3.

(1) The State Government may, in exceptional cases and for reasons to be recorded in writing, relax the provisions of Rule 3.

(2) A quarterly statement of all cases of relaxations shall be published by the Government of Andhra Pradesh in the Official Gazette of the State on the form prescribed in the Third Schedule and a copy of every such statement shall be forwarded to the Central Government.

Sd. V. Viswanathan,
Special Secretary.

THE FIRST SCHEDULE

(See Rules 2 and 3)

POSTS.

(a) any post (whether included in the cadre of a service or not) within the Telangana area under the State Government of Andhra Pradesh the appointment to which is not notified in the Official Gazette of the Andhra Pradesh State.

(b) The post of Tahsildar by whatever name designed within the Telangana area; under the control of Andhra Pradesh.

(c) any post (whether included in the cadre of a service or not) under a local authority (other than a cantonment Board) in the Telangana area of the Andhra Pradesh, which carried a scale of pay the minimum of which does not exceed three hundred rupees per mensem or a fixed pay not exceeding the amount.

Explanation: "Pay" means basic pay plus special pay, if any, sanctioned to a post but does not include various allowances.

THE SECOND SCHEDULE

(See Rules 3 and 4)

xx xx xx

THE THIRD SCHEDULE

(See Rule 5 (2))"

12. Article 16 (1) of the Constitution broadly guarantees to all citizens equality of opportunity in matters of employment under the State. Article 16 (2) in no uncertain terms, prohibits any discriminations on grounds only of religion, race, caste, sex, descent, place of birth, residence of any of them. Clauses (3), (4) and (5) are in the nature of exceptions to Article 16 (1) and (2). We are concerned in the present Writ Petitions with Article 16 (3). Now, it may be noted that Article 16 (3) does not authorise Parliament to make any law prescribing any requirement as to residence within a State or States for employment under the Union Government, (not being connected with Union Territory) what is even more important is that it does not authorise the Legislature of any State to make any law prescribing any requirement as to residence within that State for employment under the Government of that State. The Articles are thus clearly designed to prevent the practice of narrow parochialism in matters of Public Employment by the Government of a State. Parliament, is however, authorised to make a law, prescribing in regard to employment under the Government of a State any requirement as to residence within that State. Thus the law made by Parliament may prescribe a requirement as to residence within the State, as a condition for securing employment under the Government of that State. But surely it cannot be said on the language of Article 16 (3) that Parliament may make law prescribing a requirement as to residence, not within the State, but within a region, an area, a district, a taluk, a town or a village of the State as a condition for securing employment under the Government of the State. The maximum concession that the makers of the constitution were prepared to make, from the broad rule that there should be no discrimination on the ground of residence in matters of public employment, was the imposition of a condition regarding residence within the State, meaning thereby, residence anywhere in the State for employment under the Government of the State. Even this condition, the Constitution makers desired, should be imposed by Parliament and Parliament alone, by making a law in that direction. Conditions regarding

and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act.

(4) The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of previous publication.

(5) Rules made under this section shall be published in the Official Gazette, and shall thereupon have effect as if enacted in this Act."

13. In exercise of the powers conferred on the Central Board of Revenue by virtue of Section 59 of the said Act, rules were framed by them and these rules are known as "the Indian Income-tax Rules, 1922". Rules 23 and 24 are relevant and require to be considered in connection with these cases and these rules are as follows:

"23. (1) In the case of income which is partially agricultural income as defined in Section 2 and partially income chargeable to income-tax under the head "Business", in determining that part which is chargeable to income-tax the market value of any agricultural produce which has been raised by the assessee or received by him as rent in kind and which has been utilised as a raw material in such business or the sale receipts of which are included in the accounts of the business shall be deducted, and no further deduction shall be made in respect of any expenditure incurred by the assessee as a cultivator or receiver of rent in kind.

(2) For the purposes of sub-rule (1) "market value" shall be deemed to be:—

(a) Where agricultural produce is ordinarily sold in the market in its raw state, or after application to it of any process ordinarily employed by a cultivator or receiver of rent in kind to render it fit to be taken to market, the value calculated according to the average price at which it has been so sold during the year previous to that in which the assessment is made.

(b) Where agricultural produce is not ordinarily sold in the market in its raw state, the aggregate of —

(1) the expenses of cultivation;
(2) the land revenue or rent paid for the area in which it was grown; and

(3) such amount as the Income-tax Officer finds, having regard to all the circumstances in each case, to represent a reasonable rate of profit on the sale of the produce in question as agricultural produce."

"24. Income derived from the sale of tea grown and manufactured by the seller in the taxable territories shall be computed as if it were income derived from business, and 40 per cent. of such income

shall be deemed to be income, profits and gains liable to tax;

Provided that in computing such income an allowance shall be made in respect of the cost of planting bushes in replacement of bushes that have died or become permanently useless in an area already planted, unless such as has previously been abandoned."

14. The petitioners claim that Rule 24 is unconstitutional and ultra vires inasmuch as it involves excessive delegation, and a naked and uncanalised and uncontrolled power is given to the Executive, that is, the Central Board of Revenue under the control of the Central Government to make the rule in question without defining the limits in which the Executive's discretion and judgment has to be exercised in regard to the apportionment of the income between agricultural and income-tax.

15. In this connection, it is necessary to point out that Article 366(1) of the Constitution defines 'agricultural income' and this definition is as follows:

"'agricultural income' means agricultural income as defined for the purposes of the enactments relating to Indian income-tax;"

It may be seen that this definition adopts the definition found in the Indian Income-tax Act, 1922. Thus, what we find now is that the definition given in the Assam Act is exactly, barring the explanation, on all fours with the Indian Income-tax Act and these definitions are accepted and adopted as correct definitions by the Constitution. It may be seen that even the Government of India Act, 1935, adopted the same definition as is done under the Constitution, in Section 311 (2) thereof, which is as follows:

"(2) In this Act, unless the context otherwise require, the following expressions have the meanings hereby respectively assigned to them, that is to say:

'agricultural income' means agricultural income as defined for the purposes of the enactments relating to Indian income-tax;"

and when this provision was included when the Government of India Act 1935 was passed, the Indian Income-tax Act, 1922 as well as Rule 24 framed thereunder were in force as law. Hence, it must be assumed that the Government of India Act, 1935 adopted these definitions under the Indian Income-tax Act and subsequently when the Constitution was passed, the same was in the same manner adopted by the Constitution.

16. The main attack of the petitioners is against the validity of the rule-making power conferred by Section 59 of the Indian Income-tax Act, 1922, and also the validity of Rule 24 made in exercise of the power conferred by that section. On

the first point, the contention urged is that there has been an excessive delegation in the section that uncontrolled, uncanalised and unrestricted power is given to the executive to frame rules, the legislature thereby abdicating its power of legislation, as it were, in favour of the executive and that this amounted to excessive delegation, far in excess of the permissible limitations, within which delegation of legislative power could be made in favour of the executive.

17. Before we deal with this aspect of the matter, it would be necessary to notice that the Indian Income-tax Act was passed by the Central Legislature constituted under the Government of India Act, 1915. At that time the Indian Legislature had plenary power to enact the law, whereas the Provincial Legislature had only the power to pass laws in respect of the transferred subjects. Section 65 of the Government of India Act, 1915 dealt with the power of the Indian legislature to make laws. Under that section power was given to the making of laws for all persons, for all courts, and for all places and things, within British India and for all subjects of His Majesty and servants of the Crown, Government officers, and the Armed forces anywhere in India. Section 45A of the Government of India Act, 1915, classified the central and provincial subjects. Prior to 1922 and at the time the Indian Income-tax Act, 1922 was passed, the Central Legislature had the power to impose tax on agricultural income, the local legislature having only the power to legislate in respect of the transferred subjects. Hence, so far as the legislative competence goes, there could be no question that the Indian Income-tax Act 1922 was validly passed by the Indian Legislature. The Indian Income-tax Act 1922 continued to be operative by virtue of Section 311(2) of the Government of India Act, 1935.

18. The contention that Section 59 of the Indian Income-tax Act, 1922, suffers from the vice of excessive delegation has to be examined in the light of the conditions as laid down both by the Privy Council as well as by the Supreme Court in regard to the conditions governing the delegation of legislative power. That delegation to a limited extent must necessarily be made is obvious and accepted as necessary to satisfactorily giving effect to the provisions of any enactment. The leading case on the subject of delegation of legislative power of the Supreme Court is *Delhi Laws Act case*, reported in AIR 1951 SC 332. It is, however, not necessary to refer to that case in detail in connection with this matter. In *Banarsi Das v. State of Madhya Pradesh*, AIR 1958 SC 909, the Supreme Court observed as follows:

"While a power to execute a law, it was argued, could be delegated to the executive, the power to make it must be exercised by the Legislature itself.....

x x x

It was also contended that the grant of a power to an outside authority to repeal or modify a provision in a statute passed by the Legislature was unconstitutional, and that, in consequence, the impugned notification was bad in that, in reversal of the policy laid down by the Legislature in Act No. XVI of 1949 that sales to Government should be excluded from the operation of the Act, it withdrew the exemption which had been granted thereunder. And the observations in *In re, The Delhi Laws Act, 1912 etc.* AIR 1951 SC 332 at pp. 344, 399, 400, and the decision in *Rajnarin Singh v. Patna Administration Committee*, Patna, AIR 1954 SC 569 were strongly relied on as establishing this contention. Mr. N. C. Chatterjee particularly relied on the following observations of Bose, J., at page 574 of AIR in *Rajnarin Singh's case*:

"In our opinion, the majority view was that an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above, it cannot include a change of policy."

On these observations, the point for determination is whether the impugned notification relates to what may be said to be an essential feature of the law, and whether it involves any change of policy. Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like.

In *Powell v. Appollo Candle Co. Ltd.*, (1885) 10 AC 282, the question arose as to whether S. 133 of the Customs Regulation Act of 1879 of New South Wales which conferred a power on the Governor to impose tax on certain articles of import was an unconstitutional delegation of legislative powers. In holding that it was not, the Privy Council observed:

"It is argued that the tax in question has been imposed by the Governor and not by the Legislature who alone had power to impose it. But the duties levied under the Order-in-Council are really levied by the authority of the Act under which the Order is issued. The Legislature has not parted with its perfect control over the Governor and has the power, of course, at any moment, of with-

drawing or altering the power which they have entrusted to him. In these circumstances, their Lordships are of opinion that the judgment of the Supreme Court was wrong in declaring Section 133 of the Customs Regulation Act of 1879 to be beyond the power of the Legislature."

Similarly, in *Hampton Jr. and Co. v. United States*, (1928) 276 US 394 = 72 L. Ed. 624, the question arose whether S. 315 (b) of the Tariff Act 1922 under which the President had been empowered to make such increases and decreases in the rates of duty as were found necessary for carrying out the policies declared in the statute was not an unconstitutional delegation. Relying on the above decisions, their Lordships of the Supreme Court in the above case held that the power conferred on the State Government by Section 6 (2) to amend the schedule relating to exemption was in consonance with the accepted legislative practice relating to the topic, and was not unconstitutional.

19. Reliance has been placed on the case of *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 and the following passage in particular, which may be quoted:

"Consequently when the rule-making authority specifies conditions and diseases in the schedule it exercises the same delegated authority as it does when it exercises powers under sub-section (1) and makes other rules and therefore it is delegated legislation. The question for decision then is, is the delegation constitutional in that the administrative authority has been supplied with proper guidance. In our view the words impugned are vague: Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule. It is not stated what facts or circumstances are to be taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in S. 3 (d) must therefore be held to be going beyond permissible boundaries of valid delegation. As a consequence the Schedule in the rules must be struck down."

Reliance is also placed on the following passage:

"We are of the opinion therefore that the words 'or any other disease or condition which may be specified in the rules made under this Act' confer uncanalised and uncontrolled power to the Executive and are therefore ultra vires. But their being taken out of cl. (d) of S. 3 does not affect the constitutionality of the rest of the clause or section as they are severable."

20. It is argued from this decision that as in the instant case also uncanalised and naked power is given to the Executive to decide under Rule 24, as it likes, the Rule must be held to be bad and the delegation must be deemed to be unconstitutional. Reliance has also been placed on *M/s. Devi Das v. State of Punjab*, AIR 1967 SC 1895. At page 1901, Subba Rao, C. J., enunciated the principle of excess delegation as follows:

"The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An over-burdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer any arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature." (AIR 1961 SC 4 at pp. 11-12).

21. In that case, under section 5 of the Punjab General Sales Tax Act, 1948, as it originally stood, an uncontrolled power was conferred on the Provincial Government to levy every year on the taxable turnover of a dealer a tax at such rates as the said Government might direct. Under that section the Legislature practically effaced itself in the matter of fixation of rates and it did not give any guidance either under that section or under any other provisions of the Act. Accordingly, it was held that the delegation was excessive and that section 5 of

the said Act under which power is given to the Executive was held void.

22. Speaking generally, therefore, we are clearly of opinion that it is not unconstitutional for the Legislature to leave it to the Executive to determine details relating to the working out of the taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like. Applying the tests propounded in the above quoted decisions to the instant case, we find that section 59 of the Indian Income-Tax Act, 1922, laid down the policy of the Legislature in clear terms, namely, the ascertainment and determination of any class of income and provided particularly for prescribing the manner in which and the procedure by which the income, profits and gains shall be arrived at in the case of incomes derived in part from agriculture and in part from business. The Legislature has indicated in Section 59 (3) the circumstances in which the rule like rule 24 could be framed and these are:

(1) Where the income, profits and gains liable to tax cannot be definitely ascertained; or

(2) can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable; and in such circumstances the sub-section provides that the rules may

(a) prescribe the methods by which an estimate of such income, profits and gains may be made; and

(b) in cases coming under sub-clause (1) of clause (a) of sub-section (2) where incomes derived in part from agriculture and in part from business, prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax under the Indian Income-tax Act.

It is thus clear that the object and the policy and the circumstances in which the rules have to be framed have all been set out in section 59 (3) and what was left to the Executive, in the instant case the Central Board of Revenue, was to work out the details of the proportion which rule 24 has provided. It is obvious that these are matters of detail which it is more convenient and proper to be left to the Executive to determine, and it is in accordance with the policy indicated, that Rule 24 of the Indian Income-tax Rules had been framed providing for the income derived from the sale of tea, grown and manufactured by the seller in the taxable territories to be computed as if it were income derived from business, and 40 per cent of such income shall be deemed to be income, profits and gains liable to tax. What portion of the income

is derived from agriculture in the matter of tea grown and what portion should be business income for the purpose of the Indian Income-tax Act is a matter of detail which could only be effectively determined by the Executive, and Rule 24 lays down that the entire income derived from the growth and manufacture of tea is to be treated as if it were business income and 40 per cent thereof should be liable to income-tax assessment under the Indian Income-tax Act, 1922.

23. In this connection, it must be noted that the income derived from the cultivation and manufacture of tea comprises partly of the value of the tea leaf grown which is utilised in producing the tea, which is accepted as fit for the marketing and partly of the value that it acquires by being put through the process of manufacture. In other words, the marketable commodity of tea acquires its value partly by reason of the fact that it is grown in the tea-gardens and plucked and brought to the factory where the tea is dried and put through certain processes until it acquires the condition that it could be sold in the market, and the expenditure involved in putting the tea leaves through this process of manufacture. Thus the income derived by the sale of tea in the market is partly derived by agricultural operations and partly by adopting the manufacturing processes.

It is common knowledge that the manufacturing process of tea involves the drying or withering of the green tea leaves and the rolling and drying and storing thereof. The process of drying or withering the tea leaf under the sun and rolling it by hand has been replaced by the modern method of effecting it by the machinery. This process in modern times involves the withering of the tea by the use of steam or electric power. It is then fired by means of hot air from a furnace and is then finally sorted into grades and packed for export. This process may vary in different tea gardens, depending on the nature of the machinery employed. But the fact remains that after the tea leaf passes through the manufacturing process, it is still the leaf in specie, but is reduced to a state in which it would be fit for consumption and thus being sold in the market. Hence the grower and the manufacturer of tea incurs the expenditure in producing the tea in its final shape, partly over the agricultural operation involved in growing tea leaf and partly in the manufacturing process involved in making tea leaf fit for marketing, and this income has to be apportioned in the approximate proportion of the expenditure involved in the agricultural operations and in the manufacturing operations. That every tea producer has to grow tea

and has to put it through a manufacturing process to make it fit for marketing is beyond question. In such circumstances, the Legislature advisedly thought it not correct to treat the entire income derived from the sale of tea either as agricultural income or as business income and the proportion has to be maintained on a rational basis and it is this that has been done by the passing of Rule 24, which, for the purposes of the Income-tax, treats the entire income as if it were business income, but lays down that only 40 per cent thereof should be assessed as business income. We see no justification for holding that the framing of this rule involved any exercise of excessive delegation of power of legislation, nor are we satisfied that S. 59 of the Indian Income-tax Act, 1922 involved any excess delegation of legislative power.

24. In *English and Scottish Joint Co-operative Wholesale Society Ltd. v. Commissioner of Agricultural Income-tax, Assam, 1948-16 ITR 270 = (AIR 1948 PC 142)*, the assessment made under the Assam Act has been upheld by their Lordships of the Privy Council on the basis of the apportionment made in R. 24 of the Indian Income-tax Rules, 1922 and Rule 5 of the Assam Act. The following observations of their Lordships of the Privy Council may be quoted with advantage:

"The Assam Agricultural Income-tax Act applies to all agricultural income derived from land situated in the Province of Assam (Section 5) and it provides by the charging section (Section 3) that agricultural income-tax at the rate specified in the annual Assam Finance Act shall be charged for each financial year on the total agricultural income of the previous year. The part of the definition section (Section 2) which is relevant to the present case defines agricultural income as any income derived from land used for agricultural purposes by agriculture. The Indian Income-tax Act contains a definition of agricultural income in the same terms, but by a rule (Rule 24) made under it, 'income derived from the sale of tea grown and manufactured by the seller in British India shall be computed as if it were income derived from business and 40 per cent. of such income shall be deemed to be income, profits and gains liable to tax.' The scheme of the Assam Act is to tax the remaining 60 per cent. only of the income derived from the sale of tea grown and manufactured by the seller in Assam and that result is secured by suitable provisions which need not be recited (see the explanation to Section 2, the proviso to Section 8 and Rule 5 made under the Act)."

In the final result, their Lordships upheld the assessment made under the provisions

of the Assam Act and the Rules framed thereunder, read with Rule 24 of the Indian Income-tax Rules.

25. The very questions that have arisen for consideration in these cases came up for consideration before a Constitution Bench of the Supreme Court in *Karimtharuvi Tea Estates Ltd. v. Kerala State, AIR 1963 SC 760*. That was a case under the Kerala Agricultural Income-tax Act, which follows closely the provisions of the Assam Act. In that case, Kerala State's power to tax income from tea to agricultural income-tax is limited to taking 60% of the income computed for the purpose of the Indian Income-tax Act as if it were income derived from business, was questioned on the ground that the provisions of the Kerala Agricultural Income-tax Act 1950 as amended by Act IX of 1961, were null and void. In that case their Lordships had to examine the various provisions of the Act including the definition of 'agricultural income' as well as the rule-making power of the Executive under Rule 24 of the Indian Income-tax Rules. The following observations occurring at page 763 in that case may be quoted with advantage:

"The result of rule 24 is that the income derived from the sale of tea grown and manufactured by the seller is to be computed in the first instance as if it was income derived from business. Consequently, the income would be computed in accordance with the provisions of S. 10 of the Income-tax Act. Clause (xv) of sub-s. (2) of S. 10 provides that in computing the income any expenditure by an assessee not being an allowance of the nature described in any of the cls. (i) to (xiv) inclusive and not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purpose of such business, would be deducted. Of the income so computed, 40 per cent is, under R. 24, to be treated as income liable to income-tax and it would follow that the other 60 per cent only will be deemed to be 'agricultural income' within the meaning of that expression in the Income-tax Act. It follows, therefore that the power of the State Legislature to make a law in respect of taxes on agricultural income arising from tea plantations will be limited to legislating with respect to the agricultural income so determined. The State Legislature is free in the exercise of its plenary legislative power to allow further deductions from such computed agricultural income as it considers fit, but it cannot add to the amount of the agricultural income so computed by providing that certain items of expenditure deducted in the computation of the income from a business under the provisions of the Income-tax Act be

not deducted and be considered to be a part of the taxable agricultural income."

Lower down, dealing with the power of the State Legislature to enact the law in respect of agricultural income, their Lordships observed:

"It is not disputed for the respondent that the power of the State Legislature to enact a law in respect of agricultural income relates only to such agricultural income as is defined in Article 366 of the Constitution.

It is however urged that for the purpose of this definition, one has to look to the definition of 'Agricultural income' in the Income-tax Act and not to the rules made thereunder. We do not agree, "Agricultural Income" as defined in the Constitution means 'agricultural income for the purpose of the enactments relating to income-tax'. Rule 24 of the Income-tax Rules has been made under the powers conferred by section 59 of the Income-tax Act and has effect as if enacted in that Act. When section 59 of the Income-tax Act provides for the rules made under that Act to prescribe the proportions of income from business, and income from agriculture in the entire income derived in part from agriculture and in part from business, the proportion so prescribed must be taken to be prescribed by the Act. These rules were in existence in 1950 when the Constitution incorporated the definition of 'agricultural income' from the Income-tax Act by reference. The definition of the term was bound up with the rules."

26. In view of the above observations of their Lordships of the Supreme Court, it follows that the explanation to S. 2 (a) of the Assam Act which merely gives effect to R. 24 of the Income-tax Rules cannot be called into question. This explanation is as follows:

"Explanation: Agricultural income derived from such land by the cultivation of tea means that portion of the income derived from the cultivation, manufacture and sale of tea as is defined to be agricultural income for the purposes of the enactments relating to Indian Income-tax."

It may be seen that this explanation contains nothing more than what is laid down in Rule 24, under which the total income is assessed as if it were business income, and 40 per cent is taken for the purposes of assessment under the Income-tax Act. The balance of 60 per cent, which represents the agricultural income is assessable to agricultural income-tax under the Assam Act. Any doubt on the subject has been cleared by the decision of the Supreme Court in AIR 1963 SC 760.

27. It is contended by Mr. Ghosh that having regard to the use of the word

'ordinarily' in Rule 23 (2) (a), quoted earlier in this judgment, it excludes tea from its operation. The argument is not understood. There may be agricultural produce which may be sold in the market in its raw state or after application of an ordinary process to render it fit to be taken to the market. But that makes no difference at all, particularly when it is obvious that tea has to be put through the process of manufacture before it is rendered fit for marketing. The decisions relied on by Mr. Ghosh, namely: In re, Bhikanpur Sugar Concern, AIR 1919 Pat 260 (FB) and Sheolal v. Income-tax Commissioner, AIR 1932 Nag 61, have no application to the instant case as they do not deal with tea. Another case cited by Mr. Ghosh reported in Killing Valley Tea Co. Ltd. v. Secretary of State, AIR 1921 Cal 40, is a case long before the Indian Income-tax Act, 1922 and the Rules framed thereunder became law and, therefore, is not of much assistance.

28. Taking all the facts and circumstances into consideration we are satisfied that both the proviso to Section 8 of the Assam Act and Rule 5 and the Explanation thereto are in conformity with the Indian Income-tax Act and the Rules framed thereunder and therefore cannot be struck down as unconstitutional.

29. By way of reply Mr. Ghosh raised a new point, in a faint way, that although the Indian Income-tax Act, 1922 is a pre-Constitution Act, it can certainly be struck down under Article 13 of the Constitution as offending or being violative of fundamental rights. But this argument has not been advanced earlier in the case. We consider that there is no substance in this contention, which does not, in our opinion, merit serious consideration.

30. In the result, therefore, we are clearly of opinion that no exception can be taken to the assessment made against the petitioners under the Assam Act and they are liable to pay agricultural income tax as assessed under the said Act. These petitions are dismissed and the rules are discharged. In the circumstances, we make no order as to costs.

Petitions dismissed.

AIR 1970 ASSAM & NAGALAND 70
(V 57 C 14)

S. K. DUTTA, C. J. AND
K. C. SEN, J.

The Managements of Tea Gardens of Assam, Petitioner v. The Presiding Officer, Industrial Tribunal Assam, Gauhati and others, Opposite Parties.

Civil Rule No. 261 of 1965, D/- 7-5-1969.

FM/FM/C698/69/JHS/P.

Industrial Disputes Act (1947), Sch. 3, Item 5 — Payment made as bonus to labour of various tea companies according to agreement — Payment, however, not related to profits of individual establishment — Payment is not bonus within meaning of formula evolved by Bombay Full Bench in (1950) 2 Lab LJ 1247 (LATI-Bom) and could be deducted from gross profits for purpose of calculating profit for payment of bonus to other members of staff.

In respect of the years 1953 and 1954 certain lump sum payments were made as bonus, by various tea companies, to labour according to an agreement in that behalf. As regards years 1955 and 1956, the tea garden areas of the State were divided into different zones. Then ten companies were selected in each zone by drawing of lots and the bonus payable to labour was fixed on the basis of profits made by the said companies. The question for consideration was whether in determining the amount of profits for the purpose of paying bonus to other members of the staff, the payment made to labour as bonus could be deducted from gross profits. It was contended that the formula evolved by Bombay Full Bench in 1950-2 Lab LJ 1247 (LATI-Bom.) applied and the payment made to labour was bonus which could not be deducted to arrive at the profit for payment of bonus to the other members of the staff.

Held, that, according to the Full Bench formula, it was the profit of a particular establishment which was the basis for the payment of bonus. That being so, the payment made to the labour according to the agreement was not bonus within the meaning of the formula. It was a mere ad hoc payment to labour. The formula could not be applied for one purpose viz. to hold that bonus could not be a prior charge, when it was abandoned for another purpose viz. to arrive at what was bonus. As pointed out by the Supreme Court, in AIR 1967 SC 691, gross profit had to be arrived at after deducting wages and dearness allowances paid to the employees and "other items of expenditure", and the ad hoc payment that was made under the agreement to the labour had to be deducted as "other expenditure". (Para 4)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 691 (V 54) =
(1967) 1 SCR 15, *Jalan Trading Co. Private Ltd. v. Mill Mazdoor Sabha* 3

(1959) AIR 1959 SC 967 (V 46) =
1959 SCR 925, *Associated Cement Companies Ltd. v. Its Workmen* 3

(1950) 1950-2 Lab LJ 1247 (LATI-Bom.), *Mill Owners' Association, Bombay v. Rashtriya Mill Mazdoor Sangh, Bombay* 3

S. D. Banerjee, D. N. Das and S. R. Khound, for Petitioner; P. Chaudhuri and G. K. Talukdar, for Opposite Parties.

DUTTA, C. J.: This is a writ petition filed by the Assam Branch of the Indian Tea Association. The petitioner's case is as follows. A large number of tea gardens in Assam are members of the Indian Tea Association which is an Association of the employers having a Branch in Assam known as the Assam Branch of the Indian Tea Association with its head office at Dikom. This Association on behalf of the member gardens in Assam concluded an agreement with the workmen of the said gardens (opposite party No. 2) on 7-10-55 in respect of the payment of bonus to the clerical and medical staff and the artisans for the years 1954 to 1958. In January, 1956, an agreement had been reached in Delhi regarding bonus to labour. It related to the claims for payment of bonus for the years 1953, 1954, 1955 and 1956. It was agreed by the parties that in respect of the claims for the years 1953 and 1954 a lump sum payment will be made on certain conditions. For the years 1955 and 1956, it was agreed that the labour bonus would be given on the basis of zonal area prosperity of the year compared with 1954 and the resultant co-efficient applied to the basic of lump sum agreed for the years 1953 and 1954. Thus the bonus payable to labour had no relation to the profits of the individual companies and it was a lump sum payment in addition to the wage of a worker and in the nature of a fixed charge. In determining the profits for payment of bonus to the members of the clerical and medical staff and the artisans under the agreement dated 7-10-55, the bonus payable to the labourers under the Delhi agreement of 1956 was accounted as costs and the said amounts were deducted from the amount of profits. The Union however, took the stand that amounts paid as bonus to the labourers could not be deducted from the gross profits for the purpose of calculating the profits for payment of bonus to the clerical and medical staff and the artisans.

2. A dispute thus having arisen, the State Government referred it to the Industrial Tribunal, Assam for adjudication on the following points:

(i) Whether the managements of Tea Gardens in Assam under the membership of Indian Tea Association are justified in deducting amounts paid as bonus to workers pursuant to an agreement effected in New Delhi on 8th January, 1956 from the amounts of gross profits for the purpose of paying bonus to the members of the staff?

(ii) If not, to what relief are the members of the staff entitled?

3. The case of the petitioner before the Tribunal was that the bonus paid to the labourers under the Delhi agreement was not related to any profit, but in fact was a mere lump sum payment being a fixed charge in addition to the wages of the workers. Such bonus, according to the petitioner, was a mere revenue charge. The Union on the other hand, submitted that the Full Bench formula evolved by the Full Bench of the Labour Appellate Tribunal in *The Millowners' Association, Bombay v. Rashtriya Mill Mazdoor Sangh, Bombay, 1950-2 Lab LJ 1247 (LATI-Bom)* would apply and that the payment made to the labourers was bonus which could not be deducted to arrive at the profit for payment of bonus to the clerical and medical staff and the artisans. The learned Tribunal held that the above formula did apply and that the said formula did not provide labour bonus as a prior charge for deduction from the gross profit to arrive at the available surplus. The short point that we have to decide is whether the payment made as bonus to the labourers is to be deducted to arrive at the profit on the basis of which bonus has to be paid to the clerical and medical staff and the artisans. The Full Bench formula was considered by the Supreme Court in several cases and in *Jalan Trading Co., Private Ltd. v. Mill Mazdoor Sabha, AIR 1967 SC 691* the Supreme Court explained the formula as follows:

"These problems were for the first time elaborately considered by this Court in the *Associated Cement Companies Ltd. v. Its Workmen, 1959 SCR 925 = (AIR 1959 SC 967)*. Since that decision numerous cases have come before this Court in which the basic formula has been accepted with some elaboration. The principal incidents of the formula as evolved by the decisions of this Court may be briefly stated: Each year for which bonus is claimed is a self-contained unit and bonus will be computed on the profits of the establishment in that year. In giving effect to the formula as a general rule from the gross profits determined after debiting the wages and dearness allowances paid to the employees, and other items of expenditure against total receipts, as disclosed by the profit and loss account are accepted, unless it appears that the debit entries are not supported by recognized accountancy practice or are posted mala fide with the object of reducing gross profits. Debit items which are wholly extraneous to or unrelated to the determination of trading profits are ignored. Similarly income which is wholly extraneous to the conduct of the business e.g. book profits on account of revaluation of assets may not be included in the gross profits. Against the gross profits so ascertained the following items

are charged as prior debits: (1) Depreciation: such depreciation being only the normal or notional depreciation; (2) Income-tax payable for the accounting year on the balance remaining after deducting statutory depreciation. The income-tax to be deducted is not the actual amount, but the notional amount of tax at the rate for the year, even if on assessment no tax is determined to be payable. For the purpose of the Full Bench Formula income-tax at the rate provided must be deducted, but in the computation of income-tax statutory depreciation under the Indian Income-tax Act only may be allowed, (3) Return on paid-up capital at 6 per cent and on reserves used as working capital at a lower rate. In the *Associated Cement Companies' case, 1959 SCR 925 = AIR 1959 SC 967* it was suggested that this rate should be 2 per cent, in later cases 4 per cent on the working capital was regarded as appropriate. (4) Expenditure for rehabilitation which includes replacement and modernisation of plant, machinery and buildings, but not for expansion of building, or additions to the machinery."

4. It is quite obvious that the payment made to the labour under the Delhi agreement by the various tea companies was not based on the above formula at all. In respect of 1953 and 1954 lump sum payments were made. As regards 1955 and 1956, a particular formula was adopted by agreement. The tea garden areas of the State were divided into different zones. Then ten companies were selected in each zone by drawing of lots and the bonus payable to labour was fixed on the basis of profits made by the said companies. Thus, the amounts paid had no relation to the profit made by a particular tea company but were calculated on the basis of zonal prosperity. According to the *Bombay Full Bench formula*, it is the profit of a particular establishment which is the basis for the payment of bonus. This being so, it can be said that the payment made to the labour according to the Delhi agreement is not bonus within the meaning of the formula. It is a mere ad hoc payment to labour. In laying down the basis for payment of certain sums in the Delhi agreement the *Bombay Full Bench formula* was not followed. Therefore it appears that whereas the payment made to labour was not calculated according to the said formula, the ad hoc payment mentioned above is treated as bonus for the contention that according to the formula bonus cannot be a prior charge. The formula cannot be applied for one purpose viz. to hold that bonus cannot be a prior charge, when it was abandoned for another purpose viz., to arrive at what was bonus. As pointed out by the Supreme Court, in the

passage cited above, gross profit has to be arrived at after deducting wages and dearness allowances paid to the employees and "other items of expenditure". We think the ad hoc payment that was made under the Delhi agreement to the labour has to be deducted as "other expenditure". As such the answer to the first question in the reference to the Labour Tribunal must be answered accordingly.

5. In the result, this petition must be allowed and the award is set aside. The rule is made absolute. There will be no order as to costs.

6. K. C. SEN, J.: I agree.

Petition allowed.

AIR 1970 ASSAM & NAGALAND 73 (V 57 C 15)

S. K. DUTTA, C. J. AND

P. K. GOSWAMI, J.

M/s. Ashoka Construction Co., Petitioner v. Union of India and another, Opposite Parties.

Civil Revn. No. 26 of 1968, D/- 13-5-1969, from order of Addl. Deputy Commr. Shillong, D/- 27-3-1968.

(A) Arbitration Act (1940), S. 33 — Application under S. 33 need not be in any particular form. AIR 1959 Madh Pra 102 & AIR 1954 Mad. 560 & ILR (1951) 1 Cal. 438 & AIR 1967 SC 1233, Foll.

(Para 4)

(B) Civil P. C. (1908), S. 115 — Court exercising jurisdiction under S. 115 cannot correct errors of fact. (Para 9)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1233 (V 54) =
(1967) 3 SCR 147, Madan Lal v. Sunder Lal 7

(1959) AIR 1959 Madh Pra 102
(V 46) = 1959 MPLJ 87, Sheoram-prasad v. Gopalprasad 4

(1954) AIR 1954 Mad 560 (V 41) =
1954-1 Mad LJ 7, Ramaswami Servai v. Muthiralayee 5

(1951) ILR (1951) 1 Cal 438, Pan-chanan Pal v. Mani Gopal Niyogi 6
B. K. Das, for Petitioner; D. K. De and G. K. Talukdar, for Opposite Parties.

DUTTA, C. J.: This petition has been filed against the order of the Additional Deputy Commissioner, United Khasi & Jaintia Hills District, setting aside an award. The petitioner entered into a contract with the Union of India (hereinafter called the Government) for the construction of buildings of the Assam Rifles at Tezu in the N. E. F. A. The contract contained a clause being clause No. 25 for settlement of disputes arising out of the contract by arbitration. The works were

completed on 18-10-57 but disputes in respect of certain items arose and could not be settled. The petitioner (hereinafter called the contractor) took final payment on 18-10-57 under protest and without prejudice to his claims. Thereafter on 29-10-60 the contractor requested the Government for appointment of a sole arbitrator as the disputes had arisen between the parties as aforesaid. The Superintending Engineer as per agreement appointed one Shri N.M. Malkani as arbitrator on 1-1-62. The contractor objected to this appointment and prayed for the appointment of one Shri Nath as arbitrator by an application purported to be under Sections 8, 20, 31 and 41 of the Arbitration Act 1940 (hereinafter called the Act) filed before the Assistant to the Deputy Commissioner at Shillong who held that the appointment of Shri Malkani was valid. Shri Malkani, however, died before he could act as arbitrator and in his place one Shri P. S. Rao was appointed as arbitrator.

The contractor again objected to the appointment of Sri Rao and filed an application purported to be under Sections 8 and 20 of the Act praying for appointment of another person as arbitrator. The Government resisted the petition. The learned Assistant to the Deputy Commissioner however, allowed the petition after hearing both the parties and appointed Shri G. N. Dutta, as arbitrator by an order dated 29-4-65. The Government then filed a revision petition before this Court against the order of the Assistant to the Deputy Commissioner. This Court dismissed that petition. The Government then preferred an appeal before the Supreme Court and this appeal was also dismissed. The arbitrator Shri G. N. Dutta filed his award in Court on 21-1-66 and the Government filed a petition on 17-2-66 for setting aside the award. The learned Assistant to the Deputy Commissioner after hearing both the parties dismissed the said objection petition on 27-4-67 and made the award a rule of the Court and ordered drawing up of a decree in terms of the same. Thereafter the Government filed an appeal before the Additional Deputy Commissioner and the contractor also filed a cross-appeal. The contractor, however, did not press his appeal and it was dismissed. The Additional Deputy Commissioner allowed the appeal of the Government and set aside the award. The contractor has filed this petition against the order of the Additional Deputy Commissioner.

2. This petition is said to be under Rule 36 of the Rules for the Administration of Justice and Police in the Khasi & Jaintia Hills District and also under Sections 115 and 151 of the Civil Procedure Code. It is not disputed that the Act

applies to the present proceedings. Under section 41 of the Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court and all appeals under the Act. In the present case the original order was passed by a *Munsiff in his capacity as Assistant to the Deputy Commissioner in Shillong*. There was an appeal to the Additional Deputy Commissioner whose position is analogous to that of a District Judge. Sub-section (2) of Section 39 of the Act bars a second appeal against an appellate order passed under the said section. The appeal before the Additional Deputy Commissioner was filed under Section 39 (1) (vi) of the Act for setting aside the award. Hence this petition must be treated only as a revision petition under Section 115 of the Civil Procedure Code. The High Court has no power to interfere under this section except in three cases viz. where the subordinate court appears (1) to have exercised a jurisdiction not vested in it by law; or (2) to have failed to exercise a jurisdiction vested in it by law; (3) to have acted in exercise of its jurisdiction illegally or with material irregularity.

3. It appears that a preliminary objection was raised before the Assistant to the Deputy Commissioner regarding the maintainability of the petition. It may be noted that the objection petition was at first said to have been filed under Section 33 of the Act. But later this was corrected and the petition was shown to be under Section 17 of the Act. The learned Assistant to the Deputy Commissioner held that the award should be made a rule of the court since there was no petition under Section 33. But all the same, he went on to examine the contentions raised by the Government. It is argued before us by the learned counsel for the contractor that this view of the learned Assistant to the Deputy Commissioner was not set aside by the appellate court. In fact, it was not gone into by it and hence he had no jurisdiction to set aside the award.

4. The word application has not been defined in the Act. It is not necessary to make the application in any particular form. Under Section 33 the Court should decide the objections raised ordinarily on affidavits. But it is clear from the proviso to Section 33 that the Court is entitled to decide them on other evidence also. It has been laid down by several High Courts as well as the Supreme Court that there is no special form prescribed for an objection petition. In *Sheorampasad v. Gopalprasad*, AIR 1959 Madh Pra 102, it was held by the Madhya Pradesh High Court that an application filed for permission to inspect record could be treated as an application under

Section 33. All the grounds of challenge to the award were mentioned in that application, but details thereof were furnished later in the written statement. It was held that the absence of details could not come in the way of the court treating the application as one falling under Section 33.

5. In *Ramaswami Servai v. Muthiralayee*, AIR 1954 Mad. 560, the petitioner before the Madras High Court had filed an award into the Court of the Munsiff with a request that a decree might be passed in terms of the award. Notice was served on the respondents and within 30 days of the receipt of the same, the respondents filed a counter attacking the genuineness and validity of the award. In that counter it was prayed that the court might be pleased to pass an order dismissing the request for a decree. It was contended that as there was no application with a prayer "to set aside the award" within 30 days as required under Section 17 of the Act and Article 158 of the Limitation Act, the objection of the respondents could not be entertained. The Munsiff rejected this contention. On a revision petition being filed against the order of the Munsiff the High Court held that form of the application for setting aside an award being not prescribed the Court correctly did not insist on a particular form of application with court-fee stamp affixed thereon.

6. In *Panchanan Pal v. Nani Gopal Niyogi*, ILR (1951) 1 Cal. 438, it was held by the Calcutta High Court that courts could ignore technicalities and treat a petition of objection filed in course of proceedings under the Arbitration Act as one under Section 33 where, in substance, it complied with the terms thereof.

7. The above views were approved by the Supreme Court in *Madan Lal v. Sunder Lal*, AIR 1967 SC 1233. The facts of that case in brief were as follows. The award was filed in Court on September 7, 1957 and notice of filing was issued to the appellant and served upon him on September 30, 1957. It was in November 1957 i.e. more than 30 days later, that the appellant filed an objection in the nature of a written statement. Although the appellant attacked the validity of the award on various grounds, the objection did not contain any prayer at the end, nor did it indicate what relief the appellant desired. The trial Court held that the appellant's objection was not maintainable as his remedy was to apply under Section 33 if he wanted the award to be set aside. Such an application has to be filed within 30 days of the service of notice of filing the award vide Article 158 of the Limitation Act (old Act). As the objection was filed beyond the period of limitation of 30 days, it was

rejected. The appellant then went in appeal to the High Court which dismissed his appeal. Then he went to the Supreme Court which also dismissed the appeal on the ground of limitation. In this connection the Supreme Court observed as follows:

"It is clear, therefore, from the scheme of the Act that if a party wants an award to be set aside on any of the grounds mentioned in S. 30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Art. 158 of the Limitation Act. If no such application is made the award cannot be set aside on any of the grounds specified in section 30 of the Act. It may be conceded that there is no special form prescribed for making such an application and in an appropriate case an objection of the type made in this case may be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation it cannot be treated as an application to set aside the award, for if it is so treated it will be barred by limitation.

It is not in dispute in the present case that the objections raised by the appellant were covered by Section 30 of the Act, and though the appellant did not pray for setting aside the award in his objection that was what he really wanted the Court to do after hearing his objection. As in the present case the objection was filed more than 30 days after the notice it could not be treated as an application for setting aside the award, for it would then be barred by limitation."

8. In the instant case it may be noted that the trial Court actually treated the petition as one under Section 33 although he expressed the opinion that there was no petition under the said section. This is obvious from the first sentence of the judgment viz. "This is a petition for setting aside the award dated 17-1-66 made by the appointed arbitrator Sri G. N. Dutta, retired Chief Engineer of Assam." Moreover, towards the end of the judgment, the trial court said "In the result, the present petition of the Union of India praying for setting aside the award is dismissed with costs of Rs. 50/-." In the above circumstances, I do not find that the courts below wrongly assumed jurisdiction by entertaining the objection.

9. The first appellate court held that the arbitrator misconducted himself by violating a principle of natural justice inasmuch as he made the award without giving a chance to the Government to close its case by putting in written arguments. Whether there was such a violation or not, is a question of fact and this Court, while exercising jurisdiction under Section 115 of the Civil Procedure Code

cannot correct errors of fact, however gross they may be. It is true that an award may be set aside on the ground of an error of law only when it is apparent on the face of the award. But this principle will not apply when there is violation of a principle of natural justice e.g. when evidence is shut out. In such a case the Court can examine the proceedings. In the present case the appellate court did this to arrive at the conclusion that there was such a violation.

10. The appellate court also held that the arbitrator exceeded his jurisdiction by entertaining some new claims. It is contended that the appellate court was barred by res judicata from entering into this question. As the award is liable to be set aside on the ground of violation of a principle of natural justice, it is not necessary to examine the said contention.

11. In the result, this revision petition fails and it is dismissed. There will be no order as to costs.

12. P. K. GOSWAMI, J.: I agree.

Revision dismissed.

AIR 1970 ASSAM & NAGALAND 75 (V 57 C 16)

P. K. GOSWAMI, J.

Keshab Chandra Das and others, Petitioners v. On the death of Sriram Chandra Das (Plaintiff) his legal representatives (Madhab Chandra Das and others) and another (Pro forma defendant), Respondents.

Second Appeal No. 99 of 1965, D/- 23-7-1969, from order of Sub. J., No. II, Lower Assam Districts Gauhati, D/- 30-1-1965.

(A) Civil P. C. (1908), O. 41 R. 23 — Case sent back to first appellate Court to dispose of appeal on merits — Court of first appeal is competent to rehear entire matter.

Where the judgment in the first appeal is set aside by the High Court in revision and the case is sent back to dispose of the appeal on merits, the matter is in the same position as it was after the passing of the judgment and decree by the trial Court. The reasonings and the findings of the Judge in the earlier appeal do not survive and he is competent to rehear the entire matter in the appeal which is before him after the remand.

(Para 7)

(B) Transfer of Property Act (1882), S. 53 — Plea of benami referring to sham transaction — Want of consideration for transaction must be established by party

JM/JM/E592/69/HGP/D

pleading — (Evidence Act (1872), Ss. 101-104).

Where the plea of benami transaction refers not to a transaction in favour of a person other than a real owner but to a type of sham transaction such as that there was no sale at all, the party pleading benami has to establish that there was absolutely no consideration for the sale. Where the courts below concurrently found after appreciation of oral and documentary evidence that there was passing of consideration for the sale in question the plea of benami set up falls through. AIR 1957 SC 49, Rel. on.

(Para 8)

(C) Registration Act (1908), S. 49 — Lease — Non-registration of — Document can be used as proof of nature of possession.

The defendant who sold the suit land to plaintiff had his house over it and although it was recited in the sale deed that possession was delivered, the defendant took plaintiff's permission for removal of his house within 6 or 7 months. The defendant was unable to remove the house within that time and he executed an unregistered kabuliyat in favour of the plaintiff agreeing to pay a certain rent and stay there for one year. After the expiry of one year also he could not vacate and executed two successive unregistered kabuliyats. When the plaintiff in a suit for declaration of his right, title and khas possession, relied on those kabuliyats not for the purpose of establishing his right or title but only as an answer to defendant's claim to a possible plea of adverse possession.

Held that the unregistered kabuliyats showed the nature or character of defendant's possession. Although, therefore, those documents were not admissible as lease, they could however establish the nature of at least the permissible possession of the property by the defendant. That being the position, there was no question of limitation, AIR 1958 SC 199, Disting.

(Para 9)

Cases Referred: Chronological Paras

(1958) AIR 1958 SC 199 (V 45) =

1958 SCR 948, Mst. Kirpal Kuar v. Bachan Singh 10

(1957) AIR 1957 SC 49 (V 44) =

1956 SCR 691, Sree Meenakshi Mills Ltd. v. Commr. of Income tax, Madras B

(1919) AIR 1919 PC 44 (V 6) =

46 Ind App 285, Varada Pillai v. Jeevarathnammal 10

R. K. Goswami and D. C. Goswami, for Appellants; D. K. Sarma and J. N. Sarma, for Respondents.

JUDGMENT: This second appeal is on behalf of the principal defendant. The plaintiff brought a suit for declaration of

his right and title over the suit land measuring 2 Kathas 12 1/2 lechas in Barpeta town described in schedule Kha to the plaint. This land originally belonged to the principal defendant, who sold the same to the plaintiff by executing a registered sale deed on 11-2-43 for a consideration of Rs. 1,000/-. The defendant had his houses over the suit land and although it is recited in the document that possession was delivered, he took permission from the plaintiff for removal of his houses within 6 or 7 months and the plaintiff agreed to the same. The plaintiff got his name mutated in the record of rights. The defendant was unable to remove the houses within that time and requested for permission to continue there and on 14-8-43 he executed an unregistered kabuliyat in favour of the plaintiff agreeing to pay a rent of Rupees 5/- per month and stay there for one year after which he will remove his houses without notice. The plaintiff agreed to the said arrangement.

After the expiry of one year also he could not vacate and executed two successive unregistered kabuliyats on 15-12-45 and 15-12-47 agreeing to stay on the land by paying an annual rent of Rupees 60/-. The defendant ultimately did not vacate and the plaintiff has been unsuccessfully asking him to vacate the land since 1954 and finally on the 27th February, 1956 (14th Falgun 1362 B. S.) he served a registered notice on the defendant asking him to vacate on the expiry of 30th Falgun, 1362 B. S. There was also a demand in this notice for payment of arrear rent for three years from 1953 to 1955 amounting to Rs. 180/-. The defendant received the notice on 28-2-56 but did not comply with the same and hence the suit.

2. The defendant admitted to have executed the sale deed on 11-2-43 but stated that that was not a genuine sale but only a benami transaction to save the property from his creditors. He avers that the plaintiff was his class-mate from school and a special friend and, therefore, he in honest belief put his trust on him and made this benami transaction. He also stated in paragraph 9 of his written statement that the property in suit at the time of alleged sale was in much worse condition than it was at the time of his filing the written statement and that the defendant had "improved the property at his own costs several times". Defendant also admitted to have executed the three kabuliyats but stated that these were part of the defendant's benami sale to the plaintiff in order to give a colour of genuineness to the benami transaction. He stated that no rent was ever paid to the plaintiff and he denied to have made the various pro-

prises attributed to him. He questioned the validity of the notice and also the pecuniary jurisdiction of the court stating that the land in suit was of the value of more than Rs. 4,000/-.

In an additional written statement filed more than a year after his first written statement, he averred that the kabuliyaats were inadmissible and illegal and as such the plaintiff's right and title are barred under Articles 142 and 144 and other provisions of the Limitation Act, even if it could not be proved that the plaintiff is not a benamidar for the defendant as alleged in his earlier written statement.

3. The learned Munsiff framed the following issues:

- (1) Whether the suit is maintainable?
- (2) Whether the suit is barred by limitation?
- (3) Whether the suit is bad for non-joinder of the defendants?
- (4) Whether the plaintiff has right, title and interest over the suit lands?
- (5) Whether the notice to quit on the defendant was valid?
- (6) Whether this court has jurisdiction to try the suit?
- (7) Whether the alleged sale of the suit land was benami?
- (8) To what relief the parties are entitled?

The learned Munsif in answering issue No. 6 held that the land in suit was of the value of more than Rs. 2,000/-, which is his pecuniary jurisdiction, but since the suit is between the landlord and tenant, he had jurisdiction to try the suit, which has been correctly valued on the basis of the annual rental of the property, which will also be the amount for the purpose of jurisdiction under S. 8 of the Suits Valuation Act. He answered the issues in favour of the plaintiff and decreed the suit with costs with regard to the plaintiff's prayer for khas possession over the suit land, but dismissed the plaintiff's claim with regard to rent.

4. The defendant took an appeal to the Subordinate Judge and there was also a cross objection filed by the plaintiff with regard to the refused rent. The Subordinate Judge set aside the decree of the Learned Munsiff and remanded the suit to him for fresh disposal by deciding the following issues, namely—

- (1) Whether there was any relationship of landlord and tenant between the plaintiff and defendant No. 1?
- (2) If so, whether the tenancy was legally determined by service of any valid notice?
- (3) Whether the defendant is liable to pay any arrear rent and if so what amount?
- (4) To what relief, if any, the parties are entitled?

It appears, the Subordinate Judge had observed first that the Munsiff had pecuniary jurisdiction to try the suit as he agreed with the finding of the learned Munsiff that the suit was by the landlord against the tenant.

5. The defendant was not satisfied with this remand order and filed a revision petition before the High Court, being Civil Revision No. 70/61, and Mehrotra, C. J. on 30-5-62 set aside the order of remand and sent back the case to the Subordinate Judge to dispose of the appeal on merits. It is, therefore, apparent that after the order in this revision, the matter was in the same position as it was after the passing of the judgment and decree by the Munsiff. It is not possible to read the judgment of the learned Chief Justice as indicating that his Lordship at all gave any decision on the points that arose for consideration in the appeal before the Subordinate Judge. The matter is, therefore, as it was when the appeal was first preferred before the learned Subordinate Judge and after the remand order of the Subordinate Judge has been set aside, the whole matter will be at large before that court in pursuance of the High Court's order in revision.

6. The learned Subordinate Judge after remand answered issue No. 6 in favour of the plaintiff by holding after appreciation of the evidence led by the parties that the value of the land in suit was not more than Rs. 2,000/-, and he fixed the value at Rs. 1,500/- both for the purpose of court-fees and for jurisdiction. The learned Subordinate Judge, therefore, held that the suit was within the pecuniary jurisdiction of the Munsiff and he treated the suit as being one for declaration of the plaintiff's right and title to the same and for khas possession. The Subordinate Judge held that the suit was maintainable and that it was not bad for non-joinder of defendants. He also held that the same was not barred by limitation. He held that the plaintiff had right and title to the suit land by virtue of the registered sale deed and rejected the defendant's plea of benami transaction. He also held that the notice given by the plaintiff was a valid notice and was duly served. He thereupon decreed the suit in plaintiff's favour by declaring his right and title to and for khas possession of the property and ordered the plaintiff to pay additional court-fees, which had since been paid by the plaintiff. He also decreed the plaintiff's claim for Rs. 180/- as arrears of rent on the cross-objection filed by him.

7. Mr. Goswami, the learned counsel for the appellants submits that the learned Subordinate Judge erred in law in interfering with the finding of the learned Munsiff, which had been earlier affirmed

by his predecessor-in-office in the previous appeal with regard to the question of pecuniary jurisdiction. He further submits that the Subordinate Judge, therefore, had only one alternative before him to dismiss the appeal on his own interpretation of the plaint as a suit for declaration of right, title and khas possession on the point of jurisdiction.

The above argument is based on a misconception of the judgment of the learned Chief Justice in the Civil Revision. As noted earlier, there is no decision of the High Court with regard to the question of jurisdiction, nor about the finding relating to the value of the property. The earlier judgment of the learned Subordinate Judge having been set aside by the High Court, the reasonings and findings of the Judge in that appeal did not survive after his judgment had been set aside and the whole matter was remanded back to the same court for disposal of the appeal. The learned Subordinate Judge was, therefore, competent to rehear the entire matter in the first appeal before him.

Reading the judgment of the Subordinate Judge, it is clear that both the parties addressed the court on issue No. 6 regarding pecuniary jurisdiction of the Munsiff. The plaintiff while supporting the decree, could do so even by showing that some of the findings of the court below were wrong provided in doing so, he is supporting the ultimate decree of the court. Since the learned Munsiff held that he had pecuniary jurisdiction to try the suit on the footing that the suit was between the landlord and tenant, the plaintiff could support his jurisdiction on the basis of an argument that even as a title suit, the Munsiff would have jurisdiction to try the suit, if the property can be shown to be of the value of not more than Rs. 2,000/-. which was the pecuniary limit of the Munsiff's jurisdiction.

It is exactly this position, which appears to have been taken by the plaintiff as appearing in the judgment of the learned Subordinate Judge. The learned Subordinate Judge after appreciating the entire oral and documentary evidence, came to the conclusion that the property could not be valued at more than Rupees 2,000/- and this finding of fact cannot be interfered with in second appeal. The objection of the learned counsel for the appellants, is, therefore, not tenable in law.

8. The learned Subordinate Judge also found against the defendants on the benami plea set up by him. The learned counsel submits that the evidence of the witnesses, particularly that of Sri Telukdar and Sri Sadananda on that point were not considered in proper light. In

this context, he relies upon a decision of the Supreme Court in the case of *Sree Meenakshi Mills Ltd. v. Commr. of Income-tax, Madras*, reported in AIR 1957 SC 49. This decision has explained the meaning of the expression 'benami'. It is observed thus:

"The word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami', is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B.

But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid."

The benami transaction which is referred to by the learned counsel is of the second type. According to him, there was no sale and the transaction was a sham transaction. In order to establish this, he had to establish that there was absolutely no consideration for the sale. There is however a concurrent finding of fact of the Courts below against the defendants on this point. The Courts below have found after appreciation of the oral and documentary evidence that there was passing of consideration for the sale in question. That being the position, the plea of benami set up by the defendants falls through. It follows therefore that the plaintiff has established his title to the land in suit.

9. The next question to be considered is whether after the sale, the defendants remained in the land with permission from the plaintiff and later as his tenants. Mr. Goswami submits that Exts. 3, 7 & 8 are inadmissible in evi-

dence and they should not be relied upon for any purpose whatsoever. It is difficult to appreciate this submission in view of the provisions of Section 49 of the Indian Registration Act. Even if a document is compulsorily registrable and is not registered, the said document may be received as evidence of any collateral transaction not required to be effected by a registered instrument. These documents therefore show the nature or character of the possession of the defendant after title had passed to the plaintiff from him. The fact that the first Kabuliya was made after six months of the sale goes to support the story of the plaintiff that the defendant had initially promised to vacate within a few months. The execution of Ext. 3 supports this statement of the plaintiff. Although therefore these documents are not admissible as lease, they would however establish the nature of at least the permissible possession of the property by the defendant. That being the position, there is no question of limitation in this case.

10. Mr. Goswami strenuously relied upon a decision of the Supreme Court in the case of *Mst. Kirpal Kuar v. Bachan Singh*, reported in AIR 1958 SC 199 in support of his contention that Exts. 3, 7 & 8 should not be received in evidence to show the nature of possession in this case where the defendant had already been in possession of the land. He draws my attention to the following passage at para 14 of the report where their Lordships have distinguished the case of the Privy Council in *Varada Pillai v. Jeevarathnammal*, AIR 1919 P.C. 44.

"In *Varada Pillai's* case, *Duraisami* had got into possession only after the petition and claimed to retain possession only under the gift mentioned in it. The petition was therefore admissible in evidence to show the nature of her possession. In the present case *Harnam Kaur* had been in possession before the date of the document and to admit it in evidence to show the nature of her possession subsequent to it would be to treat it as operating to destroy the nature of the previous possession and to convert what had started as adverse possession into a permissive possession and, therefore, to give effect to the agreement contained in it which admittedly cannot be done for want of registration. To admit it in evidence for the purpose sought would really amount to getting round the statutory bar imposed by S. 49 of the Registration Act." In the instant case before this Court, the documents are not relied upon for the purpose of extinguishing any right or title in the defendant. The plaintiff's right and title is based upon the sale deed which has been found to be

validly executed by the defendant for adequate consideration. On the date the sale deed was executed, the defendant himself, by this deed, extinguished his right and title to the land in favour of the plaintiff who is now filing this present suit for declaration of his right and title based on that deed and for khas possession. This case is therefore clearly distinguishable on the particular facts and circumstances of the case from those that obtained in the above Supreme Court decision.

In the decision of the Supreme Court the agreement was sought to be relied upon to effect the right of the widow who had agreed in pursuance of this agreement. In this case, the plaintiff is not at all relying upon Exts. 3, 4 & 7 in order to establish his title. These documents are only an answer to the claim of the defendant to a possible plea of limitation by adverse possession. These documents are therefore clearly admissible under Section 49 of the Indian Registration Act to show the nature of possession and they are not relied upon for the purpose of effecting any right title or interest in the land. The right and title of the defendant had already been extinguished by virtue of the sale deed executed by him in favour of the plaintiff. Since these documents are unregistered, they created a monthly tenancy which has been also validly determined in this case. The principle laid down in *Varada Pillai's* case (*supra*) is clearly applicable and the decision of the Supreme Court in *Kirpal Kuar's* case, AIR 1958 SC 199 (*supra*) does not come to the aid of the appellant. The plaintiff has therefore established his right and title to the property and is entitled to get a decree for khas possession of the property on declaration of his right and title as claimed. He is also entitled to the decree for Rs. 180/- as arrears of rent.

11. Disposal of this appeal had to be delayed as I discovered that the memorandum of appeal was insufficiently stamped when considering judgment. The appellant was therefore given time to deposit the deficit court-fee which has since been made.

12. In view of the foregoing discussion, there is, therefore, no substance in this appeal which is dismissed and in the entire circumstances of the case, there will be no order as to costs in this appeal as well as in the courts below. The defendants are allowed six months' time to vacate the land.

Appeal dismissed.

AIR 1970 ASSAM & NAGALAND 80
(V 57 C 17)

S. K. DUTTA, C. J. AND
R. C. SEN, J.

Zatia and another, Petitioners v. State
of Assam and others, Respondents.

Civil Rules Nos. 7 and 8 of 1969, D/-
10-4-1969.

(A) Constitution of India, Arts. 311 (2)
Proviso (c) and 226 — Satisfaction of
Governor — So long as Governor acted
in good faith his satisfaction cannot be
determined by Court by any objective
test and inquired into by it. (Para 6)

(B) Constitution of India, Art. 311 (2)
Proviso (c) (after Constitution 15th
Amendment) — Mere reference to pro-
viso in Governor's order and inappropriate
application of old clause and proviso
cannot show that satisfaction of Governor
was obtained as contemplated by sta-
tute.

By an order made by the Governor
after the Constitution 15th Amendment,
the petitioner was dismissed from service.
The relevant part of the order, instead
of stating that the Governor was satisfi-
ed that in the interest of the security of
the State it was not expedient to hold
inquiry, stated that the Governor was
satisfied under Art. 311 (2) Proviso (c)
that in the interest of the security of the
State it was not expedient to give to the
petitioner an opportunity to show cause
against the action proposed to be taken
in regard to him. The petitioner chal-
lenged the order of dismissal.

Held, mere reference to proviso (c) of
clause (2) of Art. 311 and inappropriate
application of the old clause and the pro-
viso, could not impliedly show that the
Governor had his satisfaction regarding
dispensing with the inquiry, and as the
provisions of the Constitution in their
true letters were not complied with in the
order itself, the Governor's satisfaction in
that regard was clearly not obtained. In
that view of the matter the impugned
order was invalid. AIR 1966 SC 740. Ap-
plied. (Paras 7 and 8)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 740 (V 53) —
1966 Cri LJ 608, Ram Manohar
Lohia v. State of Bihar 7

D. M. Sen, J. P. Bhattacharjee and
N. N. Sankia, for Petitioners; G. K. Taluk-
dar, Sr. Govt. Advocate, for Respondents.

SEN, J.: The writ petition under Arti-
cle 226 of the Constitution out of which
Civil Rule No. 7/69 has arisen, has been
filed by one Zatia. He was a constable
under the Government of Assam and was
dismissed from service by an order of
the Governor dated the 3rd January 1969

as per Annexure '1' of the petition. It is
prayed in this petition that the impug-
ned orders passed by the Governor of
Assam and the order No. D. O. 1817 dated
30-11-68 passed by the Superintendent of
Police, Special Branch, Assam, Shillong
dismissing the petitioner with effect from
8-11-67 should be quashed. He has also
prayed for reinstatement to the post,
which he was holding.

2. Mr. D. M. Sen, learned Advocate
General of Nagaland appearing for the
petitioner has urged that the order of dis-
missal passed by the Superintendent of
Police was void on the face of it as no
immediate effect thereon was given. We
are not impressed by this contention, as
everything was done in terms of the
order of the Governor, although no im-
mediate effect thereto was given.

3. The most important point for con-
sideration is whether the order of the
Governor as per Annexure '1' was pass-
ed in terms of the appropriate provision
of the Constitution. It runs as follows:

"The Governor of Assam is satisfied
that D. S. B. Const. Zatia of the Mizo
Hills D. E. F. is unfit to be retained in
the Public Service and that he should
be dismissed from service.

2. The Governor is further satisfied
under Sub-clause (c) of the proviso to
clause (2) of Article 311 of the Constitu-
tion that in the interest of the security
of the State it is not expedient to give
the said D. S. B. Const. Zatia an op-
portunity to show cause against the ac-
tion proposed to be taken in regard to
him as stated above.

3. Accordingly the Governor hereby
dismisses the said D. S. B. Const. Zatia
from service with immediate effect."

4. It appears from the contention rais-
ed by Mr. D. M. Sen that the order of
the Governor only exempts the require-
ment of being given an opportunity to
show cause against the action proposed
to be taken in regard to the petitioner
and does not exempt the holding of the
inquiry, as is required under proviso (c)
to clause (2) of Article 311 of the Con-
stitution. Previous to the 15th Amend-
ment of the Constitution clause (2) read
as follows:

"No such person as aforesaid shall be
dismissed or removed or reduced in rank
until he has been given a reasonable
opportunity of showing cause against the
action proposed to be taken in regard to
him."

Under the 15th Amendment it was
explicitly provided for in Article 311 (2)
that

"No such person as aforesaid shall be
dismissed or reduced in rank except
after an inquiry in which he has been
informed of the charges against him and
given a reasonable opportunity of being

These propositions emphasize the position that no Act or Rule made under Art. 309 can modify or impinge upon the pleasure of the President or the Governor under Article 310 as qualified by Article 311 and, therefore, in cases where Article 311 does not apply, the pleasure of the President or the Governor would have a supreme overriding effect upon the tenure of a Government servant. It was also sought to be argued before the Supreme Court that Acts and Rules made thereunder were mere administrative directions and could not be enforced, and accordingly a violation of the regulations made under the Police Act would not furnish the petitioner with a cause of action. This contention was negatived. Now, in Babu Ram's case, AIR 1961 SC 751 = (1961) 2 SCR 679, the impugned order was made in exercise of the powers conferred upon the Deputy Inspector-General of Police and the Inspector-General of Police by the Police Act and the regulations framed thereunder. They were the statutory authorities to impose penalty. It was not an order made by the Governor of Uttar Pradesh. It was also a case to which Article 311 applied. In Babu Ram's case, AIR 1961 SC 751 = (1961) 2 SCR 679, the Supreme Court did not equate the Governor's pleasure with the exercise of statutory power by specified officers, but it did not make it clear that an Act of Legislature or the Rules under Art. 309 cannot impinge upon the pleasure of the President or the Governor under Article 310 as qualified by the provisions of Article 311 and were subject to the overriding power of the President or the Governor under Article 310 as qualified by the provisions of Article 311. Thus, an Act or Rules made under Article 309 can only affect the pleasure of the President or the Governor to the extent that such Act or Rules reproduce the qualifications laid down on Article 310 by Article 311. Where, therefore, Article 311 has no application, Acts and Rules made under Article 309 would be subject to the unrestricted overriding power of the President or the Governor under Article 310.

16. Mr. Singhvi, learned counsel for the petitioner, has referred to certain subsequent judgments of the Supreme Court in support of his submission that Babu Ram's case, AIR 1961 SC 751 = (1961) 2 SCR 679, has made a departure from the law as till then laid down with respect to justiciability of rules made under Art. 309 even in case where Article 311 does not apply. These cases are Motiram Deka v. North-East Frontier Rly., AIR 1964 SC 600; State of Mysore v. M. H. Bellary, AIR 1965 SC 868; and B. S. Vadera v. Union of India, AIR 1969 SC 118. We do not find it possible to read these cases in the manner in which Mr. Singhvi has invited us to do. In AIR 1964 SC 600, the appellants were Railway ser-

vants to whom Article 311 applied. The question was as to the validity of certain rules in the Railway Establishment Code, 1951, under which the appellants' services were terminated. The Supreme Court held that the rule-making authority contemplated by Article 309 cannot be validly exercised so as to curtail or affect the rights guaranteed to public servants under Article 311 (2). In AIR 1965 SC 868, the concerned Government servant was in the civil service of the State and accordingly Article 311 applied to him. His grievance was that his reversion to another department was contrary to the Bombay Civil Services Rules. The Rules applicable were those in force prior to commencement of the Constitution and which, by virtue of the provisions of Article 313, continued to be in force. The relevant passage of the judgment relied upon is paragraph 4 in which it is stated:

"In view of the decision of this Court of which it is sufficient to refer to (1961) 2 SCR 679=(AIR 1961 SC 751), it was not disputed that if there was a breach of a statutory rule framed under Article 309 or which was continued under Art. 313, in relation to the conditions of service, the aggrieved Government servant could have recourse to the Court for redress."

In view of the fact that Article 311 governed the case, this concession was rightly made by counsel. In AIR 1969 SC 118, certain Railway servants challenged their reversion. Their reversion had been ordered under the Railway Establishment Code issued by the President in the exercise of his powers under the proviso to Art. 309. Under Rule 157, the President directed the Railway Board to make rules of general application to non-gazetted Railway servants under their control. In pursuance of this rule the Railway Board framed a scheme. The question was whether the rules made under the said scheme could have retrospective effect. Paragraph 24 of the judgment was relied upon by Mr. Singhvi. It says:

"It is also significant to note that the proviso to Article 309 clearly lays down that any rules so made shall have effect, subject to the provisions of any such Act. The clear and unambiguous expressions used in the Constitution must be given their full and unrestricted meaning unless hedged in by any limitations. The rules which have to be 'subject to the provisions of the Constitution' shall have effect 'subject to the provisions of any such Act'. That is, if the appropriate Legislature has passed an Act, under Article 309, the rules framed under the proviso will have effect subject to that Act; but in the absence of any Act of the appropriate Legislature on the matter, in our opinion the rules made by the President or by such person as he may direct are to have full effect, both pros-

pectively and retrospectively. Apart from the limitations pointed out above, there is none other imposed by the proviso to Article 309 regarding the ambit of the operation of such rule. In other words, the rules, unless they can be impeached on grounds such as breach of Part III or any other constitutional provision, must be enforced if made by the appropriate authority."

The Court held that in the absence of any Act having been passed by the appropriate Legislature on the said matter, the rules framed by the Railway Board would have full effect and if so indicated retrospectively also and that there was such indication about retrospective effect and accordingly the contention was negatived. The question for determination in *Vadera's case*, AIR 1969 SC 118, was the scope of the challenge which could be made to the validity and constitutionality of a rule made under Article 309 by a Government servant to whom admittedly Article 311 applied. The Court was not called upon to consider and did not consider the effect or justiciability of rules made under Article 309 in cases where Article 311 does not apply.

17. Turning now to the decisions of this High Court in O.S. Appeal No. 52 of 1956 (Bom.), *Chandra Bhan Verma v. Union of India*, decided on 11-4-1958, *Chagla, C. J., and Mody, J.*, held that the tenure of office of a member of the defence service was at the pleasure of the President and any grievance in that connection was not justiciable. Following this decision, in *S. Framji v. Union of India*, (1958) 60 Bom LR 1302 = (AIR 1960 Bom 14), a Division Bench of this Court, consisting of *Chagla, C. J. and S. T. Desai, J.*, held that a civil servant could not assert and enforce in a Court of law any condition of service relating to his employment unless there was an infringement of Article 311 or unless he was suing for arrears of salary. In *Tara Singh Ujagar Singh v. Union of India*, AIR 1960 Bom 101, *K. K. Desai, J.*, held that Army instructions were made for the purpose of guidance of military authorities in connection with civilians employed in defence service and were only directory rules and have no binding force in themselves and do not affect the provisions of Article 310 regarding the tenure of office of persons being at the pleasure of the President or the Governor, as the case may be. In *K. P. Chankerlingam v. Union of India*, (1960) 62 Bom LR 1 = (AIR 1960 Bom 431), the same learned Judge held that the direct result of Article 310 is that no right of action is vested in the dismissed Government servant for a declaration that he is entitled to hold his office in accordance with the service rules applicable to him or that he can only be dismissed as provided by the Rules and in accordance with the

procedure prescribed thereby, the only exceptions to this principle being the cases where protection is provided in favour of the Govt. servant in the Constitution itself. It was further held that the competent authority for making orders of dismissal can be prescribed by legislation in the shape of Acts of Parliament or State and rules made thereunder and if such orders of termination are challenged as being wrongful as against the Union or the State, the Union or the State can base its defence on the provisions of Article 310.

18. It was, therefore, submitted by Mr. Singhi that these cases were decided before the decision of the Supreme Court in *Babu Ram's case*, AIR 1961 SC 751 = (1961) 2 SCR 679, and that after the judgment the decisions of this Court have taken a different trend, and according to these later decisions "an infringement of rules" case did not fall within Article 311. The first case referred to was *First Appeal No. 109 of 1959 (Bom.)* decided on December 16, 1964/February 5 and July 1965 by *K. K. Desai, J.* In that case the plaintiff, who was employed in the Ordnance Depot at Sewri, claimed that there had been no break in his service and that he was entitled to be paid the salary due to him and sued for arrears of salary. The trial Court held that the suit was not maintainable since Article 311 did not apply. Before the Appeal Court it was admitted on behalf of the Government that in view of the decision of the Supreme Court in AIR 1954 SC 245, the suit was maintainable. As pointed out earlier, in *Abdul Majid's case*, AIR 1954 SC 245, it has been held that the doctrine of English law that every servant of the Crown receives his salary at the bounty of the Crown is not a part of the doctrine of the tenure of a Crown servant being at the pleasure of King. This decision, therefore, has no relevance to the point before us. The next case relied upon is *Misc. Petn. No. 256 of 1964 (Bom.)*, *P. Narayana Menon v. M. S. Seheran, D/-19/20-10-1965*, by *Mody J.* In that case a cook in the 2nd Company, Southern Command, Signal Regiment, was removed from service. He contended that his removal was wrongful because the provisions of Rule 15 of the *Civilians in Defence Service (Classification, Control and Appeal) Rules, 1952*, were not complied with. Only one case was cited before the learned Judge, namely, *Kappor Singh Harnam Singh v. Union of India*, AIR 1960 Madh Pra 119, in which a learned single Judge of the Madhya Pradesh High Court held that though Article 311 did not apply to a civilian employed in the Defence Service, he was governed by Army Instructions (India), 1949, and that a contravention of the said Instructions would furnish a cause of action to such an employee. None of the Supreme Court cases till then decided nor any of the decisions of this High Court above re-

ferred to were brought to the notice of the Court and accordingly the learned Judge proceeded to dispose of the petition as if AIR 1960 Madh Pra 119, was correctly decided. It may also be noted that in Misc. Petn. No. 256 of 1964 (Bom.), the order was not passed by the President but by the Commander, Bombay Sub-Area, while in the case before us the impugned order is that of the President himself.

19. The third Bombay case upon which reliance was placed by Mr. Singhvi is Second Appeal No. 569 of 1960 D/-25-11-1966 (Bom.) decided by M. V. Paranjpe, J. In that case, a Gate Darwan in the Ordnance Factory, Bhusaval, was dismissed from service. His contention was that he was dismissed without following the procedure prescribed by the 1952 Rules. The learned Judge followed the decision of Mody, J., in Misc. Petn. No. 256 of 1964 (Bom.) and also made a passing reference to the judgment in Babu Ram's case, AIR 1961 SC 751 = (1961) 2 SCR 679 and held that the 1952 Rules had the force of law. It appears that the plaintiff in that case was Class IV servant and here again the order was not passed by the President but by some other punishing authority designated by the 1952 Rules.

20. The last judgment of this High Court relied upon by Mr. Singhvi is a judgment of a Division Bench of this High Court consisting of Tarkunde and Wagle, JJ. in First Appeal No. 95 of 1960, D/-18-12-1967 (Bom.). This was a case in which the plaintiff, who was in military engineering service of the Government of India, challenged an order withholding his increment and in any event prayed for arrears of salary which, according to him, were due to him. The trial Court held that the plaintiff being a civil employee in the Defence Department, was not entitled to seek the protection of Article 311 and that since Article 311 did not apply, the plaintiff's contentions were not justiciable. The Division Bench pointed out that the findings of the trial Court in regard to the scope of Articles 310 and 311 had no relevance to the pleas taken in the plaint inasmuch as the impugned order was not an order which related to the tenure of the plaintiff's office nor did it involve his dismissal or removal from service or reduction in rank. On the facts the Division Bench came to the conclusion that there was no statutory rule framed under Article 309 upon which the plaintiff based his claim and that any directions upon which he relied would be only in the nature of administrative directions and the alleged breach was not justiciable and accordingly dismissed the appeal. The ground upon which the judgment proceeded is the same as in Abdul Majid's case, AIR 1954 SC 245. This case is, therefore, not relevant.

21. The judgment of this High Court which has a direct bearing on the point to be decided by us is Second Appeal No. 939 of 1956 (Bom.), Jugatrai Mahinchand Ajwani v. Union of India, decided by a Division Bench of this Court consisting of Patel and Palekar, JJ. on 15-10-1962. In that case, the plaintiff, who was working in the office of the Chief Engineer, Southern Command, was charge-sheeted and ultimately dismissed by the Chief Engineer, Southern Command. It was contended that unless the pleasure of the President could be evidenced by an order of dismissal made by the President himself, the order would be bad and Article 310 would afford no answer to a suit by the dismissed servant. After considering all the relevant authorities on the point, the Division Bench pointed out that very important functions can be delegated by the Governor to subordinates under Article 154, and there was therefore, no reason why functions of dismissal, removal from service and reduction in rank of Government servants could not also be delegated by the President or the Governor. Consistently with the scheme of the Constitution, which makes the President and the Governor the executive heads, the words "at the pleasure of the President or the Governor" had been used in Art. 310. The Division Bench further pointed out that in view of the fact that in the course of the judgment in Babu Ram's case, AIR 1961 SC 751 = (1961) 2 SCR 679, the Supreme Court emphasised the fact that it was dealing with a case covered by Article 311 and it considered all these articles together, the observations in that judgment ought to be confined to cases to which Article 311 was applicable. With respect to the contention that a breach of rules or Army Instructions which provide for an inquiry before dismissal was justiciable, the Division Bench held that these Army Instructions were not statutory rules framed under any statute and did not give a cause of action to the aggrieved Government servant if they were not complied with and that even if the rules were framed under the enabling power either under Section 241 of the Government of India Act, 1935, or under Article 309, decided cases were against that contention. On merits also the Division Bench held that there was no violation of rules of natural justice inasmuch as the plaintiff had in substance admitted the charges, and the holding of an inquiry would, therefore, have been an idle formality. The matter was carried in appeal to the Supreme Court (Civil Appeal No. 1185 of 1965, Jugatrai Mahinchand Ajwani v. Union of India, D/-6-2-1967.) With respect to the first contention, Shah, J., delivering the unanimous judgment of the Constitution Bench, composed of five learned Judges, stated as follows:—

"We need only observe that the argument which was advanced before the High

Court that the President alone may in his exclusive personal discretion exercise the power under Article 310 has, in our judgment, no force. By Article 73 of the Constitution the executive power of the Union extends to all matters with respect to which the Parliament has power to make laws, and by Article 77 (3) the President is competent to make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business. If the power to determine employment under Article 310 is exercised in the name of the President in accordance with the rules framed under Art. 77 of the Constitution, no objection can be raised to the validity thereof."

With respect to the second contention the Supreme Court held that it was not necessary to consider whether a breach of Army Instructions conferred a cause of action to the person affected thereby as they agreed with the High Court that the appellant had at no stage denied the truth of the charges made against him and, therefore, an inquiry would have been fruitless.

22. In view of the above decisions of the Supreme Court and this High Court, we do not consider it necessary to refer to decisions of other High Courts except two. In *Kailashchand Ratan Chand v. The General Manager, Ordnance Factory, Khamaria, Jabalpur*, AIR 1966 Madh Pra 82, a Division Bench of that High Court held that if the procedure laid down in Rule 15 of the *Civilians in Defence Service (Classification, Control and Appeal) Rules, 1952*, which procedure was substantially similar to that which had to be followed for giving a delinquent civil servant a reasonable opportunity as required by Art. 311 (2), was not followed and the dismissal or removal or reduction in rank was in breach of that rule, it could not be said that the order of penalty was illegal nor could the order be quashed by the High Court under Article 226 of the Constitution if Article 311 (2) did not apply. The Madhya Pradesh High Court considered various cases and, after elaborately referring to the decision of the Supreme Court in *Babu Ram's case*, AIR 1961 SC 751 = (1961) 2 SCR 679, observed:

"It follows, therefore, that in cases not falling under Art. 311, that is to say, in cases of persons not falling under the category of persons mentioned in Article 311 (1), the pleasure of the President and the Governor is uncontrolled and when such a person is removed or dismissed from service without complying with the provisions of any rules framed under Article 309, he has no right of action against the Union or the State, as the case may be. To say that even in cases where Art. 311 does not apply, an order of dismissal, removal or reduction in rank can be assailed on the ground

of having been made in breach of a rule made under Article 309 of the Constitution is really to hold that the pleasure of the President or the Governor under Art. 310 is controlled even in these cases by the rule. The legal enforcement of the rule would be inconsistent with Article 309, and in derogation of the provisions of Art. 310 and would amount to giving to the rule-making authority contemplated by Art. 309 the power to make rules so as to affect even the powers of the President or the Governor under Article 310 of the Constitution read with Article 311 thereof. As has been stated earlier, the rule-making power under Art. 309 cannot be validly exercised so as to affect the provisions of the Constitution including Articles 310 and 311.

The view that in cases not falling under Article 311 an order of removal or dismissal cannot be assailed on the ground of having been made in breach of any rule laying down the procedure which must be followed before a penalty is imposed is supported by the pronouncements of the

Supreme Court in various cases."

In the Madhya Pradesh case, the petitioner was a machinist in the Ordnance Factory, Khamaria, Jabalpur, and he was removed from service by an order of the General Manager of that Factory and not of the President. The Madhya Pradesh High Court held that to enforce Rule 15 of the *Civilians in Defence Service (Classification, Control and Appeal) Rules, 1952*, would be inconsistent with Article 309 and in derogation of the provisions of Article 310 and would have the effect of affecting even the powers of the President or the Governor under Article 310. A Full Bench of the Punjab High Court, in *Sham Lal v. Director, Military Farms, Army Headquarters, New Delhi*, AIR 1968 Punj 312 (FB), has disagreed with the view which found favour with the Madhya Pradesh High Court. The Full Bench also disagreed with the interpretation placed by the Madhya Pradesh High Court on *Babu Ram's case*, AIR 1961 SC 751 = (1961) 2 SCR 679. It observed that the Madhya Pradesh High Court did not notice the earlier decision of a learned single Judge of the same High Court in AIR 1960 Madh Pra 119. The Full Bench held that the view that a public servant who could not claim the benefit of Article 311 could not agitate in the Law Courts that the procedure laid down by rules made under Article 309 had not been followed and could seek relief only from departmental authorities can no longer be said to be good law in view of the Supreme Court decision in *Babu Ram's case*, AIR 1961 SC 751 = (1961) 2 SCR 679. The Full Bench also referred to a decision of another Full Bench of the Punjab High Court in *L.P.A. No. 8-D of 1962 (Punj.)*, *P. H. Laxminarayan v. Engineer-in-Chief, Army Headquarters*, D/-23-9-1965, and to

the decision of the Supreme Court in AIR 1965 SC 688, in both of which the question of justiciability of rules under Art. 309 was conceded and observed that "It is not possible to see how the concessions which were made by eminent counsel were not well founded or were based on any misapprehension with regard to the law laid down in Babu Ram Upadhy's case, AIR 1961 SC 751 = (1961) 2 SCR 679". In the Punjab Full Bench case, the petitioner was an Assistant Supervisor in the Military Dairy Farm, Ferozepur Cantonment, and he was compulsorily retired from service as a measure of punishment. The impugned order was made not by the President but by the Director, Military Farms. With great respect to the learned Judges who decided that case, we are unable to interpret the judgment in Babu Ram's case, AIR 1961 SC 751 = (1961) 2 SCR 679, as widely as the Full Bench has done. A careful reading of the judgment in Babu Ram's case, AIR 1961 SC 751 = (1961) 2 SCR 679, would seem to support the view adopted by the Madhya Pradesh High Court. The rules with which the Supreme Court was concerned in that case were rules made under the Police Act which governed Government servants admittedly entitled to the protection of Article 311. It is in this context that the Supreme Court judgment and the observations made therein are to be read. The concession by counsel, however eminent, cannot carry the matter further where the question is of constitutional prerogative. Bellary's case, AIR 1965 SC 868, was admittedly one to which Article 311 applied. The fact that the Division Bench in Kailashchand's case, AIR 1966 Madh Pra 82, did not notice the earlier decision of a single learned Judge of the same High Court cannot also make any difference. The Division Bench has considered the matter fully for itself. It was not bound by the judgment of another Judge of the same High Court sitting singly. We may also point out that the view adopted by the Madhya Pradesh High Court in Kailashchand's case, AIR 1966 Madh Pra 82, is in conformity with the view taken by our Division Bench in Ajwani's case, Second Appeal No. 939 of 1956, D/-15-10-1962 (Bom.).

23. Now, in this petition as the impugned order is made by the President and not by any statutory authority, we are not concerned with the real question before the Madhya Pradesh Division Bench and the Punjab Full Bench, namely, whether when the punishing authority is other than the President or the Governor, any breach of the rules made under Article 309, providing for procedure to be followed at disciplinary inquiry would furnish an aggrieved Government servant to whom Article 311 does not apply with a cause of action. The order in the present case is made by the President himself, and any

observations in any judgment to the effect that the statutory authority must act in conformity with the requirements of the relevant statute and if not, its action would be justiciable cannot help the petitioner. Mr. Singhvi, however, contested the position that the impugned order of reversion was passed by the President. This contention cannot be accepted. In the petition, particularly ground (B) in paragraph 24, the impugned order of reversion is referred to as being an order of the first respondent. As mentioned before, the original first respondent to the petition was "the President of India" and it is only by a subsequent amendment that the description of the first respondent has been amended to "the Union of India". No point has been raised in the petition that the order, though expressed to be made by the President, was in fact not an order of the President but of the actual signatory of the said order, namely, K. Venugopalan, Deputy Secretary to the Government of India. Further, under the Constitution, unless expressly provided otherwise, acts and orders of the President are not required to be signed by the President. Article 77 (2) provides that orders and other instruments made and executed in the name of the President shall be authenticated in such manner as will be specified in rules to be made by the President and the validity of an order or instrument thus authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President. It is admitted that Joint Secretaries to the Government of India and Deputy Secretaries to the Government of India have been authorised to authenticate orders and instruments made and executed in the name of the President. It is, therefore, not open to the petitioner to contend that the impugned order was not made by the President. In fact, it is expressly stated in the body of the order that "the President hereby terminates the services of Shri J. N. Wanchoo with effect from the date he is relieved of his duties at the N.D.A. Thereafter, Shri J. N. Wanchoo will revert to the post of Section Master, R.I.M.C., Dehra Dun, on which post he holds a lien." In this connection, the passage quoted earlier from the judgment of Shah, J., in Civil Appeal No. 1185 of 1965, D/-6-2-1967 (SC), by a Constitution Bench of the Supreme Court consisting of five Judges, is apposite. Whenever the Constitution requires that an act should be that of the President personally, it expressly so provides; for example appointments of Judges of the Supreme Court under Article 124 (2) and of the Judges of the High Court under Article 217 (1) are required to be made by the President by warrant under his hand and seal. An order of dismissal, removal or reduction in rank of an employee in a defence service or a person holding any post connected with the defence is not required to be so made. In

our opinion, therefore, the impugned order was made by the President of India and was an order made in the exercise of the pleasure of the President under Article 310 and the petitioner not being entitled to the protection conferred by Article 311, any breach of the 1965 Rules is not justiciable at the instance of the petitioner.

24. Mr. Singhvi, learned counsel for the petitioner, next submitted that in any event the impugned order could be challenged on the ground that the procedure adopted at the inquiry violated the principles of natural justice and that violation of the principles of natural justice would furnish a cause of action to a Government servant even if he could not claim the protection of Article 311. In support of this submission Mr. Singhvi relied upon *Makhmalal Dey v. Union of India*, (1967) 2 Lab.L.J. 762 (Cal). In that case the plaintiff, who was an estimator in the Military Engineering Service, was dismissed by an order made by the Chief Engineer, Eastern Command. It was not disputed that in the disciplinary inquiry held in his case the directions contained in the Army Instructions were disregarded. The matter came in second appeal before a Division Bench of the Calcutta High Court consisting of S. K. Datta and A. C. Gupta, JJ., who allowed the plaintiff's appeal. The Court held that the Army Instructions were mere directions as they were not framed under any statute and, therefore, did not furnish a cause of action to the plaintiff. Datta, J., rested his judgment on the short ground that the order in question was not an order made by the President, since it was an order made by the Chief Engineer, Eastern Command. He held that the Courts were debarred from examining the pleasure of the President but were not debarred for examining whether in fact the pleasure had been exercised by the President or by some one who was duly authorised by the Constitution to act on his behalf. He found that the President had expressed no pleasure either way but an executive officer of the Union of India had expressed his pleasure by dismissing the plaintiff. The pleasure of the executive officer did not enjoy the immunity which had been granted to the President and that the pleasure of the President could not be delegated. It is not necessary for our purpose to make any observations on this finding. Gupta, J., while he agreed with this finding, proceeded further to hold that the order of dismissal was passed without observing the rules of natural justice. He observed:

"Sri Roy at one stage of his arguments said that making it obligatory on the enquiry authority to observe the rules of natural justice means introducing through backdoor the protection of Art. 311 to which the appellant was admittedly not entitled. I do not think this argument is sound. It is not correct to think that apart

from Art. 311 one has no right to complain even if the most elementary principles of justice are disregarded. . . . Article 311 is not in the Constitution just to keep a class of persons out of the scope of application of fundamental rules of justice recognized in that Article."

With great respect to the learned Judge, we find ourselves unable to agree with these observations. Where an Act of Legislature or the rules made under Article 309 are powerless to impinge upon or override the pleasure of the President or the Governor, unless in so far as such Act or Rules give effect to the provisions of Art. 311 in cases where that Article applies, it would be startling if rules of natural justice could restrict, modify or curtail the pleasure of the President or the Governor under Article 310 when not qualified by Article 311. Rules of natural justice would only be relevant in a case where Article 311 applies for the purpose of ascertaining whether a reasonable opportunity of showing cause was afforded to a Government servant. In our opinion, it is equally not open to the petitioner to assail the impugned order on the ground that the rules of natural justice were not observed.

25. Turning to the factual aspect of the case, even on the merits we find that the petitioner has not made out any case. It is the petitioner's grievance that several provisions of Rules 14 and 15 of the 1965 Rules were not complied with. We find that in the circumstances of this case it was not necessary to do so and such non-compliance has not caused any prejudice to the petitioner. The first irregularity in the conduct of the enquiry alleged by the petitioner is that the charge-sheet was not framed by the disciplinary authority, the disciplinary authority in the present case being the President. Under R. 14(3), a charge-sheet is not required to be drawn up by the disciplinary authority but it is to be drawn up or caused to be drawn up by the disciplinary authority. Though the charge-sheet in the present case is signed by the Commandant of the Academy, the said orders dated June 29, 1966 and July 1, 1966, show that the charge-sheet was caused to be drawn up and was accepted as being such by the President. It is not the petitioner's allegation that the charge-sheet was not caused to be drawn up by the President. The ground as urged was not even taken by the petitioner either in his written statement of defence to the charge-sheet or in the oral statement made by him before the Inquiry Officer. It was for the first time taken in the amendments made in the petition. We, therefore, find no substance in this contention.

26. The second irregularity which is alleged is that no evidence was recorded in support of the charges made against the petitioner, even though the petitioner had denied the same. In this connection Rule

14(14) of the 1965 Rules is relied upon. That rule is in the following terms:—

"On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the disciplinary authority. The witnesses shall be examined by or on behalf of the Presenting Officer and may be cross-examined by or on behalf of the Government servant. The Presenting Officer shall be entitled to re-examine the witnesses on any points on which they have been cross-examined, but not on any new matter, without the leave of the inquiring authority. The inquiring authority may also put such questions to the witnesses as it thinks fit." Now, even a cursory reading of this rule will show that the evidence which is required to be produced by or on behalf of the disciplinary authority is the evidence, oral or documentary, by which the articles of charge are proposed to be proved. The charges made against the petitioner related to making the said three representations respectively dated October 14, 1963, April 2, 1964 and July 13, 1964, in spite of being asked to desist from making such representations by the said memorandum dated September 17, 1963, communicated to him by the letter dated September 28, 1963 and absenting himself from the said Guest Night on August 21, 1964, at which by the said Academy Order No. 1081 dated August 28, 1964 all officers (service and civilians) and cadets were asked to attend and when reasons for his absence were asked for and sending the said letter dated September 21, 1964, couched in impertinent and insolent language. Thus, the only questions of fact which arose at the said inquiry were (1) whether the said memorandum dated September 17, 1963, was communicated to the petitioner, (2) whether the said representations were made by the petitioner, (3) whether the said Academy Order was in fact issued, (4) whether the petitioner was absent from the said Guest Night held on August 21, 1964 and (5) whether he wrote the said letter dated 21-9-1964. Now, both in his written statement of defence and in the oral statement made by him before the inquiry officer, all these facts are admitted. The only question which, therefore, remained was whether the sending of the said representations and the tone and the language of the said representations and the said letter and not attending the said Guest Night amounted to acts of insubordination or misconduct. The decision of this question turned upon the construction of the relevant rules and instructions and of the said representations and reply. The petitioner himself admitted that in sending the said representations he had not followed the normal channel of representation and had used the language which was not proper. He, however, sought to extenuate his conduct on the

ground that all through the years he harboured an overpowering sense of grievance and that his faults were natural to a person who felt strongly for so many years that justice had been denied to him. He also sought to extenuate the language used in the said letter of September 21, 1964, on the ground that at that time he was going through a period of intense mental and emotional strain. The effect of these admitted facts and whether to accept his plea in extenuation or not were not matters of evidence. These were matters to be considered and decided by the Inquiry Officer and the disciplinary authority. This Court cannot substitute its judgment for theirs. We may, however, observe that the Academy is an establishment for the training of Defence personnel, and in such establishment the last person from whom indiscipline and insubordination can be tolerated is a member of the teaching staff. While considering this ground, it is also pertinent to note that Rule 14(10) provides that "the inquiring authority shall return a finding of guilt in respect of those articles of charge to which the Government servant pleads guilty". It is true that in express words the petitioner did not plead guilty, but the effect of his written statement of defence and his oral statement in substance amounted to an admission of guilt. It is also pertinent to note that by the said charge-sheet dated December 10, 1964, in addition to being required to submit a written statement, the petitioner was asked (1) to state whether he desired to be heard in person, (2) to state whether he desired an oral inquiry to be held, (3) to furnish the names of witnesses whom he wished to call in support of his defence, and (4) to furnish a list of documents upon which he wished to rely in support of his defence. He was also offered inspection of such documents of which he desired inspection. The petitioner did not desire any of these things. He also did not desire to take inspection. He did not even desire that an inquiry should be held. In his written statement, after admitting the charges made against him, he attempted to put forward some excuse for his conduct and on the strength of such excuse requested that the proceedings against him should be dropped. The excuse put forward by him was also not such as could either exculpate him or extenuate his guilt. In these circumstances, leading evidence to prove the charges became wholly unnecessary. Mr. Singavi, however, relying upon the decision of the Supreme Court in Calcutta Dock Labour Board v. Jaffer Imam, AIR 1968 SC 282, submitted that unless the relevant statutory provisions are complied with it cannot be said that there was a proper inquiry. That decision does not lay down the proposition in such wide terms. What was held in that case that the circumstances relied upon by the inquiry authority for not holding a full in-

quiry did not justify not complying with the statutory provisions. In that case certain Dock workers, attached to the Port of Calcutta and governed by the Calcutta Dock Workers (Regulation of Employment) Scheme 1951 made by the Central Government under the Dock Workers (Regulation of Employment) Act, 1948, were detained under the Preventive Detention Act, 1950. On their release from detention the Calcutta Dock Labour Board commenced disciplinary proceedings against them. No specific allegations, however, were made against them nor was any evidence led in the inquiry. Only the detention orders were produced, but no attempt made to prove the allegations made therein. Thereafter orders terminating their services were passed. It was contended, that the Board was justified in acting upon suspicion, the basis for the suspicion being the detention of the workers. The Supreme Court held that the services of the workers could not be terminated without a proper inquiry and the circumstances that they happened to be detained could afford no justification for not complying with the relevant statutory provisions and not following the principles of natural justice. This decision has no application to the facts before us. In the present case, the order passed against the Petitioner was not passed on mere suspicion as in the Calcutta Dock Labour Board's case, AIR 1968 SC 282, but on the Petitioner's own admission of guilt. The two decisions of the Supreme Court which are relevant are *Jai Ram v. Union of India*, AIR 1954 SC 584 and *Ajwani's case*, Second Appeal No. 939 of 1958, D/-15-10-1962 (Bom), referred to earlier by us in another connection. In *Jai Ram v. Union of India*, AIR 1954 SC 584, a Civil servant had confessed his inability to work and had asked to be retired and was consequently allowed to retire. He changed his mind subsequently and sought reinstatement alleging that an inquiry ought to have been held against him before passing the order of compulsory retirement against him. The Supreme Court observed that in view of his confessed inability to work "it would be a useless formality to ask him to show cause as to why his services should not be terminated." In Second Appeal No. 939 of 1958, D/- 15-10-1962 (Bom), the plaintiff who was in the Military, Engineer Service was examined as a witness in an inquiry against another officer. In the course of his evidence he admitted that he did commit certain gross irregularities. He was served with a charge-sheet. At the inquiry he was supplied with copies of muster-roll of labourers which he was charged with filling up falsely and of the incriminatory statements made by him as also by one Mukund Lall in the previous inquiry. These two statements were the only matters relied upon in the charge-sheet. Though in his written statement the plaintiff did not expressly

admit the charges, he did not categorically state that the charges were untrue nor did he state that the statement made either by him or by the said Mukund Lall in the earlier inquiry was untrue. He also did not demand any inquiry as such. A Division Bench of this High Court consisting of Patel and Palekar, JJ. held that it would "seem impossible to contend that with his own sworn statement and that of Mukund Lall in the earlier inquiry, there could be much of inquiry. Since the statement was at no stage retracted by the plaintiff, an inquiry would have been fruitless and dismissal was justified." This conclusion was upheld by the Supreme Court (Civil Appeal No. 1185 of 1965, D/-6-2-1967 (SC)). The Supreme Court held that "the appellant never denied the truth of the statements attributed to him, and those statements established the case of the State against him. It would be difficult to hold that because the Enquiry Officer did not act strictly according to the Rules a fresh inquiry should be directed to enforce compliance with the Rules." In the present case also, since the Petitioner had admitted the charges, it would have been a mere idle formality to lead any evidence.

27. The third irregularity which is alleged is the failure to furnish to the Petitioner with a copy of the report of the Inquiry Officer and to serve upon him a notice to show cause against the penalty proposed. The purpose for which a copy of the Inquiry Officer's report is required to be furnished is set out by the Supreme Court in *State of Maharashtra v. Bhalsankar Avalam Joshi*, Civil Appeal No. 647 of 1966, D/-10-3-1969 = (reported in AIR 1969 SC 1302), upon which Mr. Singhal has relied in support of his submission that failure to supply a copy of the Inquiry Officer's report would vitiate the inquiry. In the Supreme Court case the respondent, who held the permanent post of Senior Jailor, Surenderanagar, and who was at the material time working as an accountant at the Rajkot Central Jail, was charge-sheeted and after the inquiry was concluded a notice was issued to him by the Inspector-General of Prisons to show cause why he should not be dismissed. No copy of the Inquiry Officer's report was furnished to him. He made a representation and thereafter by an order made by the Inspector-General of Police he was dismissed from service. In appeal the High Court held that this amounted to a denial of reasonable opportunity contemplated by Article 311 (2). The Supreme Court confirmed the decision of the High Court pointing out that by non-supply of a copy of the report the respondent was prejudiced in making a proper representation to the Inspector-General of Police who had to decide the guilt of the respondent and the punishment to be imposed upon him. The representation referred to by the Supreme

Court was the representation to the second show cause notice required to be given by Article 311 (2), that is the notice to show cause against the proposed infliction of the penalty of dismissal, removal or reduction in rank. Under Rule 15 (4) (1) of the 1965 Rules, a copy of the report of the Inquiry Officer is required to be furnished to the Government Officer only when the disciplinary authority proposes to impose a major penalty. In the case before us, however, the penalty as also the mode of procedure for imposing it where the case falls under Clause 5 of the contract entered into between the Petitioner and the President, that is, in cases of misconduct, insubordination, etc., is contained in the said Clause 5. Clause 5, therefore, is a special provision in that behalf in the contract and this provision, therefore, under Rule 3 (1) (i) excludes the provisions in that behalf contained in the 1965 Rules. Under Clause 5 if the Petitioner is guilty of any insubordination, misconduct, etc., the Government has the right immediately and without any previous notice to terminate his service. By reason of the said order dated January 15, 1964 the word "termination" has to be read as "reversion to the parent department." Thus, the only penalty which could be inflicted upon the Petitioner was the penalty of reversion to his parent department and that too immediately and without any previous notice to him. Even assuming the said order dated January 15, 1964 did not have the effect of varying the contract, the provisions of the said contract would really amount to the same thing. Under the contract his services were engaged for a particular period upon certain special terms. It is that service only which could be terminated under the said contract. On the termination of his service under the said contract, the Petitioner would automatically revert to his parent department to the post of Section Master on which he held a lien. The Petitioner having in substance admitted all the charges made against him, there was also nothing for him to represent with respect to the question of his guilt. This report was also not necessary to enable him to file any appeal. The impugned order was passed by the President and there was no one, therefore, to whom the Petitioner could have appealed. Rule 22 of the 1965 Rules expressly provides that no appeal shall lie against any order passed by the President. Mr. Singhvi also relied upon a decision of the Privy Council in *B. Surinder Singh Kenda v. Govt. of the Federation of Malaya*, 1962 AC 322, on appeal from the Court of Appeal of the Supreme Court of the Federation of Malaya. Under Art. 135 (2) of the Constitution of the Federation of Malaya a reasonable opportunity of being heard is required to be given to a Government servant in answer to a charge against him. In that case two men were charged in the Supreme Court at Penang for utter-

ing forged lottery tickets. The prosecution failed because it called a number of witnesses, including Police Officer, whose evidence was palpably false. The Commissioner of Police thereupon ordered an inquiry to be held. After considering the report of the inquiry, the Commissioner of Police decided that disciplinary proceedings should be taken against the appellant. The Commissioner appointed an adjudicating officer to inquire into the charges. A copy of the report of inquiry held before the disciplinary proceedings commenced was furnished to the adjudicating Officer, but not the appellant. This report contained matters highly prejudicial to the appellant. The Privy Council held that this amounted to the Court hearing evidence or receiving representation from one side behind the back of the other and amounted to a denial of natural justice. Now, the facts of that case were wholly different from the facts before us. There, the report in question was the report of a preliminary inquiry held to enable the Commissioner of Police to decide whether disciplinary proceedings should be initiated. It was not a report containing the findings of the adjudicating officer. This authority also, therefore, cannot help the Petitioner.

28. Thus, all the contentions raised by the Petitioner even on the merits must also fail.

29. In the result, we dismiss the petition and discharge the rule with costs.

Petition dismissed.

AIR 1970 BOMBAY 201 (V 57 C 34)

PATEL AND CHITALE, JJ.

C. P. Khanna, Petitioner v. V. K. Kalghatgi and others, Opponents.

Special Civil Appln. No. 1987 of 1969, D/- 10-9-1969.

(A) Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), Ss. 91 and 96 — Rules framed under Sections — Constitution of India, Articles 14, 19 (1) (f) — Provisions of Sections 91 and 96 and Rules under not violative of Articles 14 and 19.

Sections 91 and 96 of the Act and the rules framed thereunder prescribing special procedure and making provisions for compulsory arbitration in the disputes between a society and a third person do not in any manner offend Articles 14 and 19 (1) (f) of the Constitution. AIR 1962 SC 386, Foll. (Para 11)

What Article 14 prohibits is class legislation. It does not mean that all are entitled to equal treatment. It only means that two persons similarly situated must be treated alike. Reasonable classification for purposes of legislation and treatment is

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permissible. However, the conditions for the validity of such classification are that there must be intelligible differentia which distinguishes the group of persons or things from those that are left out, and, there must be rational nexus between the classification and the object to be achieved.

(Para 4)

Co-operative Societies could be treated as a class by themselves. Though the ideal is unselfishness, this cannot be achieved in practice. In order that such co-operative ventures must succeed, it is also necessary that such ventures be given reasonable protection in every possible manner. Thus provisions are made to see that its funds are not frittered away by providing careful supervision of its transactions and providing a procedure for early settlement of disputes. In order to ensure early settlement of disputes provisions are made for compulsory arbitration in matters connected with the business of the societies between the society and its members or its officers etc., or society and a stranger in very limited circumstances. The procedure is not so inadequate as to hold that it is unreasonable. There is a nexus between the object to be achieved in the making of classification and the provisions made.

(Paras 8, 10)

It could also not be said that because the Court is entitled to adjudicate disputes and determine the rights to property between two litigating parties Article 19 (1) (f) of the Constitution would be offended.

(Para 12)

(B) Constitution of India, Article 227 — Maharashtra Co-operative Societies Act (24 of 1961), Section 91 — Petition under Article 227 before any order made under S. 91 — Question whether reference made by Society is dispute within Act — Matter held would be properly decided under Act and not under Article 227. (Para 13)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 386 (V 49) =

(1962) 3 SCR 936, Mannalal Jain

v. State of Assam 11

B. R. Naik, for Petitioner.

PATEL, J.: This is an application which the petitioner has filed even before the Officer on Special Duty has made any order under Section 91 of the Maharashtra Co-operative Societies Act (hereinafter referred to as the Act) and referred the dispute to arbitration as required by it for arresting the proceedings. In short the petitioner wants to smother any proceedings at all before the Officer on Special Duty and wants this Court to go into the question of merits without permitting the said Officer to apply his mind to the proceedings.

2. Facts as alleged by the petitioner are as follows:

Respondent No. 5 is a member of the Society Respondent No. 4 and as such holds two flats Nos. 10 and 11 in the building

of the Society. The petitioner says that respondent No. 5 agreed to transfer to him his interest in the flats, his share holdings etc., for Rs. 70,000 which he paid to him. The agreement is of March 1, 1967. They jointly gave intimation to respondent No. 4 and requested that the petitioner be admitted as member. The request was turned down. For building the flats loan was obtained from respondent No. 8 and instalments had to be paid. The petitioner paid the instalments for some time but as he was not admitted to its membership he did not thereafter pay the instalments. Respondent No. 4 therefore filed a dispute before respondent No. 1 of which notice was given by respondent No. 1 to the petitioner. In this case respondent No. 4 claims dues payable in respect of flats Nos. 10 and 11 and is filed against respondent No. 5 and the petitioner. The petitioner wants the proceedings to be quashed on the ground that this is not a dispute which can be decided under the provisions of the Act. This question cannot be decided by us. The Registrar or the officer must do it.

3. Mr. Naik, for the petitioner, however says that this is not the question that he proposes to raise. He says that he wants to challenge the vires of Sections 91 to 96 and 163 of the Act. His contention as now formulated is that the provisions for compulsory arbitration in the disputes between a Society and a third person even under limited circumstances offends Articles 14 and 19(1) (f) of the Constitution of India. In amplying this ground he contends that there is no justification for requiring compulsory arbitration in the case of Societies. The procedure provided makes it from procedural aspect a very unreasonable provision. He says that the Registrar is given an absolute and unqualified discretion under Section 91 to decide whether or not a matter referred to him is a dispute, that the dispute may be referred to nominees who may not be trained personnel and may not know law and that no particular procedure is prescribed under the Act and the rules. On the other hand, he says that in the case of other litigants who are not connected with the Society, the procedure of civil Courts with all safeguards gives a proper opportunity to the parties to litigate their cases.

4. What Article 14 prohibits is class legislation. It does not mean that all are entitled to equal treatment. It only means that two persons similarly situated must be treated alike. Reasonable classification for purposes of legislation and treatment is permissible. However, the conditions for the validity of such classification are that there must be intelligible differentia which distinguishes the group of persons or things from those that are left out, and, there must be rational nexus between the classification and the object to be achieved.

5. That in a welfare State co-operative institutions play an important part cannot be denied. Different authors define 'Co-operation' differently. Facy's definition based on socio-economic aspect is: Co-operative Society is an association for the purpose of joint trading originating among the weak and conducted always in unselfish spirit on such terms that all who are prepared to assume the duties of membership may share in its rewards in proportion to the degree in which they make use of their association (Facy, Co-operation at Home and Abroad). In Co-operation in Finland, the writer says, "A Co-operative Society is a union of persons established according to the principles of equality, number of whose members is unlimited and the purpose of which is, by the joint performance of economic acts, to improve the financial position of its members or the conditions under which they carry on their profession, by means of either self-help or self-help with Government support, provided that all profits made by the joint action shall be distributed in proportion to which each member has taken part in the business and not in proportion to the capital invested." This describes the fundamentals of a co-operative society and no wonder that in every country in the world great emphasis is laid on co-operative ventures. The provisions of the Act are oriented to achieve these objectives.

6. Under the circumstances, there is no reason, therefore, why co-operative societies should not be treated as a class by themselves. Though the ideal is unselfishness, this cannot be achieved in practice. In order that such co-operative ventures must succeed, it is also necessary that such ventures be given reasonable protection in every possible manner. Thus provisions are made to see that its funds are not frittered away by providing careful supervision of its transactions and providing a procedure for early settlements of disputes. In order to ensure early settlement of disputes provisions are made for compulsory arbitration in matters connected with the business of the societies between the society and its members or its officers etc., or society and a stranger in very limited circumstances. As we have said earlier the purpose to be achieved is to protect the co-operative movement and to see that its resources are not frittered away by wasteful litigation.

7. Under Section 91 disputes have to be referred to arbitration only in limited number of cases viz., those between a Society and (1) its office bearers, past or present, its agent or servant or nominee or their successors, (2) a member, past member or a person claiming through them and (3) a person who has been granted loan by the Society or with whom the Society has or had transactions under Section 45 and any person claiming through such a person.

Section 45 of the Act covers (1) such persons and such transactions in respect of which restrictions have been placed by the rules enacted under the Act, (2) surety of a member, past member or a person other than a member who has been granted a loan by the society, and (3) other societies or the liquidator appointed under the Act. Inclusion of the first and second set of persons and their transactions cannot possibly be objected to for the obvious reasons that if these were not protected, interested office bearers of a Society might successfully evade the provisions of the Act. So far as the third set is concerned, having regard to the scheme of the Act their inclusion also cannot be objected to.

8. We now come to the procedure to be adopted in these matters. The first thing to be considered is the question of determination by the Registrar whether there is a dispute. Section 91 (1) requires any of the parties to refer its dispute with the other to the arbitrator, and by Section 91 (3) the decision of the Registrar on the question whether a dispute exists is made final. Section 93 provides that if the Registrar is satisfied that any matter referred to him is a dispute, he has to decide the matter either himself or refer it to a nominee or a board of nominees. By subsection (3) he is given power, when complicated questions of law or facts arise, to require a party to approach a civil Court and stay the action for some time. If the party fails to approach the civil Court, he has to order hearing to proceed. The relevant Rule in connection with this subject is Rule 75. It enables the Registrar, before deciding the question, to call for any copies of documents and other statements or record. This shows that he has to apply his mind to the matter and not mechanically make an order. He has to decide whether prima facie there is any substance in the matter, whether there is any legal bar and whether that is a matter triable under the provisions of the Act. If he is satisfied on these, then he has to either decide the dispute or refer it to an arbitrator. There is a right of appeal and revision to higher officers or the Government against the order made by the subordinate officers under Section 154. Having regard to the nature of the matter to be considered this is a sufficient safeguard, since the real dispute is to be gone into fully by himself or nominee after a reference is made. It is wrong, therefore, to say that the Registrar is given uncanalised power and discretion to refer or not, the dispute to a nominee or entertain it himself. Same thing could be said of a Court when it registers or refuses to register the plaint. In actual working we have rarely seen any injustice being done, and when that happens the Government interferes and in the last resort the High Court does.

9. Now as to the procedure for actual trial of disputes. Section 92 provides periods of limitation in special cases and as to the rest provides that the limitation Act will be applicable. Under Section 94 the Registrar or his nominee is required to follow the prescribed procedure and is given power of a Civil Court for summoning and enforcing attendance of witnesses, requiring parties and witnesses to give evidence on oath and compel them to produce documents. Sub-sec. (3) gives to the Registrar or his nominee powers similar to those in Order I, Rule 10 of the Code of Civil Procedure, power to add or substitute parties and power to strike off the name of a party, and clause (d) thereof is similar to Order 2, Rule 2 of the Code. Rule 77 (1) requires the nominee to decide the dispute within two months and gives the Registrar power to withdraw the same from that nominee and refer it to another in case of delays. Rule 77 (2) requires the nominee to record the evidence of the parties and the witnesses and decide the dispute upon consideration of the oral evidence and all documents that may be produced before him. Rule 77 (3) enables him to hear a dispute *ex parte* if a party fails to appear upon summoning. If there are more than one nominee by Rule 77 (4) the decision of the majority is to prevail. Rule 78 requires summonses to be issued to the parties requiring their and witnesses' attendance and production of books not less than fifteen days before hearing. Rule 78 (2) provides for the mode of service of summons. Rule 78 (3) requires a return to be made by the person serving the summons stating the particulars of service. By Rule 78 (4) power is given to the officer issuing the summons, to examine the person serving the summons, and, make inquiry of proper service. Finally, Section 97 provides an appeal against the decisions in such disputes to the Tribunal. The Tribunal is constituted under Sec. 149 of the Act which consists of experienced members of the judiciary or Advocates of standing, and under the section the Tribunal has all the powers of an appellate Court under Section 97 and Order 41 in the First Schedule of the Civil Procedure Code.

10. The above examination reveals that the inquiry of the dispute is to be judicial as evidence has to be recorded and there is the safeguard of a proper appeal and of the supervision of the High Court under Article 227 of the Constitution. The procedure is stricter than that of civil Courts and it has the salutary effect of cutting down unnecessary technicalities of which plenty of advantage is taken by all concerned in all litigations in civil Courts. Experience has been that so far, Advocates of some standing were appointed as nominees. Now it seems special officers who are full-time employees are also appointed

for this purpose. The disputes are heard very quickly though even there sometimes some seasoned litigants succeed in delaying the proceedings. The safeguard of appeal really ensures just decisions of the disputes. Speaking for ourselves, if such procedure is adopted in civil Courts, probably, the litigants will be more happy with quicker and satisfactory results and the present delays and wasteful expenditure could be avoided. We have been dealing with matters decided under the Act and we are satisfied that the standards of decisions are as good as, if not better, than those in civil Courts. We are not satisfied that the procedure is so inadequate as to hold that it is unreasonable. There is a nexus between the object to be achieved in the making of classification and the provisions made.

11. That an exception in favour of co-operative societies can be made has been decided by the Supreme Court in *Mannalal Jain v. State of Assam*, AIR 1962 SC 886. In our view, therefore, Sections 91 to 96 of the Act and the rules framed thereunder prescribing special procedure do not in any manner offend Article 14 of the Constitution.

12. A faint suggestion was made that these provisions affect the rights of the person to property and were hit by Article 19 (1) (f). This is too specious an argument to need any effective answer. The same thing happens when a decree is passed by the Court in a suit, inasmuch as the decree may direct the defendant to hand over the property to the plaintiff and pay the plaintiff certain amount. It could not be suggested that because the Court is entitled to adjudicate disputes and determine the rights to property between two litigating parties Article 19 (1) (f) of the Constitution would be offended.

13. We are not prepared to hear Dr. Naik on the question as to whether or not the reference made by the Society amounts to a dispute within the Act. It lies properly within the authority of the Registrar or Assistant Registrar, as the case may be, to decide this question. There is no reason why this Court should be flooded by this kind of applications without even offering an opportunity to the officers concerned to apply their minds to the facts and circumstances of the case.

14. We, therefore, reject the application.

Application dismissed.

AIR 1970 BOMBAY 205 (V 57 C 35)

VAIDYA J.

Kacharu Baban Kothawale and others, Appellants v. State of Maharashtra and another, Respondents.

A. F. A. D. No. 257 of 1966 D/- 11-2-1969, from decision of Dist. J. Ahmednagar, in Appeal No. 59 of 1965.

(A) Bombay Administration of Estates Regulation (8 of 1827), S. 10 — Agricultural land — Occupant not known to be living — Intestate property — District Judge merely acting on report of revenue authorities appointing administrator and directing him to take possession of lands in question — Proclamation neither issued as required by S. 10 nor published in gazette — Non-compliance of provisions of S. 10 — Order of District Judge held null and void. (Paras 8, 9, 16)

(B) Bombay Administration of Estates Regulation (8 of 1827), S. 10 — Bombay Land Revenue Code (5 of 1879), S. 72 — Agricultural lands — Tenants in possession — Person shown as occupant in record of rights, a Hindu, dying or presumed to be dead intestate — Government's right to take possession of property under S. 29, Hindu Succession Act — Effect of S. 72 Bombay Land Revenue Code — Section 72 being a provision contained in special legislation overrides general provisions of S. 10 of Regulation (8 of 1827) — Orders of District Judge appointing administrator and directing him to take possession of lands, based merely on report of revenue authorities, held null and void — (Hindu Succession Act (1956) S. 29).

Certain persons shown as tenants of agricultural land in record of rights were in possession of the lands. The person shown as occupant of the land was a Hindu. The District Judge merely acting on the report of revenue authorities that the occupant was not known to be living and the lands were intestate properties, appointed an administrator and directed him to take possession of the lands in question.

Held the orders of the District Judge were null and void. (Para 16)

The right of the Government under Section 29 of the Hindu Succession Act or under the general law prior to the Hindu Succession Act is not higher than that of an heir who can inherit the estate, subject to the liabilities and obligations of the heirs. The persons being in possession of the lands continuously as tenants, the heir would take subject to the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. (Para 11)

Further, the person presumed to be dead had merely occupancy rights in the said land, the occupancy would be governed

by S. 72 of the Bombay Land Revenue Code, 1879. The effect of the section is that the occupancy rights in agricultural lands of a Hindu, Mahomedan or Budhist who dies intestate and without known heirs instead of being managed and eventually sold by the administrator appointed by the District Court is sold by the Collector and the net proceeds are made over by the latter to the administrator for credit to the deceased's estate. In short, the intention is to prevent the occupancy of persons dying intestate coming under the management of the District Court's administrator. This section being a provision contained in a special legislation overrides the general provisions of law contained in Section 10 of the Bombay Regulation VIII of 1827. All that the Collector can sell under Section 72, however, is the right, title and interest of the deceased occupant and the subordinate rights are not affected by such a sale. (Paras 12, 13)

(Observations) — When an occupant dies without heirs, his occupancy does not lapse or become forfeited or liable to resumption by Government but the case is provided for in the Land Revenue Code by provisions of Section 34 of the Maharashtra Land Revenue Code (1966) which, of course, will not be applicable to the facts of the instant case but which provides that the Collector shall take possession of the occupancy rights and may lease it for a period of one year at a time. The section in the new Act gives a power to the Collector to keep any claimant in possession of the occupancy. (Para 14)

M. V. Sali, for Appellants, C. R. Dalvi Asst. Govt. Advocate, for Respondents.

JUDGMENT: This is plaintiff's second appeal involving interesting points of law. The properties in dispute are agricultural lands survey Nos. 89 and 90 situated in village Sangavi-Surya in Taluka Parner. Survey No. 89 measures 3 acres 29 gunthas and is assessed at Rs. 5-2-0. It is a Bagayat land called as 'Malai.' Survey No. 90 measures 12 acres 23 gunthas and is assessed at Rs. 3-12-0. It is a Jirayat land known as 'Wadi'. The plaintiffs are in possession of the suit lands for a number of years. According to them, they and their ancestor have been in possession of the lands for over 60 or 70 years. One Waman Raghunath Kulkarni was shown in the record of rights extracts as the occupant of the said lands. The plaintiffs are shown in the record of rights as tenants of the said lands.

2. The Talathi of the village reported to the Taluka Magistrate of Parner that the occupant Waman Raghunath was not known to be living and the lands were intestate property. The report of the Tala-

this was received by the Taluka Magistrate on July 26, 1960 and the Taluka Magistrate in his turn made a report to the District Judge, Ahmednagar on October 15, 1962 purporting to act under S. 10 of Bombay Regulation VIII of 1827 and Section 58 of Bombay Act IV of 1890. The report was sent by him through the Sub Divisional Magistrate, Parner Division, Ahmednagar. On October 25, 1962, the Assistant Collector, Parner Division, Ahmednagar submitted a report to the Collector of Ahmednagar with the recommendation that the papers may be forwarded to the District Judge, Ahmednagar for further orders and the Collector, Ahmednagar in his turn on November 3, 1962 forwarded it to the District Judge, Ahmednagar for necessary action. The learned District Judge before whom the report was registered as Parner Intestate Case No. 2 of 1962 passed the following order on November 16, 1962:

"Read report of the Taluka Magistrate, Parner sent under No. WS VI 1078/62 dated 15-10-1962 regarding intestate property belonging to the deceased Shri Waman Raghunath Kulkarni of Sangawisurya Taluka Parner.

ORDER

The Nazir, Civil Court Parner, is appointed Administrator of the property under S. 10 of the Bombay Regulation VIII of 1827".

On the same day, he also issued an order directing the Nazir, Civil Court, Parner to take possession of the two lands mentioned above as the Administrator appointed by him under Section 10 of Regulation VIII of 1827.

3. Coming to know of this order on December 7, 1962, the plaintiffs made an application for review of the order before the District Judge and the said review application is still pending. On that review application, the District Judge ordered stay of the recovery of possession and I am told that the plaintiffs are still in possession of the lands in dispute. The plaintiffs also gave a notice under S. 80 of the Civil Procedure Code to the Collector of Ahmednagar and to the Nazir of the suit which they intended to file challenging the validity of the order dated November 16, 1962 passed by the District Judge. In the said notice they contended that they were in possession of the lands from the time of their forefathers for over 60 to 70 years and that they had paid the assessment every year and enjoyed the land as owners openly and without any obstruction from anybody for many years. They further stated that their names were shown as tenants of the lands and the name of Waman Raghunath Kulkarni was shown as occupant, but they did not know who Waman Raghunath Kul-

karni was and his whereabouts or even whether he was living or dead. They, therefore, contended that the entry in the record of rights showing Waman Raghunath Kulkarni as occupant was a bogus entry and the village officer failed to delete it although in an enquiry made by the District Deputy Collector in the year 1945, the village officer was directed to delete the name of Waman Raghunath Kulkarni and enter the names of the plaintiffs. It was also stated in the notice that the conditions precedent mentioned in Sections 9 and 10 of the Bombay Regulation VIII of 1827 did not exist in the case at the date of the order of the appointment of the Administrator and hence the District Judge had no jurisdiction to appoint an Administrator because the properties were already in the actual possession of the plaintiffs.

4. On the basis of the said notice, the plaintiffs filed on March 6, 1963 a suit in the Court of the Civil Judge, Junior Division against the State of Maharashtra respondent No. 1 and one J. S. Jagtap, Administrator and Nazir and Clerk of the Court, Parner, respondent No. 2. On January 3, 1964, the Civil Judge, Junior Division Parner returned the plaint for presentation to the proper Court and the plaintiffs filed on January 4, 1964 the said plaint in the Court of the Civil Judge Senior Division, Ahmednagar at Ahmednagar where it was registered as regular civil suit No. 10 of 1964. In the said suit the plaintiffs prayed for a declaration that the order passed by the District Judge, Ahmednagar in Intestate Case No. 2 of 1962 was illegal, ultra vires and void and that, therefore, no person should try to recover possession of the land from the plaintiffs and the plaintiffs also prayed for an injunction restraining the defendants from taking possession of the land or interfering with the possession of the land by the plaintiffs.

5. Respondent No. 1, State of Maharashtra, resisted the suit by filing written statement Ex. 20 contending that it was not true that the plaintiffs were in possession of the lands for over 60 or 70 years as owners. They were in possession as tenants, but the fact was that the plaintiffs were in possession as tenants of Waman Raghunath till 1943-44 and after his death, they surreptitiously got their names entered in the record of rights as cultivating the lands as owners in 1944-45 though Waman Raghunath died intestate without any heirs sometime in 1943-44 and hence the lands escheated to the State Government. Defendant No. 1 further contended that the entry of the year 1944-45 showing the plaintiffs as owners did not give the plaintiffs any better title to the lands and hence the Taluka Magistrate made a report to the District Judge in ac-

cordance with the facts as observed by him and the District Judge in his turn appointed defendant No. 2 as Administrator in accordance with law and hence the plaintiffs' suit liable to be dismissed with costs. Defendant No. 2 filed a Purshis at Ex. 22 adopting the written statement of defendant No. 1.

6. On the evidence, the Civil Judge, Senior Division, Ahmednagar held that the plaintiffs proved that they were the owners of the suit lands as the plaintiffs and their ancestors were in continuous possession of the land for over 60 or 70 years without paying rent to anybody. He regarded the entries in the name of Waman Raghunath as hollow and held that there was sufficient reason in the case to believe that the plaintiffs were cultivating the lands as owners for over 60 or 70 years. He also held that there was no evidence to show existence of any person by the name Waman Raghunath Kulkarni. He, therefore, declared that the appointment of defendant No. 2 as the Administrator of the suit lands was not legal and restrained the defendants from recovering possession of the suit lands from the plaintiffs.

7. The defendants filed an appeal in the District Court at Ahmednagar. The learned District Judge allowed the appeal, set aside the decree passed by the trial court and dismissed the suit with costs. He held that the plaintiffs failed to prove their title to the suit lands and their possession for over 60 years as owners thereof, observing as follows:

"The onus lay on the plaintiffs to prove their subsisting title to the suit lands by lawful origin. They did not allege in the plaint that they acquired title to the lands by adverse possession for more than 12 years against the rightful owner Waman Raghunath Kulkarni and in absence of a pleading of adverse possession we will have to restrict ourselves to the plaintiffs' case of their title by lawful origin and their case of continuous possession for the last 60 years as owners. They did not produce any title deed to show that they or their predecessors-in-title purchased the suit lands or got them in partition. At no point of time they or their predecessors-in-title were shown as owners or Kabjedars in Record of Rights. On the other hand Waman Raghunath Kulkarni and his predecessors-in-title were continuously shown as Kabjedars in Record of Rights. But these entries which had presumptive evidentiary value were ignored by the trial court, on the excuse that the Government did not prove that a person named Waman Raghunath Kulkarni at all existed. The plaintiffs did not allege in the plaint that Waman Raghunath Kulkarni was an imaginary person or that such a person was never born and it was not their

case that the entry in the name of Waman Raghunath Kulkarni in Record of Rights was in the name of fictitious person". The learned District Judge relying on the various entries in the record of rights held:

"Defendants proved beyond doubt that the lands were owned by Waman Raghunath and that the plaintiffs cultivated them as his tenants at least till his death in about 1945."

He further held that the mere fact that the plaintiffs had not paid any rent to Waman Raghunath was not sufficient to hold that the plaintiffs cultivated the lands as owners; and the fact that the plaintiffs had paid assessments of lands for some years was not sufficient to confer ownership on the plaintiffs, particularly because it appeared from some of the entries in Exs. 8 and 43 that they paid these assessments under the terms of the lease. In view of these findings, the learned District Judge concluded that the action taken under Section 10 of the Bombay Regulation VIII of 1827 by the Taluka Magistrate was proper and the order appointing defendant No. 2 as the Administrator was also legal and proper, observing:

"After the District Judge passed an order it was for the plaintiffs to put forth their claim for enabling the District Judge to decide it; but instead of doing so they made a review application. In fact there was no question of any review. Had the plaintiffs proved their claim before the District Judge, the order appointing defendant No. 2 as administrator would have been vacated. Such an order did not decide the question of title and it was for the plaintiffs to get their title established in a Civil Court".

He was, therefore, of the view that the proper remedy for the plaintiffs was to file a suit for the declaration of their title to the land and not a suit for a declaration that the order passed by the District Judge was illegal.

8. Feeling aggrieved by the said judgment and decree passed by the District Judge the plaintiffs have filed the present second appeal. It is patent that both the Courts below have not considered the proper law applicable to the facts of the case. The general law for the appointment of administrators and managers of intestate properties is contained in Chapter II of Bombay Regulation of 1827. The relevant provision in that Regulation is contained in Section 10 which is as under:

"10: First: Whenever any person dies intestate, and without known heirs, having property, the Judge, within whose jurisdiction the property is, shall appoint an administrator for the management thereof, and shall issue a proclamation in the

form contained in Appendix C, calling upon the heir of the deceased or any person entitled to receive charge of the property, to attend and prefer his claim.

Second: The proclamation shall be published, and if the deceased was a resident of any district or country without the limits of the Court's jurisdiction, and the property is of the value of rupees one thousand (1,000) or upwards, the proclamation shall also be published in the Official Gazette.

Third: If any person appears and satisfies the Judge of his right to the possession of the property or any part of it as heir, executor, administrator or otherwise, it shall be delivered up to him, after deducting the necessary expenses of management.

Fourth: But, if no person appears and establishes his right, the Judge, on the 31st December next after the completion of twelve months from the appointment of the administrator, shall make a report of the circumstances of the case to the Sadar Diwani Adalat, accompanied by an inventory and valuation of the property; and it shall be lawful for the Sadar Diwani Adalat either to direct the property to continue for a further period under the management of the administrator, or to be sold by him under the authority of the court, and the proceeds to be deposited in the public treasury for the eventual benefit of all concerned."

The Regulation, therefore, requires in the first instance an administrator to be appointed and a proclamation to be issued. Thereafter the District Judge must hear objections, if any; and then, after waiting for a period of 12 months ending with 31st December, he must make a report to the Sadar Diwani Adalat which is now the High Court.

9. It does not appear anywhere on the record of this case that the proclamation was issued as required by Section 10 or published in the gazette. The District Judge appears to have merely acted on the report sent by the revenue authorities without applying his mind to the legal requirements of Section 10 and the procedure to be followed thereunder which is laid down in paragraph 264 at page 88 and paragraph 267 at page 89 of Volume I of the Civil Manual issued by the High Court of Judicature, Bombay which run as under:

"264: When an administrator is appointed under Section 10 of Regulation VIII of 1827, a proclamation in the Form contained in Appendix C of the said Regulation shall be prepared by the Nazir and issued under the signature and seal of the Judge.

267: Whenever any Magistrate is of opinion that property of intestates without known heirs should be sent to the District Court he should report direct to the

Judge, in the form prescribed below in this Chapter, who in the event of his concurring with the Magistrate, will order the Nazir at once to take possession, or, in the event of his differing, will direct the property to be returned, or left with the party having original possession. (See also Section 84 of Bombay Act VII of 1951)".

10. In the present case, no proclamation has been issued as required by these provisions and yet, the administrator has been called upon to take possession. It is surprising that the village officer who made the original report has not cared to refer to the claim of the plaintiffs who were in possession of these lands and whose possession as tenants was shown in the record of rights entries. If the village officer had reported about these facts, the District Judge would not have proceeded to pass the order appointing an administrator without giving a notice to the plaintiffs.

11. Apart from these defects in the procedure preceding the order passed by the District Judge, I find that the District Judge who passed the impugned order as well as both the Courts in this case have ignored the proper principles of Hindu Law applicable to the case. Waman Raghunath being a Hindu dying without any known heirs or presumed to be dead without leaving any known heirs, defendant No. 1, the State of Maharashtra, would undoubtedly take his properties by escheat under the rules of the Hindu Law as they existed prior to the Hindu Succession Act if he died before June 17, 1956. If he died thereafter, the Government would take the property under Section 29 of the Hindu Succession Act which is as under:—

29: "If an intestate has left no heir, heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government, and the Government shall take the property subject to all the obligations and liabilities to which an heir would have become subject".

The heirs would in the present case take subject to the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 whatever be the date of death of Waman because the plaintiffs are now held to be in possession of the said lands continuously as tenants of the said lands. These aspects are not at all considered by the District Judge when ordering the administrator to take possession of the said lands. The right of the Government under Section 29 of the Hindu Succession Act or under the general law prior to the Hindu Succession Act is not higher than that of an heir who can inherit the estate, sub-

ject to the liabilities and obligations of the heirs.

12. Apart from this, there is something more fatal to the order passed by the District Judge in Parner Intestate Case No. 2 of 1962 because Waman Reghunath Kulkarni whether to be treated as dead or presumed to be dead, had merely occupancy rights in the said lands. Section 72 of the Bombay Land Revenue Code 1879 lays down as follows:

72: "If an occupant who is either a Hindu, a Mahomedan, or a Buddhist dies intestate and without known heirs, the Collector shall dispose of his occupancy by sale, subject to the provisions of this Act or of any other law at the time in force for the sale of forfeited occupancies in realization of the land revenue, and the law at the time in force concerning property left by Hindus, Mahomedans or Buddhists, dying intestate and without known heirs shall not be deemed to apply to the said occupancy but only to the proceeds of such sale after deducting all arrears of land revenue due by the deceased to the Government and all expenses of the said sale".

This section was enacted in the Land Revenue Code to enable the Collector to dispose of the occupancy of an occupant dying intestate and to stay the operation of the general law regarding the property left by persons dying intestate until the occupancy was sold and arrears due to Government secured. The effect of the section is that the occupancy rights in agricultural lands of a Hindu, Mahomedan or Buddhist who dies intestate and without known heirs instead of being managed and eventually sold by the administrator appointed by the District Court is sold by the Collector; and the net proceeds are made over by the latter to the administrator for credit to the deceased's estate. In short, the intention is to prevent the occupancy of persons dying intestate coming under the management of the District Court's administrator.

13. In my judgment, this section being a provision contained in a special legislation overrides the general provisions of law contained in Section 10 of the Bombay Regulation VIII of 1827. All that the Collector can sell under S. 72, however, is the right, title and interest of the deceased occupant and the subordinate rights are not affected by such a sale. The right, title and interest of the deceased must be sold by the Collector for what it will fetch. The Collector takes the place of the Administrator appointed by the District Court under Regulation VIII and now the Collector's duty is to realise by the sale of the deceased's right, title and interest whatever he can for securing land revenue and for the benefit of the estate.

14. When an occupant dies without heirs, his occupancy does not lapse or become forfeited or liable to resumption by Government but the case is provided for in the Land Revenue Code by provisions of Section 34 of the Maharashtra Land Revenue Code, 1966 which, of course, will not be applicable to the facts of the present case but which provides that the Collector shall take possession of the occupancy rights and may lease it for a period of one year at a time. The section in the new Act gives a power to the Collector to keep any claimant in possession of the occupancy. In view of these provisions under the Land Revenue Code, it is clear that the revenue authorities erred in reporting the intestacy in respect of the occupancy rights in the suit lands under Section 10 of the Bombay Regulation VIII of 1827 to the District Judge and the District Judge acted without jurisdiction in passing an order appointing an administrator.

15. As stated above, the review application filed by the plaintiffs is still pending before the District Judge and he may, therefore, return the report to the Collector for taking proper action under the Land Revenue Code and the provisions of the Bombay Tenancy and Agricultural Lands Act.

16. In the result, the decrees passed by both the courts are set aside and it is hereby declared that the orders passed on November 16, 1962 in Parner Intestate Case No. 2 of 1962 are null and void and it is also ordered that the defendant shall be restrained from recovering possession of the suit land from the plaintiffs under the said orders. As the grounds on which this appeal is decided are grounds not urged in the lower courts, there shall be no order as to costs. Appeal allowed.

Appeal allowed.

AIR 1970 BOMBAY 209 (V 57 C 36)

PATEL AND MADAN JJ.

M/s. Garment Cleaning Works, Petitioners v. D. M. Aney and another, Opponents.

Spl. Civil Appln. No. 1325 of 1968, D/- 3-3-1969.

Industrial Disputes Act (1947), Sections 19, 2 (p) — Pendency of industrial dispute — Settlement can be arrived at between employer and employee — Award based on such settlement will operate for such period as is agreed upon.

A settlement can be arrived at between the employer and the employees in a pending industrial dispute. Merely because a

KM/KM/F74/69/YPB/M

settlement is arrived at after an industrial dispute is referred to the Tribunal it does not and cannot cease to be a settlement within the meaning of S. 2(p). Even though a dispute is referred to the Industrial Tribunal, the Tribunal cannot refuse to accept the settlement made by the parties. There is no provision in the Act of 1947 which gives power to the Industrial Tribunal to veto the settlement arrived at between the parties not even similar to one under Order 23 Rule 3 Civil Procedure Code in respect of compromises.

(Paras 7, 10)

An award is normally effective and will continue to be in operation for a period of one year, unless its operation is extended by the Government under the second proviso to sub-section (3) of S. 19. Settlement as such stands on a different footing and operates for the period agreed upon between the parties and it is common sense to suggest that that should be so even if there is an award in terms thereof. Section 19(3) which contemplates operation of an award for a period of one year is made subject to the provisions of sub-section (2) of Section 19 which says that a settlement is binding for such period as is agreed upon by the parties. An award based on a settlement must, therefore, operate as provided by sub-section (2) of Section 19 of the Act.

(Paras 6, 7)

Cases Referred: Chronological Paras
(1966) (1966) 1 Lab LJ 250 (Bom).

Ghatge and Patil Co. Employees' Union v. K. R. Powar 5

M. V. Bhatt and H. H. Madon, for Petitioners; D. S. Nargolkar with J. G. Gadkari, for Opponent No. 2.

PATEL J.: By this petition the petitioner seeks to challenge the decision of the Industrial Tribunal given on a preliminary objection in an industrial reference. The short facts leading to this reference are as follows:

2. The petitioner is doing laundry business in partnership. It employs about eight hundred workers in different departments and different branches. An industrial dispute was raised by a section of the workers regarding the scales of pay, classification, dearness allowance etc. and the said dispute was referred to the Industrial Tribunal in Reference (IT) No. 195 of 1962. A similar dispute was raised by other section of the workers of the said firm and it was referred to the Tribunal in Reference (IT) No. 12 of 1963. At this time the Union which took up the cause of the workers was the Laundry Mazdoor Sabha. Thereafter, another Union sprang up called the Bombay General Employees Association. This Association made applications for making it a party to the References. Accordingly, this Association

also was made a party to the said References. The usual procedure in the Reference was followed. No other worker or Union appeared during the conduct of the References. Thereafter settlements were arrived at in both the References between the petitioner and the Unions. The settlements were signed by the employer and the representative of each of the Unions in each of the References. They also appear to have been signed by the counsel for the workmen as shown by the annexures to the present petition. By these settlements all matters which were then pending before the Tribunal including some others were settled. The settlements were filed on October 22, 1964. The Tribunal after stating the demands etc. made the following order by paragraph 4 of its award dated November 2, 1964 in Reference No. 195 of 1962:

"In the result I make an award in terms of the settlement marked as Annexure 'P', so far as it relates to the subject matter of the Reference."

Similarly, in the other Reference after reciting the demands the Tribunal says:

"At the stage of the hearing there has been a settlement between the parties and accordingly they have submitted an agreement. I accept the same."

In the result I make an award in terms of the agreement marked as Annexure 'K'."

To both these awards the agreements were annexed as required by law. The awards and the annexures were then forwarded to the State Government.

3. The present Union, respondent No. 2, which came on the scene later, by its notices terminated the first award on February 14, 1966 and the second award on May 22, 1966. Thereafter, it submitted fresh demands on October 5, 1966. These demands related to dearness allowance and increase in piece rate payment with retrospective effect. This dispute was referred to the Industrial Tribunal by Reference (IT) No. 306 of 1967.

4. The petitioner raised a preliminary objection that the settlements entered into between the parties and which became the subject-matter of the awards are binding for the periods stated in the settlements and they cannot be reopened under the Industrial Disputes Act, 1947. The Tribunal decided this contention as a preliminary objection and answered it against the petitioner on the ground that an award binds the parties only for a year. The petitioner now comes to this Court.

5. The relevant sections in this connection of the Industrial Disputes Act 1947 (hereinafter referred to as the Act) are as below:

"2 (b):— 'Settlement' means a settlement arrived at in the course of conciliation

proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the conciliation officer.

18(1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement."

Sub-section (2) of Section 18 refers to the binding nature of an arbitration award. Sub-section (3) reads as follows:

"A settlement arrived at in the course of conciliation proceedings under this Act or an arbitration award in a case where a notification has been issued under sub-section (3A) of Section 10A or an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on

(a) all parties to the industrial dispute;
(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, Arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, records the opinion, that they were so summoned without proper cause;

(c) Where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part." Section 19 of the said Act reads as follows:

"(1) A settlement shall come into operation on such date as is agreed upon by the parties to the dispute, and if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.

(2) Such settlement shall be binding for such period as is agreed upon by the parties, and if no such period is agreed upon, for period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the par-

ties to the other party or parties to the settlement.

(3) An award shall, subject to the provisions of this section, remain in operation for the period of one year from the date on which the award becomes enforceable under Section 17A:

xx xx xx". It is argued by Mr. Shetye, for the petitioner, that having regard to the provisions of S. 19 of the Act the settlements between the Unions and the petitioner which ultimately became the subject-matter of the awards are binding for the period provided therein and that a reference made during the period of these settlements is bad and void.

6. Reliance is firstly placed on Sec. 19 of the Act. In the present case, it is said that inasmuch as in the two References which formed the subject-matter of the settlements all the workers were parties and as the settlements were arrived at between the Unions representing all the workers, the same are binding not only on the workers employed at present but also those who came subsequently on the scene. Section 19(3) which contemplates operation of an award for a period of one year is made subject to the provisions of that section and one of those provisions is sub-section (2) of Section 19 which says that a settlement is binding for such period as is agreed upon by the parties. It is clear that an award is normally effective and will continue to be in operation for a period of one year, unless its operation is extended by the Government under the second proviso to sub-section (3) of Section 19. Settlement as such stands on a different footing and operates for the period agreed upon between the parties, and it is common sense to suggest that that should be so even if there is an award in terms thereof.

7. It was contended before the Tribunal and also before us by Mr. Nargolkar, for respondent No. 2, that inasmuch as the settlements became awards of the Tribunals, the settlements merged in the awards and the awards could operate only for one year and, therefore, the workers were entitled to terminate the said awards on the respective dates on which they did so. This argument overlooks the fact that Section 19(2) provides for the operation of settlements between the parties. Section 19(3) is subject to sub-section (2) as much as to the second proviso thereto, which gives power to the Government to extend the operation of an award. Merely because a settlement is arrived at after an industrial dispute is referred to the Tribunal it does not and cannot cease to be a settlement. Even though a dispute is referred to the Industrial Tribunal, the Tribunal cannot refuse to accept the

settlement made by the parties. There is no provision in the Act of 1947 which gives power to the Industrial Tribunal to veto the settlement arrived at between the parties not even similar to one under Order 23, R. 3 of Civil Procedure Code in respect of compromises. An award based on a settlement must, therefore, operate as provided by sub-section (2) of Section 19 of the Act.

8. It cannot be urged and has not been urged that a settlement arrived at in the course of conciliation proceedings would not be binding on the parties and all workmen. This is obvious from Sections 18(1), 18(3)(d) and 19 of the Act. Is there then any difference between conciliation proceedings and the proceedings before the Tribunal? We do not see any. The purpose of the Industrial Law is to ensure fair deal to the workers and keep industrial peace and thus achieve national production. Can this be achieved by permitting one Union displacing another by extravagant promises and creating disputes and disturb long-term arrangements? If that cannot be done in respect of settlements during conciliation proceedings we do not see how it could be permitted in the case of a settlement when the dispute is before the Tribunal.

9. Before the Tribunal a decision of this Court in *Ghatge and Patil Co. Employees' Union v. K. R. Powar*, 1966-1 Lab LJ 250 (Bom) was cited to support the contention that whenever a settlement is filed before the Tribunal, the Tribunal must consider the propriety thereof and thereafter deal with the matter. The above decision does not support this contention. In that case in a pending reference the mills produced agreements signed by one hundred and four out of one hundred and twenty four employees and asked for an award in terms thereof. The Union representing the workers objected to the award being made in terms of the agreements and contended that the agreements were contrary to the principle of collective bargaining and were brought about by fraud, misrepresentation and coercion. The Tribunal went into this question and decided that the contentions of the Union were not justified. As however all the workers had not signed the agreements nor had the Union, the Tribunal went into each of the items of the settlement between the parties and accepted the settlement as being fair and just except in regard to two matters viz. privileged leave and bonus. Thereafter, it made its own award though substantially in agreement with the settlement filed by the mills. One of the terms of the settlement was that the award should be effective and operative until July 31, 1967. The Court held that as the award was not a consent award, sub-section (3)

of Section 19 of the Act applied to it and the Tribunal had no power to make it effective and operative as provided in the settlement. The Court did not decide the question as to whether a settlement is possible during the pendency of an industrial dispute, and whether an award by consent can be passed.

10. Even on first principle, apart from anything else we do not see why a settlement cannot be arrived at between the employer and the employees in a pending industrial dispute. The Tribunal has to decide the matter on such evidence as is brought before it. If the representatives of the workers come and say that the payments now made are fully justified and they do not want any increase, it is difficult to understand why the Tribunal in spite of this must go reducing or increasing the amount. There being nothing in the rules or the statute prescribed by the Government to enable the Tribunal to refuse to accept the settlement such a power of refusal cannot be implied. In our view, therefore, the settlement is operative and must have its full effect as required by Section 19(2) of the Act.

11. It was then contended that the agreements between the parties which have been filed in the proceedings did not satisfy the conditions of a settlement as defined by Section 2(p) of the Act which reads as follows:

"(p) 'settlement' means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the conciliation officer."

In this connection, we must state as already stated earlier that these settlements have been signed both on behalf of the Laundry Mazdoor Sabha and the Bombay General Employees' Association, Bombay and also by the Advocate for the workmen. Similar is the case with the other settlement. The petitioner in paragraph 5 of its petition clearly indicated that the settlements arrived at between the parties filed before the Tribunal in the two References do not cease to be settlements within the meaning of Section 2(p) of the Act. In the counter affidavit filed on behalf of respondent No. 2 no allegation was made that these agreements did not amount to settlements as the requirements were not satisfied. It is required that the parties must sign the agreements in such manner as may be prescribed. It is further required that a

copy should be sent to an officer authorised in that behalf by the appropriate Government and the conciliation officer. The whole purpose of this provision is that it should be known to every person and also to the concerned officers whose duty it is to administer the law. The purpose is fulfilled when the agreements are filed before the Tribunal which not only endorses them but sends them along with its awards. There is also no reason to suppose that proper persons required to sign those agreements had not signed them, for the reasons firstly that, no contention has been taken to this effect and secondly, the parties were represented by the Advocates and they would normally see that the agreements were completed as required by law. The same would necessarily apply to their being sent to the proper officers. In the present case, since settlement has taken place during the pendency of the References, the agreements were filed before the Tribunal. The second condition also is substantially complied with.

12. In this connection, we must observe that the agreements were arrived at as an overall arrangement between the parties for a period of five years on several matters some of which were outside the references. The workers obtained benefits for about two years under the agreements in the nature of increased remuneration. If the agreements were to be effective only for an year as is the case under the provisions of S. 19 of the Act, it is hardly possible that the employer would have agreed to the terms as contained in those agreements. On this ground i.e. estoppel, also it is impossible to sustain the contention that the respondent No. 2 was entitled to terminate those agreements and settlements.

13. We, therefore, allow the petition and hold that the agreements are binding between the parties and the References were wholly uncalled for and void. We therefore quash the proceedings. In the circumstances of the case, we do not think that we should award costs to the petitioner. The rule is made absolute. Parties to bear their own costs.

Petition allowed.

AIR 1970 BOMBAY 213 (V 57 C 37)

E. K. DESAI AND VAIDYA, JJ.

Haribhau Shinde and another, Petitioners v. F. H. Lala Industrial Tribunal, Bombay and another, Opponents.

Special Civil Appln. No. 1532 of 1968, D/- 24-7-1969.

Industrial Disputes Act (1947), Ss. 33, 9A, 10 and 19(6) — Provision of Ss. 9A

LM/BN/G73/69/CWM/P

and 33 are only procedural and do not create extra or new right in favour of employer — Conditions of service settled by award — Termination of award by Union of workmen and dispute referred to Industrial Tribunal — Notice, under S. 9A served by employer — Application for permission under S. 33 to Tribunal — Maintainability.

Where adjudication has not previously taken place and terms and conditions of service have not been fixed by awards, the right of an employer to alter the terms and conditions of service may be exercised in accordance with the provisions in Ss. 9A and 33(1)(a). Where conditions of service are once settled by an award, they could only be altered by contract, settlement and/or by award made in a reference made under S. 10. The Government would not be justified in capriciously and arbitrarily refusing a reference to any party which required alteration in terms and conditions of service. The Government would not be justified in refusing a reference on the application of such a party unless the Government is of the view that the application is frivolous or vexatious or that it was not expedient to make a reference in accordance with the application for reference. The right of the workmen to an upward revision of conditions of service and the right of the employer to a downward revision of conditions of service is now circumscribed by the provisions in the Act. There is no freedom to parties in that connection. This right exists but wherever the conditions of service have been previously adjudicated upon and declared by an award it can only be enforced through a reference made under S. 10 or by contract or by settlement. There is nothing in the provisions in Ss. 9A and 33 which alters the above position. The provisions in Ss. 9A and 33(1) are procedural and do not create extra or new rights in favour of an employer.

(Paras 15 and 16)

In application under S. 33 it is not open to the Tribunal to consider whether the order proposed to be passed by the employer was proper or adequate or whether it errs on the side of excessive severity; nor can the tribunal grant permission subject to conditions which it may consider fair. The permission granted to the employer does not end the matter and does not validate the action proposed to be taken by the employer. It merely removes the ban. The matter in respect whereof permission is granted under the section will remain to be substantively adjudicated upon in subsequent reference at the instance of either side.

(Para 8)

By an award the question of dearness allowance payable by the Company to

its workmen was adjudicated upon and decided. By notice the award was terminated on behalf of the Union and the Company was served with a notice for increase in dearness allowance. The industrial dispute relating to demands made for fixation of wage scales and classification of the workmen was referred to the Industrial Tribunal was subject matter of reference. The demand of the workmen for increase in dearness allowance and gratuity was referred to the Industrial Tribunal and was subject matter of reference. The Company served the union and its workmen with a notice under Section 9A and stated that the Company intended to reduce the prevailing dearness allowance payment by 40 per cent and to bring about that change and reduction on expiry of 21 days from the date of the notice. The union informed the Company that the proposed change was not at all acceptable to the union and rejected the same. The Company, thereafter applied to the Government to refer the demand of the Company relating to the reduction of the existing dearness allowance to the Industrial Tribunal under Section 10 (1) of the Act. The Government informed the Company that it should approach the Tribunal under section 33 (1) for permission to reduce dearness allowance. For that reason, the Government refused to refer the demand of the Company for adjudication under S. 10 (1) (a) of the Act.

Held, that though the Tribunal had jurisdiction to receive and entertain and deal with the application under S. 33, the application was entirely misconceived and the Tribunal's order adjourning it to the hearing of the main reference was not justified. (Para 17)

The terms and conditions of service as regards dearness allowance payable to the workmen were fixed by the award. These terms and conditions must continue to operate and be binding between the parties until they are changed by agreement of parties or settlement or an award made on a reference under Section 10. (Para 16)

The permission granted under S. 33 to the Company could not be of any avail to the Company. The Company could not become entitled to implement the proposed reduction in the scale of dearness allowance merely because such a permission was granted. The matter of alteration of the scale of dearness allowance would have remained to be ultimately settled by an award or contract. Under those circumstances, there was no ordinary and/or common law right or any right in the Company unilaterally to alter the terms and conditions of service and accordingly no question of raising of ban in that connection under section 33 is justified. (Para 17)

Cases Referred: Chronological Paras
(1954) AIR 1964 SC 1522 (V 51) =
1964-1 Lab LJ 19, South Indian
Bank Ltd. v. A. R. Chacko 10, 12,
13, 14

(1960) AIR 1960 SC 160 (V 47) =
(1960) 1 SCR 006, Punjab National
Bank Ltd. v. A. I. P. N. B. E.
Federation 8, 13

(1958) AIR 1958 SC 30 (V 45) =
1958 SCR 651, Crown Aluminium
Works v. Their Workmen 5

(1958) AIR 1958 Bom 74 (V 45) =
59 Bom LR 1046, Yamuna Mills
v. Majoor Mandal 10, 13

(1957) 1957-2 Lab LJ 256 (Bom),
Mangaldas Narandas v. Payment
of Wages Authority 10, 14

(1955) AIR 1955 SC 258 (V 42) =
1955 SCR 1241, Automobile Pro-
ducts of India v. Rukmaji Bala 8

(1953) AIR 1953 SC 241 (V 40) =
1953 SCR 780, Atherton West &
Co. v. S. M. Mazdoor Union 8

K. K. Singhvi with C. J. Sawant, for
Petitioners; S. D. Vimadlal with P.
Ramaswamy, for Opponent No. 2.

K. K. DESAI, J.: A somewhat difficult and ticklish question of the effect of the provisions in Ss. 9A and 33 (1) of the Industrial Disputes Act, 1947, on the industrial relations between workmen and employers has been raised in this petition under Article 227 of the Constitution, whereby the 2nd petitioner (being a registered trade Union) representing the workmen of the 2nd respondent employers has challenged the validity and correctness of the order of the Industrial Tribunal dated May 27, 1968 (in the matter of Application I. T. No. 177 of 1968), whereby the Tribunal rejected the contention of the 2nd petitioner Union (hereinafter referred to as "the Union") that the above Application No. 177 of 1968 was misconceived and the Tribunal had no jurisdiction to grant the relief claimed in that application.

2. The short facts leading to the institution of the above application may be summarised as follows:

By what is mentioned as Baxi award made in I. T. No. 411 of 1958 on December 31, 1959, the question of dearness allowance (including other allowances) payable by the 2nd respondent Company to its workmen was adjudicated upon and decided. Since then, the Company has been paying dearness allowance in accordance with the scale fixed by that award. By notice dated March 20, 1961, the award was terminated on behalf of the Union and the Company was served with a notice for increase in dearness allowance. The industrial dispute relating to demands made for fixation of wage scales and classification of the

workmen was referred to the Industrial Tribunal in July 1963 and is subject matter of reference I. T. No. 235 of 1963. On June 24, 1965, the demand of the workmen for increase in dearness allowance and gratuity was referred to the Industrial Tribunal and is subject matter of Reference I. T. No. 216 of 1965. The Company served the union and its workmen with a notice dated September 8, 1967, under section 9A of the Industrial Disputes Act and stated that the Company intended to reduce the prevailing dearness allowance payment by 40 per cent and to bring about that change and reduction from October 1, 1967, i.e. on expiry of 21 days from the date of the notice. Immediately by reply dated September 20, 1967, the union informed the Company that the proposed change was not at all acceptable to the union and rejected the same. The union expressed surprise that the change was proposed when the demand of the workmen regarding increase in pay structure was pending before the Industrial Tribunal. The union submitted its demand that the notice of change given by the Company should be unconditionally withdrawn.

The implementation of the proposed change of reduction of dearness allowance of 40 per cent has been deferred from time to time by the Company. In the meanwhile, the Company requested the Labour Commissioner to admit the matter of the Company's demand of reduction in dearness allowance into conciliation. By his letter dated October 17, 1967, the Labour Commissioner informed the Company that having regard to the preliminary discussions which had taken place, the position was explained and the case brought by the Company for conciliation was treated as closed. The Company thereupon by its letter dated October 30, 1967, to the State Government referred to the facts of the notice of change served under section 9A and the Labour Commissioner having treated the matter of conciliation as closed. The Company further stated that upon expiry of 21 days from the date of the notice of change the Company had got a right to effect the change desired by the Company but because the reference relating to the demand for increase in dearness allowance was pending, the Company could not enforce the change desired. The Company, therefore, applied to the Government to refer the demand of the Company relating to the reduction of the existing dearness allowance to the Industrial Tribunal under section 10 (1) of the Act. The Under-Secretary to the Government by his letter dated January 29, 1968, informed the Company that it should approach the Tribunal under section 33 (1) for permission to reduce dear-

ness allowance. For that reason, the Government refused to refer the demand of the Company for adjudication under section 10 (1) (a) of the Act.

The Company thereupon on February 7, 1968, filed the present Application No. I. T. No. 177 of 1968 before the Tribunal under section 33 (1) for a permission in writing to reduce the amount of dearness allowance payable to its workmen by 40 per cent or by such other percentage as from October 1, 1967, or from such other date as the Tribunal decided. In passing, it may be stated that the application contains (in about 33 typed pages) all the material facts which are relevant for defence in the reference made at the instance of the union for increase in dearness allowance.

3. The main contention made on behalf of the union by its written statement dated April 1, 1968 was that having regard to the reference for increase in dearness allowance, the application was illegal and mala fide and had been made with a view to defeat the substantive reference. Under Section 33, permission that can be granted would be of an interim nature and the matter in respect whereof permission could be asked cannot be substantive matter which was subject matter of reference before the Tribunal. The claim for reduction in dearness allowance was such a substantive matter. It appears that at the hearing of the application the union contended that the application was misconceived and the Tribunal had no jurisdiction to entertain the same. By the impugned order dated May 27, 1968, the Tribunal held that the application was in law maintainable, but it was (not?) proper and just to hear and dispose it of before the disposal of the main reference. In that connection, the Tribunal observed that Section 33 (1) of the Act provided for prejudicial alteration of the conditions of service applicable to the workmen with the express permission in writing of the Tribunal. The effect of the permission if granted was to remove the ban imposed by Section 33 and the permission would not stop the workmen from challenging the change permitted. The Tribunal, however, held that to reduce the dearness allowance by removing the ban imposed on the rights of the employers would create complications and accordingly adjourned the application and directed that it be heard with the main reference.

4. In this petition, on behalf of the union, the above order of the Tribunal is challenged mainly on the ground that having regard to the facts in this case the application was misconceived and further that the Tribunal had no jurisdiction to entertain and/or try and/or to grant the relief claimed in the applica-

tion. The Tribunal should have accordingly not adjourned the hearing of the application and should have dismissed the application. The finding of the Tribunal that the application was in law maintainable was contrary to the scheme and effect of the provisions of the Act. The contention was developed by submitting that the true effect of the provisions of section 33 was that it imposed a ban on an employer and prevented him from altering conditions of service of workmen during the pendency of an industrial reference. The section provided for lifting of that ban without empowering the Tribunal in that connection to adjudicate upon and decide any questions of merits regarding the alterations proposed. Under sub-section (a) of section 33 (1), in connection with an application made to it, the Tribunal had no power to decide the very dispute which was pending for adjudication in the reference before it. The submission was that the application of the Company was directly in respect of the dispute regarding increase in dearness allowance which was the subject matter of the reference. The application was not for "any matter connected with" that dispute but in respect of that very dispute itself. In the industrial law it was well established that an employer had no right to reduce dearness allowance unilaterally in any event when the matter of dispute in respect thereof was pending before the Tribunal in a reference. The submission was that in industrial law as settled by judicial pronouncements in respect of conditions of service once settled by adjudication declared by an award it was not possible for any employer to alter terms and conditions of service of workmen in respect of matters adjudicated upon except by adopting the process prescribed by the Act. The submission was that conditions of service once settled by an award can only be altered by agreement and/or settlement or by further reference to the Industrial Tribunal and an award made by the Tribunal. There was nothing in sections 9A and 33 that conferred right on an employer to alter conditions of service once settled by an award unilaterally by giving notices under section 9A and by making applications under section 33 for granting of permissions.

5. In reply, the contention on behalf of the Company was that an employer had a right to ask for a revision of the terms and conditions of service to the prejudice of workmen. That right had been recognised by the Supreme Court in the case of *Crown Aluminium Works v. Their Workmen*, AIR 1958 SC 30. That right was recognised in the provisions of sections 9A, 19 (6) and 33 of the Act. In fact, the provisions in sections 9A and 33

recognise and provide for the right of an employer to change conditions of service of workmen to their prejudice. The submission accordingly was that as the Company had tendered valid legal notice of change under section 9A for reduction of dearness allowance by 40 per cent, the Company had, having regard to the pendency of the Reference I. T. No. 216 of 1965, a right under S. 33 to make an application to the Tribunal for giving permission for implementation of the intended change of reduction in dearness allowance. The Company had made its application in accordance with the provisions in that section and the submission of the union that the application was misconceived and the Tribunal had no jurisdiction to entertain the same should be negatived.

6. In this connection, it is convenient first to notice the scheme in the Act by noticing sections 9A, 10, 19 (6) and 33. The relevant parts of section 9A run as follows:

"9A. No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule shall effect such change —

(a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner x x x or

(b) within twenty-one days of giving such notices provided that no notice shall be required for effecting any such change —

(a) where the change is effected in pursuance of any settlement, award or decision x x x or

(b) x x x x".

Section 10 empowers the Government to refer industrial disputes to appropriate Tribunals. Section 19 relates to period of operation of settlements and awards recognised under the Act. Sub-section (6) of that section provides:

"Notwithstanding the expiry of the period of operation under sub-section (3), the award shall continue to be binding on the parties until a period of two months has elapsed from the date on which notice is given by any party bound by the award to the other party or parties intimating its intention to terminate the award".

The relevant parts of section 33 run as follows:

"33 (1) During the pendency of any conciliation proceeding x x x or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall —

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dis-

pute, the conditions of service applicable to them x x ; or

(b) x x x, save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, or where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workmen—

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman x x x x or

(b) x x x x.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him x x x ; or

(b) x x x x, save with the express permission in writing of the authority before which the proceeding is pending, x x x x.”

Under section 33A, workmen are authorised to make a complaint when an employer contravenes the provisions of section 33 and the Tribunal is authorised on such complaint to adjudicate upon the complaint as if it was a dispute referred to the Tribunal for final adjudication.

7. It is necessary to notice that there was no provision corresponding to section 33 in the old Industrial Disputes Act 1929. The Section 33 as it was first enacted in the principal Act of 1947 imposed a total ban on the employers and prevented them pending a reference to the Tribunal from altering to the prejudice of the workmen concerned in the dispute conditions of service applicable to them. The section 33 in the Act of 1947 was substituted by Section 34 of the Industrial Disputes (Appellate Tribunal) Act, 1950, and the section as it now stands was substituted by section 21 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956.

8. The question of the true effect of the provisions in section 33 arose before the Supreme Court, inter alia, in the case of *Atherton West & Co. v. S. M. Mazdoor Union*, AIR 1953 SC 241; *Automobile Products of India v. Rukmaji Bala*, AIR 1955 SC 258; and *Punjab National Bank Ltd. v. A. I. P. N. B. E. Federation*, AIR 1960 SC 160. The result of the observations of the Supreme Court in these cases may be stated as follows:

The object of the section is to provide for the continuance and termination of the pending proceedings in a peaceful atmosphere and in substance it insists upon the maintenance of the status quo pending the disposal of the industrial dispute between the parties. The ban imposed is mandatory. The jurisdiction of the court under section 33 is limited. In application under the section it is not open to the Tribunal to consider whether the order proposed to be passed by the employer was proper or adequate or whether it errs on the side of excessive severity; nor can the tribunal grant permission, subject to conditions which it may consider fair. The permission granted to the employer does not end the matter and does not validate the action proposed to be taken by the employer. It merely removes the ban. The matter in respect whereof permission is granted under the section will remain to be substantively adjudicated upon in subsequent reference at the instance of either side.

9. Now, on the basis of this observation, Mr. Singhvi for the union has rightly argued that in an application made under Section 33 the tribunal deals with the question of raising of a ban and/or prohibition and that there would be no question of raising of ban and/or prohibition where the employer may be held to have no independent and/or ordinary and/or contractual and/or common law right to alter to the prejudice of the workmen concerned in the dispute the conditions of service applicable to them. The submission was developed by stating that the effect of the various decisions of different Courts including the Supreme Court in respect of the operation of the terms and conditions fixed by awards, having regard to the contents of S. 19 (6), was that there was in law no unilateral right of any kind in an employer unilaterally to alter the conditions of service applicable to his workmen when fixed by awards and/or binding settlements. When conditions of service are fixed and settled by awards and binding settlements, they continue to be operative as between the employer and the workmen continuously until altered by agreement of parties and/or by adjudication and an award made by a Tribunal in a reference made under the Act. The result of this position, according to him, was that in spite of the provisions in section 33 entitling an employer to apply for permission for alteration of the conditions of service of his workmen, the question of raising of ban in that connection under S. 33 could never arise in respect of conditions of service settled and decided by an award made under the Act. The employer would be bound by those conditions of service and would accordingly

have no ordinary right at all to alter those conditions. He could not acquire such a right because the section 33 contemplates an application for permission to be obtained by an employer.

10. In connection with this submission, he has relied upon the observations of this Court in the case of *Mangaldas Narandas v. Payment of Wages Authority*, (1957) 2 Lab LJ 256 (Bom); *Yamuna Mills v. Majoor Mandal*, 59 Bom LR 1046 = (AIR 1958 Bom 74); and of the Supreme Court in *South Indian Bank v. Chacko* (1964) 1 Lab LJ 19 = (AIR 1964 SC 1522); and general discussion in various authorities. In the case of (1957) 2 Lab LJ 256 (Bom), a Division Bench of this Court noticed that the award previously made had been terminated in accordance with the provisions in section 19 (6). The question was as to the terms and conditions of service between the employer and the workmen after the period mentioned in that section had expired. The Court observed:

"The termination of such an award does not, in our judgment, terminate the contract. Even after the award is determined in the matter (sic manner) provided by sub-sec. (6), the obligations created by the award can in our judgment be altered by a fresh contract or a fresh adjudication under the Industrial Disputes Act and not otherwise. The Industrial Disputes Act has been enacted with the object of securing harmonious relations x x x by providing a machinery for adjudication of disputes x x x and the object of the legislature would be frustrated if after every few months by unilateral action the employer or the employees may be entitled to reopen the dispute and ignore the obligations declared to be binding by the process of adjudication. We are therefore of the view that the termination of an award by notice has not the effect of terminating the obligations flowing from the award."

11. In the case of 59 Bom LR 1046 = (AIR 1958 Bom 74), on a similar question having been raised, the Division Bench observed at p. 1051 (of Bom LR) = (at p. 78 of AIR):

"There appears to be on the scene after the termination of the award only one thing that can govern the relations between the employer and the employees and that undoubtedly can be nothing else than the award itself. The result of the award ceasing to have effect is not that the award ceases to exist; the result of the award ceasing to have effect is x x x that it is open to either party to give a notice of change and to attempt to bring about a change. Further, it is open to the employer in cases in which he can bring about a change without a notice of change such as the matters enu-

merated in Schedule III to proceed to bring about the change, because the impediment placed in his way by S. 46 (3) is removed. But until a change is brought about by the act either of the employer or the employee after following the relevant provisions in the Bombay Industrial Relations Act, 1946, the award that exists shall continue to regulate the relations between the employer and the employees."

12. In the case of 1964-1 Lab LJ 19 = (AIR 1964 SC 1522), the Supreme Court observed:

"Even otherwise if an award has ceased to be in operation or in force and has ceased to be binding on the parties under the provisions of section 19 (6), it will continue to have its effect as a contract between the parties that has been made by industrial adjudication in place of the old contract x x x, the very purpose for which industrial adjudication has been given the peculiar authority and right of making new contracts between employers and workmen makes it reasonable to think that even though the period of operation of the award and the period for which it remains binding on the parties—in respect of both of which special provisions have been made under Ss. 23 and 29 respectively—may expire, the new contract would continue to govern the relations between the parties till it is displaced by another contract. Hence a benefit as per the terms of the award which has ceased to be operative or in force under Section 19 (6) of the Industrial Disputes Act, 1947, could be claimed on the basis that the provisions of such award would create a contract between the concerned parties."

13. Having regard to the law as pronounced by these authorities, it is clear that in the case of the present parties, as regards the right to recover dearness allowance and the obligation to pay the same, the terms and conditions of service that were operative and binding were those fixed by the Baxi award dated December 31, 1959, made in I. T. No. 411 of 1958. As has been observed in the case of 59 Bom LR 1046 = (AIR 1958 Bom 74), upon the award having been terminated under the provisions of section 19 (6), this very award governed the relations between the employer and the employees. The workmen desired to alter the rate of the benefit of dearness allowance that was fixed by that award and raised a demand in respect thereof. That demand was the dispute referred to the Tribunal under Reference No. 216 of 1965. It is apparent that as there was liberty in the workmen to demand alteration there must be corresponding liberty in the Company to demand alteration and revision of the

percentage of dearness allowance to the prejudice of the workmen. The question that is raised and requires to be decided is about whether, because such a demand for revision of the rate of dearness allowance could be raised, the employer had liberty unilaterally to bring into force and implement that demand and reduce unilaterally the dearness allowance by 40 per cent as was stated in the notice of change tendered under S. 9A. Now, the scheme of the Industrial Disputes Act, as observed by the Supreme Court in the cases of 1964-1 Lab LJ 19 = (AIR 1964 SC 1522) and AIR 1960 SC 160 which we have just noticed, was to maintain status quo as regards the terms and conditions of service between the parties until the terms and conditions were by a contract or a settlement or an adjudication award altered. Needless to state that the question of alteration of the terms and conditions by adjudication in an award must depend upon the reference that may be made by the Government under Section 10 of the Act. Apparently, the position is that in cases in which the Government for the reasons which may be germane and relevant refuses to make a reference of a demand for alteration of terms and conditions of service, the employer must be left without any remedy whatsoever. The scheme of the Industrial Disputes Act thus appears to us to have deprived both the employer and the workmen of the liberty to have the terms and conditions of service altered by unilateral action on either side. The employer was not left with liberty to make his own contract regarding the terms of employment, i.e. regarding the right to alter the terms and conditions of service fixed by an award to the prejudice of the workmen without securing a reference under Section 10 of the Act. Similarly, the workman, in spite of his right to agitate in that connection was not left with the liberty to insist upon the revision of the terms and conditions of service in his favour unless he secured the revision by a reference made under section 10 and the consequent adjudication of demand for revision by an award.

14. The question is whether the position as ascertained by us above is altered in favour of the employer by granting to him fresh rights under the provisions of sections 9A and 33 of the Act. It must at once be admitted that the language of these sections and particularly section 33 gives scope to an argument that the Legislature has envisaged existence of undisputed right in an employer to alter the conditions of service applicable to the workmen to their prejudice. In this connection, it is to be noticed that the original section 33 in the 1947 Act

imposed a total ban and provided that "no employer shall during the pendency of x x x proceedings before a Tribunal x x x, alter to the prejudice of the workmen concerned in the dispute, conditions of service applicable to the x x x x x." This provision was modified as already noticed above and the present Act clearly contemplates that the Tribunal may grant express permission to an employer to alter the conditions of service applicable to the workmen to their prejudice. Under clause (a) of section 33 (1), the permission may relate to any matter connected with the dispute. Under clause (a) of sub-section (2), the employer may alter the conditions of service in regard to any matter not connected with the dispute without even applying for permission of the Tribunal. Similarly, section 9A contemplates that an employer has a right to serve a notice for change in conditions of service and thus envisages the existence of a right in an employer to alter conditions of service applicable to his workmen. Mr. Vimadala for the Company, therefore, has with some emphasis insisted that these provisions clearly recognise the common law right of an employer to ask for a revision of conditions of service to the prejudice of his workmen. He insists that in fact section 9A does not only envisage but creates a right in the employer to alter conditions of service of workmen after giving the prescribed notice of change. Now, in this connection, having regard to the law as settled by authorities, he had to admit that the lifting of ban under section 33 does not bring about effectively the alteration in terms of conditions of service as desired by an employer. He admitted that even when permission was granted under clause (a) of section 33 (1), the workmen would be entitled to raise a dispute regarding prejudicial revision of his conditions of service and the matter would have to be ultimately finally decided only by an adjudication by Industrial Tribunal. He admitted that this would be the position even where a valid notice of change as regards conditions of service was tendered by an employer under section 9A. These admissions, we apprehend, are result of the appreciation by Mr. Vimadala of the effect of the law as pronounced in the cases of 1957-2 Lab LJ 256 (Bom) and 1964-1 Lab LJ 19 = (AIR 1964 SC 1522), which we have noticed above. In connection with his submissions that section 33 and S. 9A created a right in favour of an employer to alter the terms and conditions of service, we are not in a position to disregard the law pronounced by the above authorities that conditions of service as settled by an award would continue to be binding on both the employer and the

workmen continuously until they are altered by a contract, a settlement and/or an award made in a reference made under section 10. We have arrived at this conclusion with certain hesitation because of the language in sections 9A and 33 (1) which deal with the manner in which an employer who contemplates alteration of conditions of service may proceed. The provisions in these sections are procedural and, in our view, do not create extra or new rights in favour of an employer. This is clear on the plain language of the sections. This is admitted indirectly on behalf of the Company when it is stated that as soon as an alteration is proposed in the notice under section 9A and a permission is granted under section 33, the workmen would be entitled to raise protest and demand a reference in respect of the alterations proposed by the employer. Above must be the true construction and effect of the provisions in sections 9A and 33, having regard to the law pronounced by various Courts in connection with the operation of the award after it is terminated under section 19 (6) of the Act.

15. Mr. Vimadlal contended that the effect of the law as pronounced above was that the employer was left with no remedy when the State Government refused to make a reference under Section 10 for alteration of terms and conditions of service to the prejudice of the workmen. In his submission, after the Government had rejected the Company's application dated October 30, 1967, for referring the demand of the Company for reduction of the dearness allowance to 40 per cent, the right of the employer to alter the conditions of service remained enforceable by following the procedure prescribed in Section 33. This right should not be denied to the employer. Just as the workmen had their remedy, the employers must be held to have a right to alter the conditions of service of workmen to their prejudice if circumstances so justified. That right had been recognised in Section 33 and the contrary submission made by the union should be negatived. Now, in our view, there is no substance in these contentions. As already stated above, where conditions of service are once settled by an award, they could only be altered by contract, settlement and/or by award made in a reference made under Section 10. The Government would not be justified in capriciously and arbitrarily refusing a reference to any party which required alteration in terms and conditions of service. The Government would not be justified in refusing a reference on the application of such a party unless the Government is of the view that the application is frivolous or vexatious or that it was not expedient to make a reference

in accordance with the application for reference. We have no doubt that the Government would exercise its powers under section 10 and make a reference in all cases where the circumstances justified such a reference. The right of the workmen to an upward revision of conditions of service and the right of the employer to a downward revision of conditions of service is now circumscribed by the provisions in the Industrial Disputes Act. There is no freedom to parties in that connection. This right exists but wherever the conditions of service have been previously adjudicated upon and declared by an award can only be enforced through a reference made under Section 10 or by contract or by settlement. We are quite clear that there is nothing in the provisions in Sections 9A and 33 which alters the above position.

16. In this connection, we must state that under sub-section (2) of Section 33, in regard to matters not connected with the dispute, the employer has been given a right to alter the terms and conditions of service applicable to workmen, provided he proceeds in accordance with the standing orders applicable to the workmen, and where there are no such standing orders he proceeds in accordance with the terms of contract between the parties. Similarly, it is quite clear that where adjudication has not previously taken place and terms and conditions of service have not been fixed by awards, the right of an employer to alter the terms and conditions of service may be exercised in accordance with the provisions in Sections 9A and 33(1)(a). In this case, we are not concerned with such a situation. In this case, the terms and conditions of service as regards dearness allowance payable to the workmen are fixed by the Baxi award and these terms and conditions of service must continue to operate and be binding between the parties until they are changed by agreement of parties or settlement or an award made on a reference under Section 10.

17. The submission of Mr. Singhvi that there was no question or raising any ban under Section 33 in the matter of application of the Company requires to be considered in the light of the findings made above. As already held, there was no right in the Company unilaterally to alter the terms and conditions of service in accordance with the notice of change given under Section 9A. The Company itself was conscious of that position and, therefore, made the application dated October 30, 1967, requesting the Government to refer the demand of the Company relating to reduction of the existing dearness allowance to the Tribunal under Section 10(1) of the Act. It is quite clear that the Company found itself in a difficult

situation when by the letter dated January 29, 1968, the Under-Secretary to the Government rejected that application and referred the Company to the provisions in Section 33(1). It appears not to have been appreciated that permission granted under that Section to the Company could not be of any avail to the Company. The Company could not become entitled to implement the proposed reduction in the scale of dearness allowance merely because such a permission was granted. The matter of alteration of the scale of dearness allowance would have remained to be ultimately settled by an award or contract. Under those circumstances, the submission made by Mr. Singhvi that there was no ordinary and/or common law right or any right in the Company unilaterally to alter the terms and conditions of service and accordingly no question of raising of ban in that connection under Section 33 is justified and we accept the same. The Tribunal should accordingly have accepted the submission made on behalf of the union that the application No. 177 of 1968 requesting the Tribunal's permission under Section 33(1) was misconceived and untenable. It is true that such an application could only be made to that Tribunal. We are, therefore, not holding that the Tribunal had no jurisdiction to receive and entertain and deal with the application. We, however, are clearly of the view that the application was entirely misconceived and the Tribunal's order adjourning it to the hearing of the main reference was not justified.

18. We do not find it necessary to decide other contentions made by the union.

19. The rule is accordingly made absolute. The above application I. T. No. 177 of 1968 of the Company will stand rejected. The Company will pay costs of the petitioners fixed at Rs. 500.

Rule made absolute.

AIR 1970 BOMBAY 221 (V 57 C-38)

K. K. DESAI AND VAIDYA JJ.

Chandrakant Ramrao Saraf and others, Petitioners v. Shri Punde and others, Respondents.

Special Civil Appln. No. 1455 of 1967 D/- 25/26-6-1969.

Panchayats — Bombay Village Panchayats Act, 1958 (3 of 1959), Section 40 — Maharashtra Panchayat Samitis (Registration of Voters and Conduct of Election) Rules (1962), Rr. 3 and 4 — Deletion of names of voters from voters' list on ground that they have ceased to be members of Panchayat under S. 40(1)(b) — Question of cessation of membership not

decided by authority prescribed under S. 40(2) — Held deletion of names was illegal.

The language in sub-section (2) of S. 40 directly deals with the question of a member of panchayat ceasing to be a member and vacating his office for the reasons mentioned in sub-clauses (a) and (b) of sub-section (1). Though the last part of sub-section (1) provides that such member shall cease to be a member and his office shall be vacant, the time from which the provision is to operate is indicated by the provisions in sub-section (2). Apparently, the question of a member of Panchayat having ceased to be a member and vacated his office can never be decided without giving him a reasonable opportunity of being heard. Apparently that question does not automatically stand decided and must be raised before the President of a Zilla Parishad in the manner mentioned in sub-section (2). (Para 8)

Where the Tahsildar, who was Returning Officer, on his own motion deleted the names of some voters from the voters' list on the ground that they had ceased to be the members of the Panchayat under the provisions of sub-section (b) of Section 40 (1), his order was liable to be set aside. Though the Tahsildar had power to amend the voters' list under Rule 3 (3) he had no jurisdiction in the matter of such a question raised in connection with the office of membership. This question could only be raised before the President of Zilla Parishad and in appeal against his decision before the State Government. Consequently the voters were not disabled from continuing to be the members of the Panchayat. Their names were wrongly and illegally deleted by the Tahsildar from the voters' list. Their names must be deemed to be continuing in the voters' list in spite of the provisions in R. 4(3). (Paras 9, 10)

A. V. Savant for R. W. Adik, for Petitioners; C. R. Dalvi Asst. Govt. Pleader, for Respondents Nos. 1 and 2.

K. K. DESAI, J. (25-6-1969): In this petition under Art. 226 of the Constitution the grievance of the six petitioners who were members of the Turkabad Village Gram Panchayat is that their membership of the Panchayat had been illegally treated as vacated and cancelled and consequently on July 19, 1967 their names were illegally deleted from the voters' list for Gangapur Gat Panchayat Samiti, Turkabad. The grievance of the first petitioner is that on the basis of deletion of his name from the voters' list on July 19, 1967, the Tahsildar, as Returning Officer, Panchayat Samiti Election, Tanka Gangapur had illegally rejected the first petitioner's nomination for contesting the election for the membership of Panchayat Samiti.

2. The only facts which need to be noticed are as follows:

The petitioners were elected as members of the Gram Panchayat for village Turkabad in December 1966. As elected members of the Gram Panchayat, the petitioners were eligible to vote and contest the elections for Panchayat Samiti of Gangapur Taluka for Turkabad Circle. In connection with elections to Panchayat Samiti to be held on July 31, 1967, the last date for filing nomination papers was July 18, 1967. In that very connection the voters' list was published on July 12, 1967. Admittedly, in that list the names of the petitioners appeared. Petitioner No. 1 filed his nomination paper dated July 15, 1967 for contesting the election to the Panchayat Samiti.

It appears that the Tahsildar of the village purporting to act under sub-rule (3) of Rule 3 of the Maharashtra Panchayat (Registration of Voters and Conduct of Election) Rules (hereinafter referred to as "the Rules") on his own motion on July 19, 1967 deleted the names of all the petitioners from the voters' list. On the basis of that deletion, by the impugned order dated July 19, 1967 he held that on account of the membership of the candidate (i.e. of Petitioner 1) of the Gram Panchayat, Turkabad having been cancelled, he was disqualified from standing for election. He referred to Rules 15 and 19(2)(a) in the order.

3. Admittedly the petitioners' names have been deleted from the voters' list on the ground that they had ceased to be members of the Gram Panchayat under the provisions of sub-section (b) of Section 40(1) of the Bombay Village Panchayats Act, 1958. That was the oral information given to the petitioners by the Tahsildar. The contention on behalf of the Petitioners is that sub-section (2) of Section 40 of the Act provides that the question of elected members vacating the office of the membership of the Panchayat can only be decided by the President of a Zilla Parishad after giving to the member concerned a reasonable opportunity of being heard with a right in the member to file an appeal against the decision of the President to the State Government. The Tahsildar had no power under sub-rule (3) of Rule 3 to delete the petitioners' names from the Voters' list on the basis that the petitioners had ceased to be members of the Panchayat, before that question had been raised before and decided by the President. In fact the question had never been raised and had not been decided by the President. The Tahsildar acted illegally and without jurisdiction in deleting the names of the petitioners from the voters' list purporting to act under the powers given to him under sub-rule (3) of Rule 3. As the

action of the Tahsildar in deleting the names of the petitioners was illegal, the Petitioners were entitled to relief in that connection in this writ petition. As that action was illegal, the rejection of the nomination of petitioner No. 1 on the basis of that action was also illegal and petitioner No. 1 was entitled to relief in that connection in this petition.

4. Before referring to the provisions in that Act and the rules on which reliance is placed, it requires to be recorded that an affidavit in reply has not been filed on behalf of any of the respondents. We will accordingly proceed to decide this petition on the footing that the allegations of facts made in the petition are correct. We will assume in favour of the petitioners that the Tahsildar deleted their names from the voters' list on the ground that the petitioners had vacated the office of membership of the Panchayat under the provisions of sub-section (1)(b) of Section 40 of the Act.

5. The relevant contents of Section 40 run as follows:

"40. (1) Any member of a Panchayat who during his term of office—

(a) is absent for more than four consecutive months from the village ... unless leave not exceeding six months so to absent himself has been granted by the Panchayat, or

(b) absents himself for six consecutive months from the meetings of the panchayat, shall cease to be a member and his office shall be vacant.

(2) If any question whether a vacancy has occurred under this section is raised by the President of a Zilla Parishad suo motu or on an application made to him in that behalf, the President shall as far as possible decide the question within sixty days from the date of receipt of such application. Until the President decides the question, the member shall not be disabled from continuing to be a member of the Panchayat. Any person aggrieved by the decision of the President may, within fifteen days from the date of such decision, appeal to the State Government; and the decision of the State Government in appeal shall be final:

Provided that, no decision shall be given under this sub-section by the President against any member without giving him a reasonable opportunity of being heard."

The relevant provisions in Rules 3 and 4 run as follows:

"3. Voters' list. (1) The Collector shall cause a voters' list to be prepared by an officer appointed by him in this behalf...

(2) Not less than four days before the last date fixed for the nomination of candidates under Rule 13, the officer appointed under sub-rule (1) shall publish

the voters' list by affixing copies thereof at.....

(3) The officer appointed under sub-rule (1) may on his own motion or on an application made to him amend the voters' list and shall authenticate it with his signature.

(4) x x x x x x

4. Persons entitled to vote and contest election. (1) No person whose name is not and every person whose name is entered in the voters' list of an electoral division on such day as the Collector may, by general or special order, fix in this behalf, shall be entitled to vote from that electoral division.

(2) x x x x x x

(3) The voters' list shall be conclusive evidence for the purpose of determining under this rule whether any person is qualified to vote, or as the case may be, is qualified to be elected at any election".

6. There is no dispute that the voters' list was published by the Tahsildar under sub-rule (2) of Rule 3 on July 12, 1967. Similarly, there is no dispute that the Collector had nominated July 18, 1967 to be the relevant date under Rule 4(1). Apparently having regard to the clear language in sub-rules (1) and (3) of Rule 4, every person whose name was entered in the voters' list of an electoral college on July 18, 1967, was entitled to vote from the electoral college and was qualified to be elected at the election mentioned in the petition. The question is whether the voters' list, as existing on the date of publication, i.e., July 12, 1967, was conclusive under sub-rule (2) of Rule 4 or whether the list could be at a subsequent date amended by the Tahsildar.

7. (26-6-1969) The further question is whether the Tahsildar in exercising powers vested in him under sub-rule (3) of R. 3 could amend the list on the ground of a voter or a member of Panchayat having ceased to be a member for any of the reasons mentioned in S. 40(1)(a) and (b) without a decision having been made in that connection under the sub-section (2) of Section 40 by the President of Zilla Parishad or in an appeal by the State Government. The subsidiary question would be whether when the Tahsildar amends the voters' list under the powers vested in him under sub-rule (3) of Rule 3, his decision must not be arbitrary and capricious but on the footing that he knew all relevant provisions of law and that in law, so far as the question of voter having ceased to be a member of Panchayat under Section 40(1)(a) and (b) arose, he was not entitled to make any amendments before a decision in that connection was pronounced by the President of a Zilla Parishad or in an appeal by the State Government, as the case might be.

8. The answer to these questions depends on the true construction and effect of the provisions in Section 40 and the Rules 3 and 4 which we have already quoted above. It is abundantly clear on a reading of the scheme in Section 40 that under sub-clauses (a) and (b) of sub-si. (1), a member of a Panchayat may cease to hold the office of being a member for the two grounds and/or reasons contained in sub-clauses (a) and (b) of sub-section (1). On those grounds, the provision in the last part of sub-section (1) is that the member "shall cease to be a member and his office shall be vacant." There is no doubt that if no further provision was made in sub-section (2) of this section, the direct effect of the contents of sub-section (1) of the section would be that automatically upon the grounds mentioned in sub-clause (a) and (b) of sub-section (1) becoming complete, a member of a Panchayat would cease to be a member and his office would be vacant. Though this is the clear effect of the language of sub-section (1), upon reading sub-section (2), it is quite clear that the question of a member of a Panchayat ceasing to be a member and vacating his office for the grounds mentioned in sub-clauses (a) and (b) of sub-section (1), must be decided in the manner and by the procedure prescribed in sub-section (2). In that connection the important provision in sub-section (2) is:

"Until the President decides the question, the member shall not be disabled from continuing to be a member of the Panchayat".

"..... no decision shall be given against any member without giving him a reasonable opportunity of being heard." The above clear language in sub-section (2) directly deals with the question of a member of Panchayat ceasing to be a member and vacating his office for the reasons mentioned in sub-clauses (a) and (b) of sub-section (1). Thus though the last part of sub-section (1) provides that such member "shall cease to be a member and his office shall be vacant," the time from which the provision is to operate is indicated by the above quoted phrases from the provisions in sub-section (2). Apparently, the question of a member of Panchayat having ceased to be a member and vacated his office can never be decided without giving him a reasonable opportunity of being heard. Apparently that question does not automatically stand decided and must be raised before the President of a Zilla Parishad in the manner mentioned in sub-section (2). In any event, in the present case, the question appears to have been raised before the Tahsildar on July 18, 1967. He was not the officer before whom such a question ought to have been raised. He

was not the officer prescribed by sub-section (2) of Section 40 or any other provision for deciding the question raised, viz., that the six petitioners in this case had absented themselves for six consecutive months from the meeting of the Panchayat without the leave of the Panchayat. The Tahsildar had no jurisdiction in the matter of such a question raised in connection with the office of membership of the petitioners of the Panchayat in question. This question could only be raised before the President of Zilla Parishad and in an appeal against his decision before the State Government. This question was liable to be decided only after a reasonable opportunity of being heard was provided to the six petitioners. The Tahsildar, when he decided that the six petitioners had ceased to be members of the Panchayat in question because they had absented themselves for six consecutive months from meeting without leave of the Panchayat, was acting in a matter in which, having regard to the clear provisions in sub-section (2) of S. 40, he had no jurisdiction. In fact it is quite clear that after such a question was raised the six petitioners were not disabled from continuing to be the members of the Panchayat until the question was decided in the manner prescribed by sub-section (2). As this question has not been decided by the authorities prescribed by sub-section (2) up to date, the submission made by Mr. Sawant for the petitioners that the petitioners are not disabled from continuing to be members of the Panchayat must be upheld. The contention made on behalf of the respondents by Mr. Dalvi that upon the petitioners having absented themselves for six consecutive months from meetings of the Panchayat without the leave of the Panchayat having been obtained, they ceased to be members and their office was vacated is contrary to the provision in sub-section (2) that until the question was decided by the authorities mentioned in sub-section (2), the petitioners were not disabled from continuing to be members of the Panchayat. This contention of Mr. Dalvi is accordingly rejected.

3. Now, in spite of the provision in sub-rule (2) of Rule 3 that the voters' list should be published not less than four days before the last date fixed for the nomination of candidates under Rule 13, having regard to the power vested in him under sub-rule (3) of Rule 3, the Tahsildar continued to have authority to entertain applications for and also *suo motu* on his own motion to amend the voters' list and to authenticate it with his signature. That power has not been circumscribed by the period of four days mentioned in sub-rule (2) of Rule 3. The re-

sult of the above finding is that even after the voters' list was published on July 15, 1967, the Tahsildar continued to have power to amend the same and once again authenticate the same by his signature. It is also not in dispute that under sub-rule (1) of Rule 4, the Collector had fixed July 18, 1967 and every person whose name was entered in the voters' list on that day was, therefore, entitled to vote from the electoral college. Similarly, under sub-rule (3) of Rule 4, every person whose name was entered in the voters' list on July 18, 1967 was qualified to be a candidate for the election to the Panchayat Samiti. The contention of Mr. Dalvi for the respondents is that the voters' list was amended by the Tahsildar by deletion of the names of the six petitioners and that was done on July 18, 1967. As under sub-rule (3) of Rule 4 the voters' list, as existing on July 18, 1967, was conclusive evidence for the purpose of determining under the rules the question whether the petitioners were qualified to be elected and to vote at the election, a finding should be made that the petitioners were not qualified to vote or to be elected at the election in question. On the basis of plain language of sub-rules (1) and (3) of Rule 4, this submission would be justified and would require to be accepted. The question is as to how the rights of the petitioners, whose names according to what we have already found and held above, were wrongly and illegally deleted by the Tahsildar from the voters' list, are affected by reason of the provisions in sub-rules (1) and (3) of Rule 4. In that connection it requires to be remembered that the election was directed to take place on July 31, 1967. One year ten months and 26 days have now expired since that fixed date. The elections are now to take place. It is abundantly clear to us that upon our striking down the Tahsildar's action in deleting the names of the six petitioners from the voters' list as on July 18, 1967, the list will have to be changed as of that date so as to include the names of the petitioners therein. Since we are about to give directions to the above effect, the voters' list, as existing on July 18, 1967, will be including the names of the six petitioners. That would be so in spite of the provisions in sub-rule (3) of Rule 4. That will be the effect of the order which we are about to pass in this petition. In law, therefore, the list, as will now be amended according to our directions, must be deemed to have been existing on July 18, 1967 and that list will be conclusive evidence for the purpose of determining whether the petitioners were qualified to vote and to be elected at the election that was then directed to be held. If we accepted Mr. Dalvi's submission, we will have proceeded on the footing that judi-

al process was insufficient to correct the illegality of the action of the Tahsildar so as to give appropriate relief to the petitioners in respect of their right of vote and their right to be elected to the Panchayat Samiti. We are unable to hold that the powers which are vested in us are insufficient.

10. As the above is the true construction and effect of the provisions in Rules 3 and 4 read with Section 40 of the Act, we strike down the Tahsildar's action dated July 19, 1967 of deleting the names of the six petitioners from the voters' list and we hold that the names of these six petitioners must be deemed to be continuing in the voters' list as of and from July 18, 1967. Necessary amendments will be carried out by the Tahsildar as a result of the directions given by us above. This will not, however, mean that the question of absence of the petitioners for six consecutive months from the meetings of the Panchayat without the leave of the said Panchayat cannot be considered by the authorities prescribed. We further strike down the action of the Tahsildar rejecting the first petitioner's nomination for the purpose of his being elected. We are not, however, deciding whether the election programme, as then fixed, will be continuing or it needs to be amended by the authorities. Appropriate action in that connection can be taken as we are not dealing with that question. The rule will be made absolute with costs against respondent No. 1 who will be entitled to reimburse himself from appropriate sources.

Rule made absolute.

AIR 1970 BOMBAY 225 (V 57 C 39)

VAIDYA J.

Kantilal Takhatmal Jain and another, Petitioners v. State, Respondent.

Criminal Revn. Appln. No. 729 of 1968 D/. 3-8-1968.

Criminal P. C. (1898), Sections 190 (1), 252, 251-A, 173 and 155 (2) — Raid by Police with intention to detect cognizable offence under Rule 131-B of Defence of India Rules — Submission of report by Police for offence under Section 134 Customs Act — Permission under S. 137 of Customs Act obtained — Magistrate can take cognizance — Report under Section 173 can be treated as complaint under S. 190 (1) (b) — No evasion of S. 155(2).

While taking cognizance of an offence under S. 190(1)(b) the Court is not bound by the contents of the report made by the Police. When a Magistrate takes cognizance of an offence under S. 190(1) either on a complaint under cl. (a) or on a police

report under cl. (b), it is for the Magistrate to consider against whom he should proceed and for what offences he should proceed to trial after considering the contents of the complaint or the report, and although there is no section in the Criminal Procedure Code which empowers a police officer of his own motion to make any report about a non-cognizable offence to the Magistrate, the information about such an offence, placed before the Court can be considered as a complaint.

(Paras 8, 9, 11)

Where the police raided certain premises with the intention of detecting offence under R. 131B of the Defence of India Rules (1962), but after investigation and after taking sanction of the Collector of Central Excise under S. 137, the police filed a report under S. 173 Cr. P. C. before the Magistrate alleging that the accused were guilty of offence under S. 135, Customs Act the Magistrate can take cognizance of the offence under S. 135, Customs Act, by treating the charge sheet as a complaint in respect of a non-cognizable offence. Therefore, the procedure under S. 252, Cr. P. C. has to be followed and not one under S. 251A. When the police raided the premises and discovered facts which according to them, constituted offences under Rule 131B (5) of Defence of India Rules as well as under Section 135 of the Customs Act and if they have chosen to report the offence under S. 135 of the Customs Act, it cannot be said for this reason that they have tried to evade the provisions of S. 155(2). Case law discussed. (Paras 12, 14 & 15)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 1167 (V 54) =
1967-2 SCJ 427 = 1967 Cri LJ 1081,
Raghubans Dubey v. State of Bihar 8, 9
- (1965) AIR 1965 SC 1185 (V 52) =
1965-1 SCR 269 = 1965 (2) Cri LJ 250, Pravin Chandra Mody v. State of Andh Pra 5, 8
- (1958) AIR 1958 Punj 172 (V 45) =
1958 Cri LJ 683, Ram Krishna v. State 8
- (1927) AIR 1927 Bom 440 (V 14) =
ILR 51 Bom 498 = 28 Cri LJ 939, Emperor v. Shiv Swami Guruswamy 12, 15
- (1926) AIR 1926 Bom 195 (V 13) =
ILR 50 Bom 344 = 27 Cri LJ 503, Emperor v. Abasbhai 12
- (1926) AIR 1926 Mad 865 (V 13) =
ILR 49 Mad 525 = 27 Cri LJ 1031 (FB), Public Prosecutor v. Ratnavelu Chetty 12
- (1925) AIR 1925 Bom 131 (V 12) =
ILR 49 Bom 212 = 26 Cri LJ 441, Candri Bawoo v. Emperor 12
- (1924) AIR 1924 Cal 476 (V 11) =
ILR 51 Cal 402 = 25 Cri LJ 732, In re, Nagendra Nath Chakravarti 12

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(1919) AIR 1919 Cal 433 (V 6) = ILR 46 Cal 807 = 20 Cri LJ 794,
 Bhairab Chandra v. Emperor 12
 (1902) ILR 26 Bom 150 = 3 Bom LR 586 (FB), King Emperor v. Sada 11, 12, 15

Ashok Desai with H. G. Mehta, for Petitioners; V. H. Gumaste, Govt. Pleader, for State.

ORDER: The petitioners, who are the accused in Criminal Case No. 429/P of 1968 on the file of the learned Additional Chief Presidency Magistrate, 3rd Court, Esplanade, Bombay, have filed this application in revision praying for setting aside the order passed by the learned Magistrate on June 14, 1968, in the said case, rejecting an application of the petitioners requesting the Court to dismiss the case on the ground that the police had no power to file a charge-sheet in respect of the offence under Section 135 of the Customs Act, 1962 for which the accused are being tried.

2. The few facts which are relevant to this application are as under:

The two petitioners Kantilal Jain (accused No. 1) and Dinesh Desai (accused No. 2) claim to be traders. Petitioner No. 1 claims to be a broker in jewellery and petitioner No. 2 professes to carry on printing business. On the basis of some information received by the Officers of the C. B. I. Economic Offences Wing, they raided certain premises situate at 220-224 Kalbadevi Road, Third floor, Bombay on June 28, 1966. The petitioners were found in the premises. It is alleged by the prosecution that the petitioners were carrying on the business of smuggling of gold. The premises were in actual possession of petitioner No. 1 Kantilal Jain and his brother Motilal Jain. As soon as the officers raided the premises, it is alleged, Dinesh Desai, petitioner No. 2 rushed towards the gallery in a vain bid to escape, but he was chased and caught. There was a bag in his hand which contained 24 rectangular pieces of gold with foreign marking, viz., Cornuix Neux Pheciux, Paris 10 tolas 999. In the main hall to the south of the place there was a wall clock. Petitioner No. 1 was sitting on a mattress. In the clock 18 rectangular pieces of gold with the same foreign markings weighing 10 tolas each were found. Fourteen rectangular pieces of gold with similar marking and weight were found below the mattress on which the petitioner No. 1 was sitting. There was also a cupboard on the right side of the place where Kantilal was sitting, and in the cupboard Indian currency valued at Rs. 9100 together with a piece of paper bearing accounts in Gujarati were found. Five hundred and sixty tolas of gold

consisting of 56 rectangular pieces and the total currency of Rs. 12,550 and the other documents were seized as a result of the raid by the C. B. I., E. O. W. Officers. After further investigation the sanction of the Collector of Central Excise purporting to be under S. 137, was taken by the said Police Officers. Motilal the brother of petitioner No. 1, died in a house collapse before the filing of the charge-sheet. The Inspector of Police, C. B. I., E. O. W., Bombay therefore filed a charge-sheet in the Court of the Additional Chief Presidency Magistrate, Esplanade, Bombay, on January 22, 1968 against the two petitioners alleging therein that the two petitioners were guilty of the offence under Section 135 of the Customs Act for being in possession of the said pieces of gold, which were smuggled. According to the prosecution both of them were guilty of the offence under section 135 of the Customs Act read with Section 34 of the Indian Penal Code.

3. After the accused appeared in the case and three adjournments of the case for some reason or the other were granted, on June 14, 1968, an application was filed on behalf of the accused praying that the case should be dismissed because the offence under Section 135 is a non-cognizable one in view of the provisions of Section 104(4) of the Customs Act which lays down:

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this Act shall not be cognizable."

It was submitted on behalf of the accused that as the offence was a non-cognizable one, the investigation carried out by the C. B. I. E. O. W. was illegal, inasmuch as the said police officers had not been authorised by an order of a Magistrate as required under Section 155 (2) of the Criminal Procedure Code. It was further submitted that the charge-sheet that was filed was not a complaint within the meaning of S. 190(1)(a) of the Criminal Procedure Code & hence the Court had no jurisdiction to proceed with the matter even though the Collector of Central Excise had given the sanction for the prosecution. The petitioners also submitted that the only authority who could file a complaint in respect of the offence was the authority under the Customs Act, because under Rule 131-B (5) of the Defence of India Rules, 1962, no Court or Tribunal can take cognizance of any offence except on a complaint being made by Collector of Customs, Central Excise or Land Customs.

4. The application was resisted on behalf of the State by the Prosecutor on the ground that the police in the present case started investigation of the cognizable of-

fence under Rule 131B of the Defence of India Rules, 1962, and while investigating that offence, the facts disclosed the commission of an offence under Section 135 of the Customs Act which they admitted to be non-cognizable. Thus the police investigated both the offences under Rule 131B of the Defence of India Rules and under Section 135 of the Customs Act, 1962. It was submitted that as the police were investigating principally a cognizable offence the police were entitled to investigate the non-cognizable offence also without obtaining the permission from the Magistrate under Section 155 of the Criminal Procedure Code. It was, therefore, contended that the charge-sheet which was filed was a chargesheet under S. 173 of the Criminal Procedure Code and hence the procedure that was to be followed at the trial of the case was the one prescribed under S. 251A of the Criminal Procedure Code.

5. The learned Presidency Magistrate overruled the contentions of the petitioners. He held that the police initially started investigation of a cognizable offence under Rule 131B of the Defence of India Rules. As the facts which constituted that offence also constituted an offence under the Customs Act, the police were entitled to investigate the latter offence along with the former one. The learned Magistrate relied on the decision of the Supreme Court in *Pravin Chandra Mody v. State of Andhra Pradesh*, AIR 1955 SC 1185 and held that the police were entitled to file one chargesheet with respect to both the cognizable as well as the non-cognizable offence. However, the learned Magistrate came to the conclusion that since sub-rule (5) of Rule 131B of the Defence of India Rules bars the jurisdiction of a court to take cognizance of an offence under that Rule except on a complaint made by a Collector of Customs, the police had chosen to report an offence merely under Section 135 of the Customs Act. He further observed:

"In view of that provision if the police had chosen to prosecute the accused for committing an offence under Rule 131B, they would have been required to request the Collector of Customs to file a complaint. In that case the accused would have been entitled to the advantage of the procedure enacted by Section 252 of the Criminal Procedure Code. If the initial investigation had not related to the offence under the Defence of India Rules, but if the offence under the Customs Act were to be investigated by itself, then the police would have been required to take the permission of a Magistrate before starting the investigation. In the alternative the customs officers themselves would have been required to investigate

the offence and in that case they would have been required to file a complaint after obtaining the necessary sanction as contemplated by Section 137 of the Customs Act. In that case the accused would have been entitled to the advantage of the procedure prescribed by Section 252 of the Criminal Procedure Code."

He further held that if the procedure under Section 251A of the Criminal Procedure Code was to be followed on the basis that the chargesheet filed by the police was under Section 173, the accused would be prejudiced inasmuch as he would lose the advantage of cross-examining the witnesses both before the charge was framed and after the charge was framed. He, therefore, ordered that although the contention of the accused that the cognizance of the alleged offence under Section 135 of the Customs Act was not properly taken by the Court was rejected, the procedure to be followed for the trial would be the one prescribed under Section 252 of the Criminal Procedure Code.

6. The petitioners have filed this application in revision praying for setting aside the said order in so far as it rejected the petitioners' contention that the court had no power to take cognizance of the offence under S. 135 of the Customs Act. Mr. Desai the learned counsel for the petitioners, has submitted that the offence under Section 135 being non-cognizable, the police had no power to make any report with respect to that offence. According to him, Section 155 clause (2) of the Criminal Procedure Code is mandatory; and he submitted that the violation of these mandatory provisions would render the entire investigation and report illegal and hence if the court takes cognizance of an offence on the basis of that report, the Court would be committing an illegality. There can be no doubt that Section 155(2) of the Criminal Procedure Code is mandatory and violation thereof by the police would be illegal.

7. Mr. Desai further contended that the assumption made by the learned Presidency Magistrate that the offence under Rule 131B of the Defence of India Rules, 1962 is a cognizable offence is incorrect because, according to him, the only provision in the Defence of India Rules which enabled the police to arrest offenders who contravened the provisions of the Defence of India Rules is Rule 152 which mentions the contravention of several rules as well as the contravention of any order or direction made or given under any of the said rules, but it does not mention Rule 131-B. Mr. Desai, therefore, contends that apart from Rule 152, there is no other power in the Police to arrest without a warrant any person for the contravention of the Defence of India

Rules. Mr. Desai further submitted that Rule 131-B clause (5) of the Defence of India Rules expressly lays down —

"Notwithstanding the provision of Rule 154, no Court or Tribunal shall take cognizance of any offence under this Rule except on a complaint being made by a Collector of Customs, Central Excise or Land Customs".

Rule 154 referred to in the said Rule is as under:

154. "Cognizance of contraventions of Rules, etc.

(1) No court or Tribunal shall take cognizance of any alleged contravention of these Rules, or of any order made thereunder, except on a report in writing of the fact constituting such contravention, made by a public servant.

(2) Proceedings in respect of a contravention of the provisions of these Rules or of any order made thereunder alleged to have been committed by any person may be taken before the appropriate Court having jurisdiction in the place where that person is for the time being.

(3) Notwithstanding anything contained in Schedule II of the Code of Criminal Procedure, 1898 (5 of 1898), a contravention of any of the following rules, namely Rules 9, 36, 133B and 133J, shall be triable by a court of Session, a Presidency Magistrate or a Magistrate of the first class and a contravention of any order made under rule 83, or under sub-rule (2) of Rule 125 shall be triable by a Court of Session, Presidency Magistrate or a Magistrate of the first or second class.

(4) Any Magistrate or Bench of Magistrates empowered for the time being to try in a summary way the offences specified in sub-section (1) of section 260 of the Code of Criminal Procedure, 1898 (5 of 1898), may, if such Magistrate or Bench of Magistrates thinks fit, on application in this behalf being made by the prosecution, try a contravention of any such provisions of these Rules or orders made thereunder, as the Central Government may, by notified order specify in this behalf in accordance with the provisions contained in Sections 262 to 265 of the said Code."

Mr. Desai relies on the provisions of clause (1) of the said Rule and argues that under that Rule, it would have been possible for the Court to take cognizance of an offence on a report by a police officer who is a public servant. But that power is expressly excluded by clause (5) of Rule 131B which says, "notwithstanding the provision of Rule 154..." Mr. Desai submitted that the offence under Rule 131B is an offence in respect of which the Court had no jurisdiction to take cognizance except upon a complaint being made by a Collector of Customs, Central Excise or Land Customs. The

Court, could not, therefore, take cognizance of an offence on the basis of a police report. He argued that the police had no power to investigate an offence in respect of which they could not file a report or chargesheet on the basis of which the Court could take cognizance of an offence. Mr. Desai further contended that in view of this nature of the offence under Rule 131B, the prosecution could not rely on the fact that initially the police were investigating into the present case in respect of an offence under Rule 131B. He has, therefore, submitted that the report which is made by the police to the Court in the present case is not under any section authorising the police to investigate either the offences under Rule 131B of the Defence of India Rules, 1962 or the offence under S. 135 of the Customs Act, and on the basis of such a report, the Court had no jurisdiction to proceed further in the matter.

8. There is no substance in these contentions urged by Mr. Desai. Firstly, it is now well settled in view of the decisions of the Supreme Court in AIR 1965 SC 1185 and Raghubans Dubey v. The State of Bihar, (1967) 2 SCJ 427 = (AIR 1967 SC 1167) that while taking cognizance of an offence under section 190 (1) (b) the Court is not bound by the contents of the report made by the Police. In Pravin Chandra Mody's case, AIR 1965 SC 1185 their Lordships have laid down:

"Section 156 (2) provides that whereas police officer enquires into an offence under section 150 (1) his action cannot be called into question on the ground that he was not empowered to investigate the offence. The enquiry was an integrated one, being based on the same set of facts. Even if the offence under the Essential Commodities Act may not be cognizable—though it is not alleged by the appellant that it is non-cognizable—the police officer would be competent to include it in the charge-sheet under section 173 with respect to a cognizable offence. In Ram Krishna v. State, AIR 1958 Punj. 172, Falschaw J. (as he then was) observed that the provisions of section 155 (1), Criminal Procedure Code, must be regarded as applicable to those cases where the information given to the police is solely about a non-cognizable offence. Where the information discloses a cognizable as well as a non-cognizable offence the police officer is not debarred from investigating any non-cognizable offence which may arise out of the same facts. He can include that non-cognizable offence in the charge-sheet which he presents for a cognizable offence. We entirely agree. Both the offences if cognizable could be investigated together under Chapter XIV of the Code and also if one of them was a non-cognizable offence."

The question in the first case was as to whether in a case where cognizance was taken by the Magistrate under section 190 (1) (b) and the police report alleged that the accused had committed an offence under section 420, which is a cognizable offence, and an offence under section 7 of the Essential Commodities Act, 1955 for contravention of clauses (4) and (5) of the Iron and Steel Control Order, which was contended to be a non-cognizable one, the procedure to be followed by the Magistrate was one under S. 251A or under section 252 of the Criminal Procedure Code. Their Lordships held that the trial had to proceed under section 251A as the report included both a cognizable and a non-cognizable offence, because the police were not prevented under the Code of Criminal Procedure from investigating a non-cognizable offence along with a cognizable offence when the two arose from the same facts.

9. In Raghubans Dubey's case, 1967-2 SCJ 427 = (AIR 1967 SC 1167) their Lordships held that the Court had jurisdiction to proceed against persons not mentioned as accused in the report because the court was taking cognizance of the offence. The question arose in that case as to whether the Court had power to issue process against persons not mentioned as accused in the report made by the police under section 173. It was contended that if the Magistrate took cognizance of the offence against persons who are not mentioned as the accused in the report, there would be a separate complaint case and the accused against whom the Magistrate proceeded could not be tried along with the other accused mentioned by the police report and their Lordships stated that once cognizance is taken under section 190 (1) (b) a proceeding was instituted within the meaning of Section 207-A and on the facts of the case, their Lordships held that the case did not fall within S. 190 (1) (a) or under section 190 (1) (c) and stated as follows:

"The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence. As pointed out by this Court in (1965) 1 SCR 269 = AIR 1965 SC 1185, the term "complaint" would include allegations made against persons unknown. If a Magistrate takes cognizance under section 190 (1) (a) on the basis of a complaint of facts he would take cognizance and proceeding would be instituted even though persons who had committed the offence were not known at that time. The same position prevails, in our view, under section 190 (1) (b)".

Thus it appears that when a Magistrate takes cognizance of an offence under section 190 (1) either on a complaint under

clause (a) or on a police report under clause (b), it is for the Magistrate to consider against whom he should proceed and for what offences he should proceed to trial after considering the contents of the complaint or the report.

10. In the present case it is not challenged before me that the police officers of the C. B. I., E. O. W. had authority to investigate generally into the offence under the Customs Act or the D. I. Act. What is urged is that they had no power to investigate into the offence and report to the Magistrate under section 173 in respect of the offence under S. 135 of the Customs Act as the said offence is non-cognizable and the offence under Rule 131B is also non-cognizable. However, irrespective of whether the offence investigated is cognizable or non-cognizable, I have to consider whether the Magistrate was right in taking cognizance of the offence in the present case.

11. A Full Bench of the Bombay High Court has taken the view in *King Emperor v. Sada*, (1902) ILR 26 Bom. 150 (FB), that although there was no section in the Criminal Procedure Code which empowered a police officer of his own motion to make any report about a non-cognizable offence to the Magistrate, the information about such an offence, placed before the Court could be considered as a complaint. In the said case Chanda-varkar, J. observed:

"It is true that the word "report" is not defined in the Code of Criminal Procedure, but it appears to me that the Legislature has studiously attached to the expression "Police report" a peculiar meaning throughout the Code wherever the expression occurs, and pointed out the occasions when and the purpose for which such reports should be made. Where a police report goes beyond these occasions and purposes it must fall within the definition of "complaint" in S. 4, clause (m) of the Code. The argument that the word "report" occurs in sections outside Chapter XIV of the Code only strengthens this view, because the only sections outside that chapter where the expression "Police report" occurs are sections 62 and 114. As to section 62, it provides that the Police are to report the cases of all persons arrested without warrant to the District Magistrate, or, if he so directs, to the sub-Divisional Magistrate. That means that where the police have by law the power to make an arrest without a warrant i.e., in cognizable cases, the police must report such arrest. So also section 114 points in the same direction. It enables a police officer to report to a Magistrate when there is reason to fear the commission of a breach of the peace. That section must be read with

Chapter IV, which entails upon the public the duty of assisting Magistrates and Police Officers whenever a breach of the peace is apprehended. In no other section does the expression "Police report" occur, and the fact that the word "report"—not the expression "Police report"—occurs in S. 438, section 466, section 472, section 474 and section 510, is beside the question, those are sections which deal with reports other than those of a police officer. It appears to me that the Code has carefully specified the purposes for which and the occasions when the police are empowered to make reports as to offences committed or threatened, and when they travel beyond them their reports cease to have the privilege conferred upon them by the Code and can only come within the definition of "complaint", which is wide enough to include them."

The question in that case arose in peculiar circumstances where a constable filed a complaint against the accused for committing nuisance on the public road under section 61 of the Bombay District Police Act and when the accused was discharged, the Magistrate before whom the complaint was made ordered compensation to be paid under section 250 of the Criminal Procedure Code on the ground that the complaint against the accused was vexatious. The District Magistrate made a reference to the High Court on the ground that section 250 was inapplicable in the case as it was instituted upon a police report or upon information given by a police officer. The question before the Full Bench, therefore, was as to whether the complaint filed by the constable before the Magistrate was a complaint within the meaning of section 250 of the Criminal Procedure Code. The Full Bench took the view that the argument that section 250 was inapplicable because the complaint was a complaint by a police constable and, therefore, a report and not a complaint within the meaning of section 250 was untenable.

12. The said Full Bench decision was considered by a Division Bench of this Court consisting of Patkar and Fawcett, JJ. in *Emperor v. Shivaswami Guruswami*, ILR 51 Bom 498 = (AIR 1927 Bom 440). The accused in that case was charge-sheeted for offence under sections 414, 385 and 204 of the Indian Penal Code and a charge was framed by the Sub-Divisional Magistrate under section 161 with reference to the taking of a bribe in the course of an investigation and under section 193 with reference to the tearing of certain documents. The Magistrate acquitted the accused on the ground that there was no case against the accused under S. 414 and that the offences under sections, 385, 204, 161 (as the law

then stood) and section 193 were all non-cognizable offences and in so far as the investigation was conducted without the order of the Magistrate under section 155 (2), the entire proceedings were ab initio void. In an appeal against that acquittal, the order was reversed and the Sub-Divisional Magistrate was directed to continue his enquiry and to try the accused in accordance with law. In view of the decisions in *Bhairab Chandrav. Emperor*, ILR 46 Cal. 807 = (AIR 1919 Cal. 433) and the Full Bench decision of the Madras High Court in *Public Prosecutor v. Ratnavelu Chetty*, (1926) ILR 49 Mad. 525 = (AIR 1926 Mad 865) and the decision of this Court in *Emperor v. Abas-lal*, ILR 50 Bom. 344 = (AIR 1926 Bom. 195) Patkar, J. found:

"Speaking for myself, I am inclined to take the view that a Magistrate can in a proper case treat a Police report of a non-cognizable offence as a complaint and take cognizance under S. 190 (1) cl. (a), of the Criminal Procedure Code. I have the less hesitation to take that view in the present case where a charge-sheet was sent by Bando, the Sub-Inspector who was the official superior of the present accused, a Head constable, and who would, in the ordinary circumstances, be the person investigating an offence committed by his subordinate....."

"On the whole, I think, under the circumstances of the present case, the Magistrate could have treated the report of the Police-officer as a complaint, when he as a matter of fact took cognizance of the case, examined the Sub-Inspector who was the official superior of the accused and who could properly complain of the accused's conduct in this case, and also framed a charge."

Fawcett, J. while agreeing with the order summed up the law thus:

"If the view that has been adopted by the Calcutta and Madras High Courts were taken, there would be no necessity to consider whether the report—the charge-sheet in this case—should or should not be treated as a complaint giving jurisdiction to the Magistrate under clause (a) of section 190 (1) for both those courts have in effect decided that the words "a report in writing...made by any Police-Officer" in clause (b) of section 190 (1) cover any report made by a Police-Officer, whether of a cognizable or a non-cognizable offence. That is clearly laid down in (1926) ILR 49 Mad. 525 = (AIR 1926 Mad. 865). It is also the view that commended itself to Mookerjee and Chatterjea JJ. in *In re Nagendra Nath Chakravarti*, ILR 51 Cal. 402 = (AIR 1924 Cal. 476). There it is observed that, under the amendment introduced by section 45 of Act XVIII of 1923 in clause (b) of section 190 (1) the expression

"Police report", which had been interpreted in a technical sense, has been replaced by the non-technical expression "report made by any police officer." This conclusion, no doubt, has the merit of simplicity. But it seems to me that it is not open to us, in face of the Full Bench decision in (1901) ILR 26 Bom. 150, to adopt the same view. At any rate, I think that, until the whole question has been fully considered by a Full Bench, it would not be proper for us to make such a great departure from the construction that is put upon clause (b) of S. 190 (1) by the Full Bench in Sada's case, (1901) ILR 26 Bom. 150. He further said:

"... it would be disregarding the provisions of sub-section (2) of section 155 to say that the expression "report made by any police-officer" in section 190 (1) (b) covers a case where he is expressly prohibited from investigating and reporting. Therefore, until Sada's case (1902) ILR 26 Bom. 150, is overruled, I think it must be followed especially as the other view would nullify the ruling in Sada's case, (1902) ILR 26 Bom. 150 that section 250 can apply to a police-officer, who makes a false and frivolous or vexatious complaint in the form of a report." He concluded as follows:

"I agree with my learned brother that, if a Police-report under section 190 (1) (b) is limited in this way, the reference to a Police report in clause (h) of S. 4 must similarly be limited; and, therefore, there is scope for a police-report being treated as a complaint in a proper case, as in fact has been held in Sada's case, (1902) ILR 26 Bom. 150. In Candri's case (1924) ILR 49 Bom. 212 = (AIR 1925 Bom. 131) it was held that the report could not properly be treated as a complaint, but Sada's case, (1902) ILR 26 Bom. 150 lays down that there may be cases where it can be so treated, for instance, where the Police-officer has himself seen the alleged offence committed, as mentioned by Candy J. in his judgment at page 156. I think it might also cover a case where an alleged non-cognizable offence is brought to the notice of a Police-Officer so soon after its commission, that there was a direct connection between the offence and the Police-officer's intervention in the matter, such as cases where he is called on to take action under sub-section (1) of section 57 of the Code.

In the present case, there is clearly good ground for treating the charge-sheet as a complaint".

In view of these decisions of this Court, which are binding on me, it is possible to construe the charge-sheet filed in the present case as a complaint in respect of a non-cognizable offence. This complaint is filed with the necessary sanction under

section 137 of the Customs Act. Thus it is clear on the authorities that the investigation cannot be challenged as illegal merely because the police have reported about the non-cognizable offence under section 135. In any event, it is open to the Magistrate to take cognizance of the non-cognizable offence, in view of the sanction given by the Collector under Section 137, treating the charge-sheet itself as a complaint.

13. Mr. Desai, however, contended that the police had no power to investigate even the offence under Rule 131B. The simple answer to this contention is to be found in the provisions of sub-section (2) of section 5 of the Criminal Procedure Code which lays down that all cognizable offences are to be investigated under the Criminal Procedure Code unless there is a contrary provision in some enactment. The only provision in the Defence of India Rules which relates to the investigation of an offence under said Rules is Rule 152. As Rule 152 does not refer to the offence under section 131B, an offence under Rule 131B will have to be investigated in accordance with the Criminal Procedure Code. The offence under Rule 131B is clearly an offence for which the police may arrest without a warrant under schedule II to the Criminal Procedure Code. The fact that the police could not complain in respect of the offence under Rule 131B (1) in view of the provisions of Rule 131B (5) does not take away the powers of the police to investigate and then arrest and report about the arrest to the Magistrate under the Criminal Procedure Code. In these circumstances, therefore, the contention of Mr. Desai that initially the investigation made by the police was illegal has to be rejected.

14. Mr. Desai has also argued that the manner in which the police filed the report in the court is a fraud on S. 155 (2) and also on the provisions of R. 131B (5) of the Defence of India Rules. Section 155 (2) prohibits the police from investigating an offence without the order of the Magistrate. Rule 131B (5) bars the jurisdiction of the Court from taking cognizance of the offence except on a complaint by the Collector of Customs, Central Excise or Land Customs. By committing a breach of both these mandatory provisions, the Police have sought to file a report about a non-cognizable offence under section 135 of the Customs Act and hence Mr. Desai argues that the court was precluded from taking cognizance of the offence. It may be that the police have not reported under rule 131B (5) because they themselves wanted to file a report before the Magistrate, with respect to the offence under section 135 of the Customs Act. They have done so

with the consent of the Collector of Central Excise. It may also be that they were unable to prove all the ingredients of the offence under Rule 131B and, therefore, they have filed the report only under section 135 of the Customs Act. The allegation of Mr. Desai that the police have committed a fraud on rule 131B (5) is, therefore, unfounded. Similarly, the fact that they have reported with respect to an offence under S. 135, Customs Act, in the facts and circumstances of the case, cannot be considered as intended to evade section 155 (2) of the Criminal Procedure Code. The police raided the premises of the petitioners and discovered facts which, according to them, constituted offences under rule 131B (5) as well as under section 135 of the Customs Act and if they have chosen to report the offence under Section 135 of the Customs Act, it cannot be said for this reason that they have tried to evade the provisions of Section 155(2).

15. In my judgment, therefore, the charge-sheet filed by the police in the present case can be construed as a complaint within the meaning of Section 190 (1) (a), and as it is to be construed as a complaint, the order of the learned Magistrate directing that the trial of the case should be in accordance with the provisions of Section 252 of the Criminal Procedure Code is right. Mr. Gumaste, the learned Government Pleader, has conceded before me that if the chargesheet has to be construed as a complaint, in view of the decisions in (1901) 1LR 26 Bom 150 and 1LR 51 Bom 498 = (AIR 1927 Bom 440) the procedure under Section 251-A of the Criminal Procedure Code will not apply to the trial.

16. In the result, the order passed by the learned Presidency Magistrate is confirmed, although for slightly different reasons. Rule discharged. Stay vacated.
Rule discharged.

AIR 1970 BOMBAY 232 (V 57 C 40)

FULL BENCH
(AT NAGPUR)

KOTVAL, C. J., DESHMUKH AND
PADHYE, JJ.

Smt. Radhabai, Petitioner v. State of Maharashtra and others, Respondents.
Spl. Civil Appln. No. 175 of 1966, D/- 27-2-1969.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958) (as amended by Act 41 of 1963), S. 38 (7) — "Acquired any land by transfer or partition" — Interpretation of — Words "acquire" and "partition", meaning of — Partitions of every kind

are now included within ambit of S. 38 (7) — AIR 1966 Bom. 194 Overruled.

The word "partition" was not used in S. 38 in any special sense, much less in the sense "to acquire a right or title for the first time" in contradistinction with the redistribution of pre-existing rights or title. On the other hand, the sub-section gives the indication that barring the case of surrenders which is separately dealt with in the Act, by the use of the words "transfer" and "partition", the Legislature intended to exhaust all the various means by which any person could get a right or title in a legal way.

(Para 13)

If the word "acquire" is assigned its more generic connotation, namely, that it means to receive or to come into possession of, then in the context of transfer or partition, that word can be given its full meaning without any violence to the language used. The proper construction of the amended section should be to read the word "acquire" in a wider sense which it is capable of bearing in the context of the addition of the words "or partition", and if so read, the whole meaning of the statute becomes clear.

(Para 16)

The language of sub-section (7) of section 38 as amended by Act. 44 of 1963 is initially clear and unambiguous and there is no difficulty in giving full effect to the new words added "or partition". After the amendment partitions of every kind are now included within the ambit of S. 38 (7) along with transfers. There is no basis for the distinction between partitions of one kind and another, namely, partitions which give rights for the first time and partitions which merely redistribute pre-existing rights, nor does the word "acquire" in the new context in which it is used in the amended sub-section (7) of section 38 create any anomaly, difficulty or doubt. But even assuming that there is any doubt, a reference to the Objects and Reasons of the Bill put the matter beyond any shadow of doubt. AIR 1966 Bom. 194, Overruled.

(Paras 24, 25)

(B) Civil P. C. (1908), Pre. — Judicial precedents — Revenue Tribunal is bound to follow decision of its own High Court.

(Para 2)

(C) Civil P. C. (1908), Pre. — Interpretation of Statutes — Duty of Court — Intention of legislature to be gathered only from words used in Statute — It is only in case of some doubt extraneous aids such as Statement of Objects and Reasons and previous history of Legislation can be taken.

(Para 12)

(D) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 38 (7) — As amended by Act 44 of 1963 — Scope and effect

of amendment in doubt and actively disputed — Court can legitimately look to Statement of Objects and Reasons in making that amendment — AIR 1967 SC 986 & AIR 1960 SC 1080 & AIR 1966 SC 1342 & AIR 1963 SC 703 Rel. on. (Para 20)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 986 (V 54) =

1967 Cri LJ 946, Shivanarayan v. State of Madras 119a

(1966) AIR 1966 SC 1342 (V 53) =

(1966) 3 SCR 379, Income tax Commr. Patiala v. Shahzada Nand & Sons. 119

(1966) AIR 1966 Bom 169 (V 53) =

1966 Mah LJ 240, Rangubai Lalji v. Laxman Lalji 22

(1966) AIR 1966 Bom 194 (V 53) =

1966 Mah LJ 289, Salubai v. Chandu 1, 7, 9, 11, 12, 14, 17, 21, 22, 25

(1964) Special Civil Appns. Nos. 78

and 79 of 1963, D/- 28-4-1964 (Bom) 24

(1963) AIR 1963 SC 703 (V 50) =

(1963) 2 SCR 26, Gujarat University v. Sri Krishna 118

(1963) AIR 1963 Bom 163 (V 50) =

1963 Mah LJ 289 = 65 Bom LR 251 (FB). Shrikrishna v. Namdeo 4, 8, 20

(1961) 1961 Nag LJ 493 (Rev), Ram-

bhau v. Bhaskar 2

(1960) AIR 1960 SC 1080 (V 47) =

(1960) 3 SCR 887, Kochuni v. States of Madras & Kerala 117

(1960) 1960 Nag LJ 416 = ILR

(1960) Bom 740, Dayabhai v. State of Bombay 2, 4, 8

(1958) 1958 Nag LJ 100 (Rev),

Manjurabai v. Prahlad 2, 20

(1958) 1958 Nag LJ 453 = ILR

(1959) Bom 424, Manabai v. Ramchandra 2, 4

(1952) AIR 1952 SC 369 (V 39) =

1953 SCR 1, Aswini Kumar Ghose v. Arbinda Bose 117

(1916) AIR 1916 PC 104 (V 3) =

43 Ind App 151, Girja Bai v. Sadashiv Dhundiraj 8, 14, 22

(1888) ILR 10 All 272 = 15 Ind App

51, (PC) Sartaj Kuari v. Deoraj Kuari 22

(1584) 3 Co Rep 7a = 76 ER 637,

In re Heydon's Case 18, 19a,

B. R. Mandlekar, for Petitioner; C. S. Dharmadhikari, Asst. Govt. Pleader, (for

Nos. 1 and 3) and C. G. Madkholkar (for

No. 5), for Respondents, R. N. Deshpande, for Intervener.

KOTVAL, C. J.: The short question that arises for decision in this reference is

whether the interpretation of the amended sub-section (7) of section 38 of the

Bombay Tenancy and Agricultural Lands Act, 1958 (XCIX of 1958) (hereinafter referred to as the new Tenancy Act), in

the decision of this Court in Salubai v.

Chandu, 1966 Mah LJ 289 = (AIR 1966 Bom. 194) is correct, and if not, what is the correct interpretation.

2. The circumstances under which the reference came to be made are as follows: One Mohanlal was a landholder of survey no. 74/3, area 9.17 acres, in village Uttar Wadhona in Yeotmal District. Mohanlal had a wife Radhabai and a son Lakhanlal who was born on 29-4-1937. Mohanlal died on 15-4-1938 and on that date Lakhanlal was a minor. Lakhanlal attained majority on 29-4-1958, the age of majority in his case being twenty-one years because a guardian had been appointed. After he attained majority, the property belonging to the joint family came to be partitioned between Radhabai and Lakhanlal. This was on 22-6-1959 and the field survey No. 74/3 came to the share of Radhabai. Thus, Radhabai became the landholder. She required the field for her bona fide personal cultivation and she gave a notice under section 38 (1) of the new Tenancy Act to the respondent no. 5 Uttamchand Uderaj Marwadi who was the tenant. After the notice, she applied under section 38 for possession on the ground that she required the field for her bona fide personal cultivation. On the date on which the Naib Tahsildar decided the application the position in law and upon the authorities was as follows: In Manjurabai v. Prahlad, 1958 Nag LJ 100 a Full Bench of the Revenue Tribunal at Nagpur had on 11-12-1957 held under section 9 (9) of the Berar Regulation of Agricultural Leases Act that a partition is a transfer. On 24-6-1958 however a Division Bench of the High Court (to which one of us Kotval J. was a party) held in Manabai v. Ramchandra, 1958 Nag LJ 453 under the same provision of law that the word "transfer" as used in section 9 (9) does not include a partition. It expressly reversed the decision in Manjurabai's case, 1958 Nag LJ 100 (Rev.). These cases were as stated above decided under the provisions of the Berar Regulation of Agricultural Leases Act. Before the Naib Tahsildar's decision however the Bombay Tenancy & Agricultural Lands Act (Vidarbha Region) Act 1958 (Act XCIX of 1958) came into force on 30-12-1958, Section 132 thereof repealed the Berar Agricultural Leases Act. Two further decisions must thereafter be noted. On 11-12-1959 a Division Bench of the High Court held in Dayabhai v. State of Bombay, 1960 Nag LJ 416 under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act 1947 that the word "transfer" not being defined in that Act, must be given the same meaning as in section 5 of the Transfer of Property Act and under the Transfer of Property Act it had been

held in a number of cases that "transfer" includes a partition and that therefore it must be held that under the Prevention of Fragmentation and Consolidation of Holdings Act 1947 also a partition of an agricultural holding amounts to a "transfer" within the meaning of section 27 (b) of that Act. On 23-8-1961 a Division Bench of Maharashtra Revenue Tribunal held in *Rambhau v. Bhaskar*, 1961 Nag LJ 493 under Section 9 (9) of the Berar Regulation of Agricultural Leases Act that a partition amounts to a transfer. This decision was obviously wrong in view of the previous decision of a Division Bench of this Court in *Manabhai's case*, 1958 Nag LJ 453. The Maharashtra Revenue Tribunal was bound to follow the decision of the High Court.

3. This was the position in law and upon the authorities when the present matter came up for decision before Mr. D. N. Kharche the Naib Tahsildar. He had of course to decide the case under the provisions of section 38 of the new Tenancy Act (99 of 1958) and could have taken the view that he was uninhibited by the previous decisions because they were decisions under the Berar Regulation of Agricultural Leases Act or the Transfer of Property Act. He did not do that. He resorted to the simple expedient of ignoring all decisions and simply saying that the tenant was recorded as a tenant in 1953-54 whereas the partition took place only on 22-6-1959 and therefore the landlady could apply under Section 38 (3) (d) of the Tenancy Act. The order is otherwise so cryptic and ill-written that it is difficult to understand what this Naib Tahsildar intended to say.

4. Radhabai the landlady filed an appeal to the Special Deputy Collector (the 3rd respondent before us), but before the appeal could come up for hearing before that officer other developments took place in the law. We have already referred to the decision of a Division Bench in *Dayabhai's case* 1960 Nag LJ 416 where it was held that both under the Transfer of Property Act and under the Prevention of Fragmentation and Consolidation of Holdings Act 1947 a partition amounts to a transfer. This view was felt to be in conflict with the earlier view of the Division Bench in 1958 Nag LJ 453. Therefore a Full Bench was constituted. In *Shrikrishna v. Namdeo*, 1963 Mah LJ 259 = (AIR 1963 Bom 163) the Full Bench of this Court (to which one of us, Kotval J. was a party) held that a partition is not a transfer within the meaning of sub-section (7) of Section 38 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958). As to the conflict (noted by the Full Bench in paragraph 3 of its judgment) which had really prompted the reference in that case

the Full Bench decided nothing. It said that *Manabhai's case*, 1958 Nag LJ 453 was decided under the Berar Regulation of Agricultural Leases Act and *Dayabhai's case*, 1960 Nag LJ 416 under the Prevention of Fragmentation and Consolidation of Holdings Act read with the Transfer of Property Act and since the Full Bench was not concerned with those Acts it was unnecessary to decide whether there was a conflict and if so which view was right. The Full Bench however did hold that a partition was not a transfer so far as the Bombay Tenancy and Agricultural Lands Act (Section 38) was concerned.

5. At this stage the Legislature took a hand in the controversy. It passed an Amending Act (Act 44 of 1963) in order to undo the effect of the Full Bench decision. By Section 2 of the Amending Act they simply added the words "or transfer" after the word "partition" wherever it occurred in Section 38, sub-section (7) and made a small consequential change. By Section 6 of the Amending Act they applied the amendment in Section 38 to all appeals and pending proceedings whatsoever. The Amending Act came into force on 28-12-1963.

6. Now all this had happened before Radhabai's appeal before the Special Deputy Collector came up for hearing. He cursorily referred to the legislative amendment but not to its effect. He did not refer to the Full Bench case or to any of the previous decisions. He simply said that the respondents were tenants since 1953-54 long before Radhabai's right as a "landlord" arose (it arose only on 22-6-1959) and therefore she was not entitled to claim under Section 38 at all. The Member of the Maharashtra Revenue Tribunal who decided the Revision Application was even more brief. He said "The non-applicant has been a tenant of this field from before the partition by which the applicant acquired this field for her share. Both the lower Courts were therefore right.....".

7. Now according to the provisions of sub-section (7) of Section 38, as it stood before the amendment, all persons "acquiring" land by "transfer" after the 1st day of August 1953 could not terminate the tenancy of a protected tenant or claim possession on the ground that they required the land for their bona fide personal cultivation. Though neither the Special Deputy Collector nor the Member expressly referred to this provision, it is clear that their finding that the tenant was on the land prior to 1953-54 was with reference to this provision of the law. But in so holding what the Special Deputy Collector and the Member tacitly assumed throughout was that partitions of every kind are now included within the ambit

of the provisions of sub-section (7) of Section 38 a point which was acutely disputed before the learned single Judge and the Division Bench of this Court in the Writ Petition which came to be filed against the order of the Tribunal. The point is taken on the basis of a decision of a learned single Judge of this Court in 1966 Mah LJ 289 = (AIR 1966 Bom 194) decided on 23-4-1965. How this point arises on the basis of that decision may now be stated.

8. In 1963 Mah LJ 289 = (AIR 1963 Bom 163) the Full Bench gave three reasons for holding that a partition was not included within the meaning of the word "transfer" in sub-section (7) of Section 38 of the Bombay Tenancy (Vidarbha) Act and the reasons were, (i) The expression "by transfer" was preceded by the words "has acquired any land". The Full Bench held that in the context in which it was used, the word "acquired" had the meaning of 'acquired a title for the first time' and partition does not give a person a title or create a title in him; it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independently of the wishes of his former co-sharers. They referred in this respect to the decisions of the Privy Council in *Girja Bai v. Sadashiv Dhundiraj*, AIR 1916 PC 104 and in 1960 Nag LJ 416.

(ii) Secondly they pointed out that a conflict would arise between sub-section (2) and sub-section (7) of Section 38 if partition were included in the word "transfer", for, sub-sections (1) and (2) of Section 38 dealt with all tenancies, whereas sub-section (7) dealt with only a tenant who was a protected lessee, and they saw no reason why in the latter case the right was put an end to after the 1st day of August 1953, while under the proviso to sub-section (2) it was put an end to by 30th June 1959 (the prescribed date). On this reasoning the Full Bench held that if the word "transfer" did not include partition, then the anomaly created by the mention of the two different dates could be understood. In other words, they sought to harmonise the provisions of the unamended section.

(iii) Thirdly, they pointed out that in other parts of the Act, particularly Section 57(1) and (2) and Section 119-B, the words "partition" and "transfer" were used side by side but in contradistinction with each other. Therefore, the one could not be included in the other. It will be noticed that in the Full Bench case, the word "partition" was throughout used in the normal sense in which it is understood in the context of the Hindu Law and there was no particular or special meaning assigned to it.

9. Then came the Amending Act on 28-12-1963 which fell to be considered in Salubai's case, 1966 Mah LJ 289 = (AIR 1966 Bom 194). Sub-section (7) of Section 38 before its amendment merely stated:

"Nothing in this section shall confer on a tenure-holder who has acquired any land by transfer after the 1st day of August 1953, a right to terminate the tenancy of a tenant who is a protected lessee and whose right as such protected lessee had come into existence before the transfer."

By the Amending Act, the words "or partition" were added after the word "transfer" wherever it occurred in this sub-section, thus doing away with the argument that a partition was not a transfer. We are not concerned with a small ancillary amendment also made in the sub-section. In considering this amendment, Salubai's case, 1966 Mah LJ 289 = (AIR 1966 Bom 194) noticed the previous decision of the Full Bench and the fact that the words "or partition" were added by legislation after the word "transfer". But the learned Judge who decided Salubai's case, 1966 Mah LJ 289 = (AIR 1966 Bom 194) took the view that that was the only change in the sub-section and that the addition of those two words "or partition" had not affected either the structure of sub-section (7) or any other sub-section of Section 38 or any other part of the Act so far as was material and relevant in construing the effect and ambit of the change brought about by the amendment. Principally it was pointed out that the word "acquired" preceding the words "any land by transfer or partition" remained the same as before the decision of the Full Bench; and since the Full Bench had said that "acquired" meant acquired for the first time, partition must also be given a similar meaning. The learned Judge observed in para 53 at p. 310 (of Mah LJ) = (Para 51 at p. 210 of AIR):

"One of the reasons which has been accepted by the Full Bench of this Court in interpreting this unamended Section 38(7) of the Vidarbha Act was the use of the word 'acquired' in sub-section (7) which is even now retained after the amendment."

Then the learned Judge proceeded to state what was the meaning of that word and he held that having regard to the normal dictionary meaning, it meant to gain or to get as one's own (by one's own exertions or qualities). He noted that it had a secondary meaning, namely, to receive or to come into possession of, but he held that in the context and in the absence of any other amendment except the addition of the words "or partition" in sub-section (7) of Section 38, "a person who acquires a thing or property

gets this right for the first time from someone else otherwise the use of the word 'acquire' is inappropriate and will not convey the correct meaning". In a later passage in para 55 (of Mah LJ) = (Para 52 of AIR) he pointed out:

"It would therefore appear that whenever property is said to be 'acquired' it postulates absence of pre-existing right in the property and the change as a result of acquisition must mean getting ownership of the property with all its component incidental rights."

10. Then the learned Judge proceeded to consider what was the nature of partition and he drew a distinction between two categories of partitions (i) partitions where the tenure-holder did not have any right in the property or pre-existing right in tandem prior to partition but got such right of ownership for the first time as a result of partition; and (ii) partitions where there is a pre-existing right in the property and only a redistribution of those rights. In view of the meaning which he felt the Full Bench had assigned to the word "acquired" in sub-section (7) of Section 38 after amendment, the learned Judge held that in the context of that word, the word "partition" must be restricted to the former category only. He held in para 60 (of Mah LJ) = (Para 57 of AIR):

"All this discussion will, therefore, show that retention of the words 'acquired land by partition' must be given their full meaning and a person cannot be said to acquire land by partition if partition is amongst the members of an undivided Hindu family who were already owners of the property. What takes place as a result of partition is the change in the mode of enjoyment." And in a later passage:

"It is therefore clear to my mind that even after making the amendment in Section 38(7) by the addition of words 'or partition', the Legislature did not intend to bring within the mischief of the section by this amendment, the rights of those landlords who were owners of property from before and who chose to divide property as a result of partition which was only choosing a different mode of enjoyment of the property. On the other hand, what is intended to be hit even after the amendment is that class of landlords who would acquire the property for the first time as a result of partition or under the cloak of partition..... This mode of construction and inference would be permissible in view of the fact that no other change has been made in the structure of sub-section (7) of Section 38 in spite of the view taken by the Full Bench of this Court that the use of the word 'acquisition' points

out to obtaining rights of ownership for the first time."

11. Now, it seems to us that in taking this view the learned Judge was greatly influenced by the nature of the arguments before him and the stand taken by counsel and perhaps by the concession which counsel made in that case. In para 59 at p. 313 (of Mah LJ) = (Para 56 at p. 212 of AIR) the learned Judge has noted: "It is not disputed that the partition may create rights for the first time in persons who had no pre-existing rights..." That in our opinion was a fundamental concession which having regard to the law, we shall presently show, does not appear to be correct. But apart from that, counsel for both the sides focussed the attention of the Court in that case only upon the Full Bench decision and its reasons and argued whether the three reasons given by the Full Bench still continued to operate despite the amendment or not and the whole decision in *Satubai's* case, 1966 Mah LJ 289 = (AIR 1966 Bom 194) turned upon that argument.

12. It seems to us that it is this approach in that case that has affected the decision. We are unable to accept that approach. After all, the learned Judge was construing an enactment and it is the first duty of a Court in construing an enactment to gather what was the intention of the Legislature from the words used by the Legislature in the enactment independently of all other considerations. No such attempt seems to have been made in *Satubai's* case, 1966 Mah LJ 289 = (AIR 1966 Bom 194) by counsel on either side. Secondly, it is only in the event of some doubt or difficulty in the interpretation of a statute that extraneous aid may be taken, extraneous aid being in the nature of the previous history of the legislation, the precedents bearing upon the previous history and its stated objects and reasons. In the present case, it appears that the reasons given in the Full Bench case were all that the decision was concerned with. The learned Judge did not look at the question from this point of view.

13. Turning to the sub-section as it stands after amendment, it simply says that nothing in the section shall confer on a tenure-holder a right to terminate the tenancy of a tenant who is a protected lessee and whose rights as such protected lessee had come into existence prior to the transfer or partition after the 1st day of August 1953 if the tenure-holder has acquired any land by transfer or partition after the 1st day of August 1953. There does not appear to be anything in sub-section (7), or for that matter, in any of the provisions of Section 38 as such, to indicate that the word "partition" was used in any special sense, much less in

the sense "to acquire a right or title for the first time" in contradistinction with the redistribution of pre-existing rights or title. On the other hand, the sub-section gives the indication that barring the case of surrenders which is separately dealt with in the Act by the use of the words "transfer" and "partition", the Legislature intended to exhaust all the various means by which any person could get a right or title in a legal way.

14. Then we turn to the word "acquire". It is on that word that the decision in *Salubai's case*, 1966 Mah LJ 289 = (AIR 1966 Bom 194) principally turned. No doubt, in the Full Bench case one of the reasons given was the use in the Section of the word "acquire" before the words "any land by transfer". In the Full Bench, we (I say "we" because one of us, Kotval J. was a party to that decision) had pointed out the distinction between "partition" and "transfer" (See paras 5 and 6) and the fact that a partition does not give a person a title or create a title in him but that it only enables him to get what is his own in a definite and specific form for purposes of disposition independently of the wishes of his former co-sharers. At the same time, the Full Bench had noted in that case that the word "acquire" can also be used in the context of partition. At p. 291 para 6 (of Mah LJ) = (At p. 210, Para 47 of AIR) this is what we have said:

"As, therefore, in the words of the Privy Council, (the reference is to AIR 1916 PC 104) partition only enables him to obtain in a definite and specific form the land, which was his own, it cannot be said that he has acquired that land. By the process of partition, he no doubt acquires the interest of other co-sharers in that land, but the words in the sub-section are 'acquired any land'. It does not contain the words 'or any interest therein', such as are used in Section 119 B. The language used in sub-section (7) of Section 38 of the Tenancy Act, therefore, itself indicates that this sub-section does not apply in cases in which a person becomes the sole owner of the land as a result of partition."

15. Now, the amended section says "acquired any land by transfer or partition", and we have already pointed out that there is no qualification of the word "partition". We also can see no reason why in the new context, the word "acquire" should necessarily be held inappropriate in the context of all partitions. The word "acquire" has clearly two meanings—a broader meaning and a narrower one, and the learned Judge has himself set forth those meanings in *Salubai's case*, 1966 Mah LJ 289 at p. 310, para 53 = (AIR 1966 Bom 194 at p. 210 para 51) where he stated:

"According to the shorter Oxford Dictionary, 'to acquire' means to gain or to get as one's own (by one's own exertions or qualities). Its secondary meaning is to receive or to come into possession of." But he accepted the first of those two meanings and held:

"The use of the word 'acquire' necessarily postulates a change of relationship vis-a-vis thing or property which is said to be acquired and which was not existing before. The notion of ownership of property implies various component rights viz., that of possession, enjoyment, destruction, alienation, exclusion and others incidental to the right of ownership. A person who acquires a thing or property gets this right for the first time from someone else otherwise the use of the word acquire is inappropriate and will not convey the correct meaning."

16. If the word "acquire" is assigned its more generic connotation, namely, that it means to receive or to come into possession of, then in the context of transfer or partition, that word can be given its full meaning without any violence to the language used. In our opinion, there was no difficulty therefore in reading the word "acquire" to convey that meaning in the new context of the amended Act, that is to say, in the context of partition. On the other hand, what the learned Judge has done is to allow the meaning of the word "acquire" to remain the same, although the context is changed and to seek to reconcile the language used by giving a new connotation to the word "partition", and in this, as we shall presently show, the learned Judge missed the whole purpose and object of the enactment. In our opinion, there was no anomaly created by the use of the word "acquire" even after the addition of the words "or partition" in sub-section (7) of Section 38. The proper construction of the amended section should be to read the word "acquire" in a wider sense which it is capable of bearing in the context of the addition of the words "or partition", and if so read, the whole meaning of the statute becomes clear.

17. But as *Salubai's case*, 1966 Mah LJ 289 = (AIR 1966 Bom 194) itself shows, the learned Judge, on reading the reasons given in the Full Bench case, felt great doubt and difficulty in construing the provisions of the amended sub-section, because, according to him, though the words "or partition" were added, the rest of the Act remained the same, and therefore did not have the effect of removing the reasons which had impelled the decision of the Full Bench. That being so, he felt that there was some cryptic meaning in the words "or partition" which had to be uncovered. It is precisely in such a case of doubt or difficulty that a Court may

legitimately look to other aids to the construction of the statute, especially to its Objects and Reasons as declared when the law was passed. That this can be done is now settled law. Though no doubt in the earliest case in *Aswini Kumar Ghose v. Arbinda Bose*, AIR 1952 SC 369 the Supreme Court stated that the Statement of Objects and Reasons is not admissible as an aid to the construction of a statute they pointed out in later cases that what they meant by the rule there laid down was that the Statement of Objects and Reasons could not be looked into as a direct aid to construction but that they could be used "for the limited purpose of ascertaining the conditions prevailing at the time the bill was introduced, and the purpose for which the amendment was made": see *Kochuni v. States of Madras and Kerala*, AIR 1960 SC 1080 at p. 1036-7.

18. In *Gujarat University v. Shri Krishna*, AIR 1963 SC 703 the Supreme Court observed that the Statement of Objects and Reasons of a Statute may and do often furnish valuable historical material in ascertaining the reasons which induced the Legislature to enact a statute but in interpreting the Statute they must be ignored.

19. In *Income-tax Commr. Patiala v. Shahzada Nand and Sons*, AIR 1966 SC 1342 the Supreme Court pointed out at p. 1347 (para 8):

"When the words of a section are clear but its scope is sought to be curtailed by construction, the approach suggested by Lord Coke in *In re: Heydon's case*, (1584) 3 Co. Rep. 7a, yields better results:

"To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act; to consider according to Lord Coke: 1. What was the law before the Act was passed; 2. What was the mischief or defect for which the law had not provided; 3. What remedy Parliament has appointed; and 4. The reason of the remedy."

In that case, no doubt the Supreme Court applied these principles of construction to the interpretation of Section 34 (1A) of the Indian Income-tax Act after its amendment in 1956: but we can see no reason why the same principle will not operate in the construction of the present statute, especially when "its scope is sought to be curtailed by construction".

19a. Lastly, there is an important pronouncement on this subject in *Shivanarayan v. State of Madras*, AIR 1967 SC 986 where the expression "forward contracts" in Section 2 (c) of the Forward Contracts (Regulation) Act 1952, fell to be construed. Their Lordships observed in para 7 at p. 989:

"It is sound rule of interpretation that a statute should be so construed as to prevent the mischief and to advance remedy according to the true intention of the makers of the statute. In construing, therefore, Section 2(c) of the Act and in determining its true scope it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the statute for curing the mischief."

In holding so, their Lordships again referred to *Heydon's case*, (1584) 3 Co Rep 7a (cit. sup.).

20. In the present case, where the exact scope and effect of the amendment made by Act No. 44 of 1963 is in doubt and so actively disputed on either side we think that we can therefore legitimately look to the Statement of Objects and Reasons in making that amendment, and the Statement of Objects and Reasons dated 26th September 1963 appended to the Bill (Bill No. L of 1963 published in the Maharashtra Government Gazette dated 8th October 1963, Part V, at page 309) is as follows:

"Statement of Objects and Reasons

As a result of a certain judgment of the High Court, it has become necessary to amend certain provisions of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 for making the intention of the Legislature clearer in respect of those provisions. It is also considered necessary to make certain provisions so as to remove the difficulties which have been noticed during the course of implementation of the Act. The Bill seeks to carry out these amendments.

2. The following notes on clauses explain the provisions of the Bill:

Clauses 2 and 3:—Sub-section (7) of Section 33 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, provides that nothing in that section shall confer on a tenure holder who has acquired any land by transfer after the 1st day of August 1953, a right to terminate the tenancy of a tenant who is a protected lessee and whose right as such protected lessee had come into existence before the transfer. The expression "transfer" in this provision was intended to include partition and the Maharashtra Revenue Tribunal had also taken similar view. The High Court in 65 Bom LR 251 — (AIR 1963 Bom 163) (FB) has, however, held that the expression "transfer" in this provision does not include partition. As a result of this decision, many protected lessees stand in danger of being dispossessed of their lands. It has, therefore, become necessary to amend Sections 33,

and 39 to make it clear that the expression 'transfer' includes 'partition'".

The reference in the second paragraph to the decision of the Maharashtra Revenue Tribunal is obviously to the decision in 1958 Nag LJ 100 (Rev), which held that partition was included in the word "transfer". The reference to Shrikrishna Ninaji v. Namdev Bapuji is to the Full Bench decision reported in 1963 Mah LJ 289 = (AIR 1963 Bom 163) (FB).

21. This Statement of Objects and Reasons throws a flood of light upon what was intended to be achieved by the amendment. The Full Bench decision of this Court is expressly referred to and it is stated that as a result of that decision, many protected lessees stood in danger of being dispossessed of their lands, and therefore, the amendment had become necessary. It is clear therefore that the Statement of Objects and Reasons removes that doubt or difficulty which the learned Judge experienced in Salubai's case, 1966 Mah LJ 289 = (AIR 1966 Bom 194) for, it says in clear terms that it was the intention of the Legislature to include partition in the word "transfer" from the very start, but since the Full Bench has held that it was not so included, the Legislature was by the amendment including it. In other words, accepting the principle of the decision of the Full Bench, the amendment sought to undo the effect of that Full Bench decision. It is always open to the Legislature to thus express its real intention and set aside the interpretation put upon a statute by the Courts, and that is precisely what the Legislature intended to do in the present case.

22. Nothing is clearer than the statement made in the Objects and Reasons which preceded the passing of the Amending Act No. 44 of 1963. The intention was to include partition also within the ambit of sub-section (7) of Section 38 and it immediately suggests that the interpretation put upon the word "partition" in the context of the word "acquire" by the learned single Judge in Salubai's case 1966 Mah LJ 289 = (AIR 1966 Bom 194) was not correct. If the interpretation put upon the word "Partition" in Salubai's case, 1966 Mah LJ 289 = (AIR 1966 Bom 194) were to be accepted, it would nullify the whole purpose and object of the amendment. The proper construction of amendment, clearly shows that the Legislature intended to include in the word "transfer" partitions as normally understood namely, the redistribution of pre-existing rights and not the acquisition of rights by a person for the first time.

Thus, in our opinion, a correct reading of the enactment guided by Objects and

Reasons themselves is sufficient to show that the decision in Salubai's case was not correct. But it has also been contended on behalf of the respondents before us that the statement in Salubai's case, 1966 Mah LJ 289 = (AIR 1966 Bom 194) that the reasons which impelled the decision in the Full Bench case still remain is also not correct. It was also contended that the whole basis of the decision that property can be acquired in certain cases by partition without there being any pre-existing right or title in the person acquiring it is incorrect in law. In this respect, reference was made to the principle laid down by the Privy Council in Sartaj Kuari v. Deoraj Kuari, (1888) ILR 10 All 272 (PC):

"The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, 'so connected with the right to a partition' that it does not exist where there is no right to it"

(the underlining (here in ' ') is ours) and to the decision of the Privy Council in AIR 1916 PC 104 where Privy Council quoted with approval a passage from Sarkar's translation of Viromitrodaya:

"For partition is made of that in which proprietary right has already arisen consequently partition cannot properly be set forth as a means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares."

It was also pointed out that even women sharers who had no right to enforce a partition but were entitled only to a share on partition got their share by virtue of only a pre-existing right and reference was made to the decision of this Court in Rangubai Lalji v. Laxman Lalji, 1966 Mah LJ 240 = (AIR 1966 Bom 169) thus showing that it is the fundamental nature of a partition that it is only a subdivision or re-distribution of rights already existing in those who get shares by partition.

23. It was also urged on behalf of the respondents that the second reason which prevailed with the Full Bench in coming to the conclusion that partition was not included in the word "transfer" in the unamended sub-section, namely, that otherwise there would be a conflict between sub-sections (1) and (2) on the one hand and sub-section (7) on the other does not really prevail especially after the amendment. Counsel took us through the previous history of the legislation particularly through the provisions of Section 9 of the Berar Regulation of Agricultural Leases Act, and he pointed out that protected lessees under those provisions enjoyed a special protection and that

therefore if in sub-section (7) of Section 38 which deals only with protected lessees, a special date is fixed for giving notice to the tenure-holder which creates rights under sub-sections (1) and (2) namely, of applying for possession for his or her bona fide cultivation, it could be justified, even though in sub-sections (1) and (2) a different date, namely 30-6-1959 (the prescribed date) is mentioned in the proviso to Section 38(2). It was urged that all that the Legislature intended was to continue the special protection afforded to protected lessees under the Berar Regulation of Agricultural Leases Act by this special treatment in the case of protected lessees under sub-section (7) of Section 38.

24. In our opinion, it is not necessary to examine these questions or to find out whether the reasons which prevailed with the Full Bench in coming to their decision in fact exist and operate today or not. In our opinion the language of sub-section (7) is initially clear and unambiguous and we can see no difficulty in giving full effect to the new words added "or partition". We have also said that we can see no basis for the distinction between partitions of one kind and another, namely, partitions which gave rights for the first time and partitions which merely redistribute pre-existing rights, nor can we see that the word "acquire" in the new context in which it is used in the amended sub-section (7) of Sec. 38 creates any anomaly, difficulty or doubt. But even assuming that there is any doubt, a reference to the Objects and Reasons of the Bill put the matter beyond any shadow of doubt. Therefore, irrespective of the reasons given in the Full Bench case, since the language of the statute is clear and expresses unequivocally the intention of the Legislature, that intention must be given effect to. Indeed, we note and that was pointed out by counsel for the respondents that the learned Judge himself has in one decision given effect to the amendment in the same manner that we propose to do in this case; See the decision of the Division Bench in Special Civil Appeals Nos. 78 and 79 of 1963 D/- 28-4-1964 (Bom) by the Division Bench consisting of Mr. Justice N. L. Abhyankar and Mr. Justice R. M. Kantawala.

25. For these reasons, we are unable to accept the decision in 1966 Mah LJ 289 - (AIR 1966 Bom 194). In our opinion after its amendment by Act 44 of 1963 partitions of every kind are now included within the ambit of sub-section (7) of Section 38 along with transfers.

26. This was the only point canvassed before us. The Division Bench in referring the case has not framed any question but has expressly stated that the

original petition is being referred to us for disposal. In view of what we have said, the petition is dismissed with costs.

Petition dismissed

AIR 1970 BOMBAY 240 (V 57 C 41)

(NAGPUR BENCH)

R. R. BHOLE, J.

State, Petitioner v. Shantilal Vallabhadas Pandya Dist. Wardha, Opponent (Accused).

Criminal Ref. No. 70 of 1968, D/- 4-2-1970.

Municipalities — Maharashtra Municipalities Act (46 of 1965) Ss. 26, 296, 27, 305 — Offence under S. 26 is cognizable — Complaint by Municipal Chief Officer under S. 296 is not necessary for taking cognizance — Criminal P. C. (1898), Sections 4(1)(f), 190 (1)(b).

Offence under S. 26 of the Municipalities Act is cognizable. Therefore, once the police officer arrests the person committing the offence under S. 26 without warrant, even though at the instance of the presiding officer of a polling station, that arrest being an arrest without warrant as provided in S. 4(1)(f) of the Criminal Procedure Code, filing of complaint under S. 296 of the Municipalities Act by the Chief Officer is not necessary before the Magistrate can take cognizance of the offence. This is also clear from the fact that offence under S. 27 is cognizable and that the police officer can also arrest any person under S. 305 of the Act. 1949 Nag LJ (Note) 45, Disting.

(Paras 5, 6, 7)

Cases Referred: Chronological Paras (1949) 1949 Nag LJ (Note) 45, K. E. v.

Abdul Hafiz

S. N. Hajarnavis, Addl. Govt. Pleader, for Petitioner; B. A. Udhoji, for Opponent (Accused).

ORDER: This is a reference by the Learned Sessions Judge, Wardha, for quashing the conviction passed by the Judicial Magistrate, First Class, (Second Court), Wardha, on an accused who was found guilty under Section 26(2) of the Maharashtra Municipalities Act. He is alleged to have behaved in a disorderly manner within the premises of a polling station on the day of the election. On 14-6-1967 there was an election going on in the Municipal Town Hall at Pulgaon. On that day accused No. 1 Shantilal for whom the reference is made and another accused Dwarka Prasad were shouting and behaving in a disorderly manner in the premises of that Polling Station and causing disturbances. The Presiding Officer as well as

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14. Mr. Mitra next submits that this portion is to be read separately and independently and as this clause does not refer to the making of an award as a condition precedent to a right of action, the suit would lie and the only remedy of the other party would be to apply for a stay of the suit under Section 34 of the Arbitration Act. If this portion is read independently and separately, then I will have to uphold the contention of Mr. Mitra. But as I have already pointed out, this later portion also forms an integral part of Cl. 7, and cannot be read divorced from the rest of the clause. In the circumstances, this contention of Mr. Mitra also fails. Clause 7, in my opinion, clearly indicates that all differences between the parties arising out of the policy including the differences based upon disclaimer of liability by the Insurance Company, will have to be referred to arbitration, and that the making of an award was to be a condition precedent to any right of action against the company. In this particular case, as I have pointed out in the earlier portion of my judgment, the insurance company had disclaimed its liability in toto, and it was therefore, necessary for the opposite party to have referred the matter to arbitration before it could file the instant suit. As that has not been done, the suit is premature and must be dismissed.

15. The result, therefore, is that this Rule succeeds and is made absolute. The judgments and decrees passed by the Courts below are set aside and the suit be dismissed. Each party will bear its own costs all through.

16. I must place on record the help and assistance I have received from Counsel on both sides in deciding this case, which does not appear to be covered strictly by any reported decisions in our country.

Rule made absolute.

AIR 1970 CALCUTTA 225 (V 57 C 42)

D. BASU AND AJAY K. BASU, JJ.

The State of West Bengal and others, Appellants v. Sm. Kalyani Chowdhury and others, Respondents.

A. F. O. O. No. 158 of 1962, D/- 28-11-1969.

(A) Constitution of India, Art. 226 — Mandamus — Statutory Tribunal — No mandamus to compel it to exercise jurisdiction which it does not possess.

Mandamus lies against a statutory tribunal to dispose of a matter pending before it if it makes unreasonable delay in determining it (vide Halsbury's Laws of England 3rd Ed., Vol. II, P. 95). But

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the Court cannot, by mandamus, compel an inferior tribunal to exercise a jurisdiction (e.g., hearing of appeal) which it does not possess. (Para 12)

(B) Civil Services — Civil Services Classification (Control and Appeal) Rules, Rr. 49 and 56 — Mere non-promotion to selection post without any disciplinary action does not amount to penalty within R. 49 — No appeal lies under R. 56.

Rule 49 gives a list of 'penalties'. Unless the order is penal in nature, neither R. 49 nor 56 would be attracted.

(Para 17) Mere non-promotion to a selection post is not a 'penalty' as contemplated under R. 49 as withholding promotion. Where there is no disciplinary action taken against the petitioner, R. 49 has no application. AIR 1962 SC 1704, Rel. on.

(Para 14) No one has a right to get promotion to the selection Grade (as a matter of course) and where the High Court after due consideration did not consider the petitioner, a member of Bengal Civil Service (Judicial) confirmed in the grade of District Judge, for being promoted to the Selection post as a subordinate Judge, because he was not considered fit for getting the extra emolument attached to the Selection Grade, it cannot be held that the refusal to promote was 'penal in nature' and as such no appeal can be filed against it under R. 56. (Paras 15 and 16)

Cases Referred: Chronological Paras (1962) AIR 1962 SC 1704 (V 49) =

1962-2 SCA 646, High Court at

Calcutta v. Amal Kumar Roy 14

S. K. Roy Choudhury and M. Majumdar, for Appellants; Noni Coomarr Chakravarti and Madhusudan Banerjee, for Respondents.

AJAY K. BASU, J.:— This is an appeal filed by the State of West Bengal against the order and judgment passed by J. P. Mitter, J., allowing the writ application of the petitioner.

2. The facts are that one Nishakar Choudhury, the petitioner since deceased, was a member of Bengal Civil Service (Judicial) and afterwards became member of the West Bengal Higher Judicial Service upto the time of his retirement on the 1st March, 1956. By an order dated 4-1-1954, he was confirmed in the grade of District Judge in the Higher Judicial Service with retrospective effect from 21-1-1951. And, in fact, at the time of retirement he was holding the post of Additional District and Sessions Judge, 24 Parganas at Alipore.

3. The main contention of the petitioner was that though he was confirmed as a District and Sessions Judge by the order of the Government dated 4th January, 1954, with retrospective effect from 21st January, 1951, he was not promoted to the selection grade of Subor-

dinate Judges on 15-1-1950 and that other officers who were junior to him were given the Selection Grade of Subordinate Judges passing over the petitioner's claim for such Selection Grade which resulted certain pecuniary loss to him.

4. According to the petitioner, his non-promotion to the Selection Grade of Subordinate Judges should be treated as withholding promotion under R. 49 of the C. S. Classification Rules which is a penalty and entitles him to appeal under R. 56 of the said Rules under which he is governed.

5. The further case of the petitioner was that under R. 56 he preferred an appeal to the Governor but the Government has not yet taken any decision though the appeal was filed as early as on 4th August, 1954.

6. On these allegations the petitioner obtained a Rule under Art. 226 of the Constitution on 24-7-1957 and ultimately the Rule was heard by J. P. Mitter, J. on 22nd June, 1960 and by his judgment of the 14th August, 1961, Mitter, J. held that the appeal by the petitioner before the Governor was maintainable and therefore ordered that the appeal preferred by the petitioner be considered by the Governor.

7. From this order of Mitter, J., the State of West Bengal preferred an appeal which has come up before us for hearing.

8. Mr. Roy Choudhury, appearing for the appellant, argued that the appeal should be allowed because the contention of the petitioner that the non-selection to the Selection Grade was a penalty as it is deemed to be withholding promotion within the meaning of Rule 49 is erroneous and illegal. If the Rule 49 is not attracted in the case of the petitioner then the petitioner has no right of appeal under Rule 56. Hence, the Governor cannot entertain such appeal.

9. The next point urged by Mr. Roy Choudhury was that in any event, the petitioner having died before the judgment of the lower Court the application should have abated and Mitter, J., should have discharged the Rule on that ground alone on the principle of *actio personalis moritur cum persona*.

10. Mr. Nani Coomarr Chakravarti, appearing for the respondents, drew our attention to the inordinate delay of the Government in not disposing the appeal. Mr. Chakravarti also drew our attention to the letter written by Shri B. K. Bhattacharyya, the then Registrar of the Appellate Side, High Court, dated 3/4 September, 1954 being annexure 'B' to the petition in which the Registrar had used the expression "Withholding Promotion" in the case of Selection Grade.

11. In our opinion, the letter is rather unhappily worded but the position at law

cannot be changed by any statement made by the Registrar of this Court.

12. There is no doubt that mandamus lies against a statutory tribunal to dispose of a matter pending before it if it makes unreasonable delay in determining it (vide Halsbury's Laws of England 3rd Ed., Vol. II, p. 95). But the Court cannot, by mandamus, compel an inferior tribunal to exercise a jurisdiction which it does not possess.

13. The main point for determination in this appeal, therefore, is whether the refusal to promote Sri Choudhury to the Selection Grade of a Subordinate Judge amounts to a penalty of 'withholding promotion' within the meaning of Rule 49 of the Civil Services Classification (Control and Appeal) Rules, because otherwise no appeal will lie under Rule 56 of the said Rules.

14. In our opinion, non-promotion to a selection post is not a 'penalty' as contemplated under Rule 49 as 'withholding promotion'. In the case of the High Court at Calcutta v. Amal Kumar Roy reported in (1962) 2 SCA 646 = (AIR 1962 SC 1704) the Supreme Court has held that where there is no disciplinary action taken against the petitioner, Rule 49 has no application.

15. In our view, no one has a right to get promotion to the Selection Grade (as a matter of course) and in this particular case the High Court after due consideration did not consider the petitioner for being promoted to the Selection post as stated in Annexure 'B'. The appellants have failed to point out anything to show that the Selection goes by seniority alone or that a person cannot be confirmed as a District Judge unless he had been promoted to the Selection Grade of Sub-Judges. In fact, it is stated in the petition that there are only 3 + 1 posts in the Selection Grade, while the number of posts of District Judges is much larger.

16. No allegations were made against Sri Choudhury and he was not sought to be punished for any misconduct. He was not promoted simply because he was not considered fit for getting the extra emolument attached to the Selection Grade. Hence, it cannot be held that the refusal to promote was 'penal in nature'.

17. It cannot be overlooked, that R. 49 gives a list of 'penalties'. Unless the order is penal in nature, neither Rule 49 nor 56 would be attracted.

18. In the instant case, thus, no appeal lay to the Governor and the petitioner is not entitled to the mandamus asked for.

19. In view of our decision on this point, it is not necessary to go into the question of abatement raised on behalf of the appellants.

20. The appeal is allowed and the judgment of the Court below is set aside. But we make no order as to costs.

21. D. BASU, J.:— I agree.

Appeal allowed.

AIR 1970 CALCUTTA 227 (V 57 C 43)

P. N. MOOKERJEE AND
A. N. CHAKRAVARTI, JJ.

Rabindra Nath Ganguly and others,
Petitioners v. Calcutta Dock Labour
Board, Respondent.

A. F. O. Q. Nos. 94 to 98 of 1963, D/-
7-10-1969.

City Civil Courts Act (W. B. Act 21 of 1953), S. 5 (4) and Sch. I, Item No. 10 (ii) — Jurisdiction of City Civil Court — Calcutta Dock Labour Board, a statutory Corporation — Suit against, by registered dock workers for wrongful dismissal — City Civil Court can try it — It is not a suit relating to 'management' of Corporation within Sch. I, Item 10 (ii) — Expression 'management' refers to internal management of Board as distinguished from acts of management of scheme under Section 3, Dock Workers (Regulation of Employment) Act.

The Calcutta City Civil Court has jurisdiction to entertain and try a suit brought by registered dock workers against the Calcutta Dock Labour Board challenging the legality of the order of their dismissal passed by the Board in view of the provisions of Section 5 (4) read with Schedule I, Item No. 10 (ii) of the Calcutta City Civil Courts Act.

The expression 'management' in Schedule I, Item 10 (ii) takes its colour from the context and must necessarily refer to the organisational set up of the Corporation. The Board has to administer the scheme as required under Section 5-B and, in exercising that function, it will necessarily have to do various administrative acts but they would not all be acts of management of the Board. Management of the Board obviously, means management of the Board itself. The taking of disciplinary action against a dock worker, belonging to the pool of workers recruited by the Board, is a matter of management of the pool. But management of the pool, which is one of the objects of the scheme, is not the same thing as management of the Board. (Paras 13, 14)

Management is a very broad term. In a sense, all administrative acts of the Board would be acts of management. But, when they relate to any of the various objects of the scheme as enumerated in Section 3 of the Dock Workers (Regulation of Employment) Act, 1948, they would be acts of management "of the

scheme" and not "of the Board". Management "of the Board" has reference to its organisational set up and includes acts, relating to such matters as for example, calling of the meetings of the Board, observance of the rule regarding quorum, disposal of business at the Board's meetings, preparation of statement of accounts and balance sheet, etc. It refers to administration or management of the Board itself as distinguished from its functions under Section 5-B of the Dock Workers (Regulation and Employment) Act. First Misc. Appeal No. 26 of 1965 (Cal), Foll. (Para 16)

Cases Referred: Chronological Paras
(1965) First Misc. Appeal No. 26

of 1965 (Cal), Shamsher Ali Khan
v. Calcutta Dock Labour Board 15
Mohindra Chandra Chakraborty, for
Petitioners; Manash Nath Ray, for Res-
pondent.

JUDGMENT: These five appeals arise out of a common order of the Chief Judge, City Civil Court Calcutta, in five suits, returning the plaints for presentation to the proper Court.

2. The appellants were registered dock labourers under the Calcutta Dock Labour Board. The Board took disciplinary action against them for an alleged misconduct and, pending enquiry, they were suspended. The Deputy Chairman of the Board, who held the enquiry, found them all guilty of the said charge of misconduct and ordered their dismissal from service on May 23, 1961. There was an appeal by them to the Chairman but it was dismissed on September 8, 1961.

3. The appellants then instituted suits against the Dock Labour Board in the City Civil Court, challenging the legality and validity of the order of dismissal. There were also some prayers for such incidental reliefs as damages, recovery of arrears of pay etc.

4. The Dock Labour Board, against which the suits were brought is a Statutory Corporation, created under the provisions of Section 5-A of the Dock Workers (Regulation & Employment) Act, 1948, as amended by Act 8 of 1962.

5. Section 5(4) of the City Civil Courts Act, 1953, lays down that the City Civil Court shall not have jurisdiction to try suits or proceedings of the description specified in the First Schedule to the Act. Item No. 10 (ii) of the said Schedule speaks of suits and proceedings "relating to or arising out of the constitution, incorporation, management or winding up of corporations."

6. A preliminary point arose before the Chief Judge, City Civil Court, as to whether that Court had jurisdiction to entertain the suits in view of the above provisions of law. The learned Chief Judge was of the view that appointment

and dismissal of registered workers were a part of the work of management of the Board and, accordingly, he held that he had no jurisdiction to try the suits and ordered the plaintiffs to be returned for presentation to the proper Court. It is against this order that the present appeals have been filed.

7. The main question that arises for decision in these appeals is: What is the meaning of the word "management" in the expression "management of Corporations" as used in item 10 (ii) of Schedule 1 to the City Civil Courts Act, 1953? The particular corporation, that we are concerned with in the present case, is the Dock Labour Board. Hence certain provisions of the Dock Workers (Regulation and Employment) Act have to be looked into.

8. Sub-section (1) of S. 3 of the Act provides for the making of a scheme for the registration of dock workers with a view to ensuring greater regularity of their employment. Sub-section (2) says:

"In particular, a scheme may provide—

(a) for the application of the scheme to such classes of dock workers and employers as may be specified therein;

(b) for defining the obligations of dock workers and employers subject to the fulfilment of which the scheme may apply to them and the circumstances in which the scheme shall cease to apply to any dock workers or employers;

(c) for regulating the recruitment and entry into the scheme of dock workers, and their registration, including the maintenance of registers, the removal either temporarily or permanently, of names from the registers and the imposition of fees for registration;

(d) for regulating the employment of dock workers, whether registered or not, and the terms and conditions of such employment, including rates of remuneration, hours of work and conditions as to holidays and pay in respect thereof;

(e) for securing that, in respect of periods during which employment, or full employment, is not available for dock workers to whom the scheme applies and who are available for work, such workers will, subject to the conditions of the scheme, receive a minimum pay;

(f) for prohibiting, restricting or otherwise controlling the employment of dock workers to whom the scheme does not apply and the employment of dock workers by employers to whom the scheme does not apply;

(g) for the training and welfare of dock workers, in so far as satisfactory provision therefor does not exist apart from the scheme;

(h) for health and safety measures in places where dock workers are employed, in so far as satisfactory provision therefor does not exist apart from the scheme;

(i) for the manner in which, and the persons by whom, the cost of operating the scheme is to be defrayed.

(j) for constituting or prescribing the authority to be responsible for the administration of the scheme;

(k) for such incidental and supplementary matters as may be necessary or expedient for the purposes of the scheme."

9. Section 5-A which provides for the creation of a Dock Labour Board and lays down how the Board is to be constituted runs as follows:

"(1) The Government may, by notification in the Official Gazette, establish a Dock Labour Board for a port or group of ports to be known by such name as may be specified in the notification.

(2) Every such Board shall be a body corporate with the name aforesaid, having perpetual succession and a common seal with power to acquire, hold and dispose of property and to contract and may, by that time, sue and be sued.

(3) Every such Board shall consist of a Chairman and such number of other members as may be appointed by the Government.

Provided that every such Board shall include an equal number of members representing—

(i) The Government,

(ii) the dock workers, and

(iii) the employers of dock workers, and shipping companies.

(4) The Chairman of a Board shall be one of the members appointed to represent the Government, and nominated in this behalf by the Government."

10. Section 5-B defines the function of the Board and is in these terms:

(1) A Board shall be responsible for administering the scheme for the port or group of ports for which it has been established and shall exercise such powers and perform such functions as may be conferred on it by the scheme.

(2) In the exercise of its powers and the discharge of its functions, a Board shall be bound by such directions as the Government may, for reasons to be stated in writing, give to it from time to time.

11. Section 5-C enjoins that the Board shall maintain proper accounts and prepare an annual statement of accounts including a balance-sheet in the prescribed form.

12. Section 8 gives the Government a rule-making power. The rules may provide for, among other things, the meetings of a Board, the quorum for such meetings and the conduct of business thereof.

13. The Board has to administer the scheme as required under Section 5-B and, in exercising that function, it will necessarily have to do various administrative acts but they would not all be acts of management of the Board. Management,

of the Board obviously, means management of the Board itself. The taking of disciplinary action against a dock worker, belonging to the pool of workers, recruited by the Board, is a matter of management of the pool. But management of the pool, which is one of the objects of the scheme, is not the same thing as management of the Board.

14. The sense of the word "management" should be gathered from the context, in which it occurs. It stands in a series of several words: "Constitution, incorporation, management or winding up". The first, second and fourth terms of the series viz., "Constitution", "Incorporation", and "winding up" must necessarily refer to the organisational set up of the corporation itself. It would be reasonable to hold that the third term also does the same.

15. In an unreported Bench decision of this Court, Shamsher Ali Khan v. Calcutta Dock Labour Board, First Misc. Appeal No. 26 of 1965 (Cal), the question how far City Civil Court had jurisdiction to entertain suits against the Dock Labour Board was considered and Chatterjee, J., delivering the judgment held that

"management of the corporation" means management of the internal affairs of the corporation. He made a distinction between matters, relating to functions of the Board, and those, relating to the Board itself, that is to say, the machinery, by which the functions are to be discharged, and observed as follows: "Every matter, relating to the functions of the Board, has some relation to management, directly or indirectly, but the statute bars only such suits, which refer to the management of the affairs of the business of the Board and not all types of suit by or against the Board; if the intention of the legislation had been to exclude all suits, it would have said so and would not have limited the bar to suits as referred to in Item 10 (ii)."

16. We respectfully agree with the above view. Management is a very broad term. In a sense, all administrative acts of the Board would be acts of management. But when they relate to any of the various objects of the scheme as enumerated in Section 3 of the Dock Workers (Regulation of Employment) Act, 1948, they would be acts of management "of the scheme" and not "of the Board". Management "of the Board" has, as already stated, reference to its organisational set up and includes acts, relating to such matters as, for example, calling of the meetings of the Board, observance of the rule regarding quorum, disposal of business at the Board's meetings, preparation of statement of accounts and balance sheet, etc. It refers to administration or management of the Board itself as dis-

tinguished from its functions under Section 5-B of the Dock Workers (Regulation & Employment) Act.

17. In the above view of the matter, it must be held that the City Civil Court had jurisdiction to try the suits. Accordingly, the appeals are allowed and the orders of the lower Court are set aside and it is ordered that that Court should proceed with the suits in accordance with law in the light of this judgment. In the circumstances of the cases, no order is made as to costs.

Appeals allowed.

AIR 1970 CALCUTTA 229 (V 57 C 44)

A. C. GUPTA, J.

Suranjan Kanjilal, Appellant v. Malati Dutt, Respondent.

C. R. No. 2593 of 1969, D/- 3-10-1969.

(A) Civil P. C. (1908), O. 9, R. 13 and O. 43, R. 1 (d) — Application to set aside ex parte decree dismissed for default — Order is appealable under O. 43, R. 1 (d). AIR 1916 Cal 391, Foll. (Para 3)

(B) Civil P. C. (1908), S. 151, O. 9, R. 13 and O. 43, R. 1 (d) — Application to set aside ex parte decree dismissed for default — Remedy by way of appeal is not illusory — Appellant can canvass that there was sufficient cause for non-appearance when application was called on for hearing — High Court would not ordinarily exercise its inherent powers to set aside order when remedy of appeal is not availed of except in exceptional cases. AIR 1928 Cal 812 & AIR 1937 Cal 425, Foll. (Para 4)

Cases Referred:	Chronological	Paras
(1937) AIR 1937 Cal 425 (V 24) =		
41 Cal WN 893, Abdul Jabbar v. Azizar Rahman		5
(1929) AIR 1929 Cal 17 (V 16) =		
32 Cal WN 811, Sourendra Nath Mitter v. Jatindra Nath Bose		4
(1928) AIR 1928 Cal 812 (V 15) =		
32 Cal WN 101, Jnanendra Mohan v. Profullananda Goswami		4
(1927) AIR 1927 Cal 534 (V 14) =		
31 Cal WN 576, Sarat Krishna Bose v. Bisweswar Mitra		4
(1916) AIR 1916 Cal 391 (V 3) = 21		
Cal LJ 628, Kumud Kumar Bose v. Hari Mohan Samaddar		3, 4

A. K. Motilal and Satyanarayan Roy, for Petitioner; Manan Kumar Ghosh, for Opposite Party.

ORDER:— An application under O. 9, R. 13 of the Code of Civil Procedure made by the petitioner to set aside an ex parte decree for eviction passed against him was itself dismissed for default. The petitioner then applied under Section 151

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of the Code to set aside the order of dismissal stating reasons for his non-appearance when the application under Order 9, Rule 13 was called on for hearing. The Court below dismissed the application under Section 151 on the ground that as the Code provides an appeal from an order dismissing an application under Order 9, Rule 13, the application under Section 151 was not maintainable. The legality of this last order is in question in this Rule.

2. Mr. A. K. Motilal learned Advocate for the petitioner, raised two contentions to show that the order passed by the learned Munsif was wrong. Mr. Motilal submitted, first, that the order dismissing for default the application under Order 9, Rule 13 was not appealable and, secondly, even if the order was appealable this did not preclude the Court from setting aside the order of dismissal in exercise of its inherent power, if on the facts of the case the Court thought that it was necessary to do so for the ends of justice.

3. As regards the first contention, the point is covered so far as this Court is concerned by a decision of a Division Bench reported in 21 Cal LJ 628 = (AIR 1916 Cal 391), Kumud Kumar Bose v. Hari Mohan Samaddar, where it has been held that an order dismissing an application to set aside an ex parte decree, whether on the merits or for default is appealable under Order 43, Rule 1 (d) of the Code. The first submission of Mr. Motilal, therefore, fails.

4. Mr. Motilal next contended that even if an appeal lay from an Order dismissing for default an application under Order 9, Rule 13, the relief is illusory because in such an appeal the appellant cannot canvass the ground that there was sufficient cause for his non-appearance when the application under Order 9, Rule 13 was taken up for hearing. Mr. Motilal submitted that it was, therefore, not only desirable but also proper for the Court to invoke its inherent power under Section 151 of the Code to do justice in such a case. In support of his contention Mr. Motilal referred to a number of decisions of different High Courts including two Bench decisions of this Court namely 31 Cal W N 576 = (AIR 1927 Cal 534), Sarat Kumar Bose v. Bisweswar Mitra and 32 Cal WN 811, = (AIR 1929 Cal 17), Sourendra Nath Mitter v. Jatindra Nath Bose. The two Calcutta cases contain certain observations which indeed support the view that where the dismissal for default is not due to laches on the part of the applicant, the Court can allow an application under Section 151 to set aside an order dismissing for default an application under O. 9, R. 13. But these observations made

in said two cases appear to have proceeded on the view that the Code of Civil Procedure does not contain any express provision for setting aside an order of dismissal for default in such case. I have already referred to the decision in 21 Cal LJ 628 = (AIR 1916 Cal 391) which holds that an order of dismissal for default is also appealable. Further, it has been held by another Division Bench of this Court, Jnanendra v. Profullananda, 32 Cal W N 101 = (AIR 1928 Cal 812) that in an appeal from an ex parte decree the appellant can urge that there was sufficient cause for his non-appearance at the hearing of the application under O. 9, R. 13. This decision answers the contention that an appeal provided from an ex parte order of dismissal is an illusory right. A later decision of this Court, also of a Division Bench, holds that if a litigant does not choose to avail of a right of appeal provided by the Statute, the Court could not exercise its inherent power to give him relief; Abdul Jabbar v. Azizar Rahaman, 41 Cal WN 893 = (AIR 1937 Cal 425).

5. More recently another Division Bench of this Court on a consideration of the authorities states the following proposition among others as having been settled by consensus of judicial opinion:—

"Where the Code itself makes an express provision for a particular remedy, the party, who does not avail of such remedy, cannot as a Rule, be allowed to resort to Section 151, for, to do so would be to defeat the object and utility of the Code itself."

This decision, however, points out that "there may, of course, be extraordinary cases, where the application of S. 151 may be justified even though there may be an alternative remedy. One of such exceptional cases may be where the Court itself had committed such mistake or such omission as may itself be termed as abuse of the processes of the Court. In such cases the Court is bound to rectify its mistake according to the maxim—'actus curiae neminem gravabit' (an act of Court shall prejudice no man)". It is not claimed that the instant case is of the exceptional kind.

6. It thus appears that the questions raised by Mr. Motilal are no longer live issues so far as this Court is concerned; it is not necessary, therefore, to refer to the decisions of the other High Courts relied on by him.

7. This Rule is discharged, but without any order as to costs.

Rule discharged.

AIR 1970 CALCUTTA 231 (V 57 C 45)

SABYASACHI MUKHARJI, J.

The Administrator General of West Bengal, Plaintiff v. Kumar Purnendu Nath Tagore, Respondent.

Suit No. 683 of 1951, D/- 7-10-1969.

(A) Civil P. C. (1908), O. 9 (Gen.) — Rr. 35 and 35-A of Chap. X of Original Side Rules of Calcutta High Court — Distinction between pointed out — Suit filed on Original Side — Dismissal for non-prosecution — Application for recalling and setting aside order — O. 9, Civil P. C. has no application.

In order to attract the provisions of Order 9 suits must be called on for hearing and in order to grant restoration of the suits dismissed under Order 9, the Court must be satisfied that there are sufficient causes for non-appearance at the time when the suits were called on for hearing. Under Rules 35 and 35-A of Chapter X of the Rules of the Original Side of Calcutta High Court the scope of enquiry is entirely different. When a Court exercises its power under R. 35 or R. 35-A the Court is concerned with the reasons for non-prosecution of the suit. Suits are not called on for hearing when they appear in the list of the Judge under R. 35 or R. 35-A. In considering whether a suit should be dismissed either under R. 35 or R. 35-A the Court is concerned with the question whether there has been non-prosecution after the length of time mentioned in those rules and whether there are sufficient reasons for such non-prosecution.

(Para 5)

Hence, where a suit filed in the Original Side of the High Court is dismissed for non-prosecution under the Rules the suit cannot be restored under O. 9, Civil P. C. even if an application is made within time. AIR 1965 Cal 547, Rel. on.

(Para 5)

(B) High Court Rules and Orders — Calcutta High Court Rules (Original Side) Chap. X, Rr. 35 and 35-A — Order dismissing suit for non-prosecution drawn up, signed and perfected — Absence of notice to plaintiff is merely an irregularity and does not affect validity of Order — Court has no power to recall Order.

(Para 6)

(C) Civil P. C. (1908), O. 47, R. 1 — Suit dismissed for non-prosecution — Application for recalling and reviewing order filed within 30 days of date of Order is not barred by limitation under Art. 124, Limitation Act — Even if application for review is not in the prescribed form that is not fatal to its maintainability — (Limitation Act (1963), Art. 124).

(Para 8)

(D) Civil P. C. (1908), O. 47, Rr. 1 & 4, Proviso (b) — Grounds for review — Review on ground of discovery of new matter — Strict proof required by proviso (b) to R. 4 — Dismissal of suit for non-prosecution — Review — Plaintiff alleging his inability to place before Court certain facts owing to death of his solicitor — Review allowed on ground of 'any other sufficient reason'.

Where an Order dismissing a suit for non-prosecution was sought to be reviewed on the basis of minutes of the previous order of the Court which the plaintiff alleged could not be brought to the notice of the Court due to difficulty arising from death of his solicitor.

Held, (i) that the knowledge of the solicitor is deemed in law to be the knowledge of client and that, therefore, strict proof as required by the proviso to R. 4 that in spite of due diligence the plaintiff could not have brought the fact to the notice of the Court, could not be said to have been given. It was not also a case where there was any mistake or error apparent on the face of the record.

(Para 7)

(ii) that on the facts and circumstances of the case, there was 'sufficient reason' for exercising the power of review under O. 47, R. 1 in the interests of justice. The words 'any other sufficient reason' in O. 47, R. 1 mean a reason sufficient on grounds at least analogous to those previously specified in the rule. AIR 1922 PC 112 & AIR 1934 PC 213 & AIR 1954 SC 526, Rel. on; AIR 1959 Cal 150, Dist.; AIR 1963 Cal 100 & AIR 1924 Cal 774, Ref. to.

(Para 7)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Cal 547 (V 52),
Nanlal M. Verma and Co. (Gunnies) P. Ltd. v. Gordhandas Jerambhai 5
- (1963) AIR 1963 Cal 100 (V 50),
Benoy Krishna Rohatgi v. Surabali Misra 7
- (1959) AIR 1959 Cal 150 (V 46) =
63 Cal WN 201, Hriday Kanta v. Jogesh Chandra 7
- (1954) AIR 1954 SC 526 (V 41) =
1955 SCR 520, M. M. B. Catholicos v. M. P. Arthanasius 7
- (1953) Original Side No. 41 of 1953
(Cal.), Administrator General v. Purnendu Nath Tagore 3
- (1934) AIR 1934 PC 213 (V 21) =
61 Ind App 378, Bisheshwar Pratap Sahi v. Parath Nath 7
- (1924) AIR 1924 Cal 774 (V 11) =
ILR 51 Cal 70, Bindubashini Roy v. Secy. of State 7
- (1922) AIR 1922 PC 112 (V 9) =
49 Ind App 144, Chhajju Ram v. Neki 7

Advocate General, for (The Administrator General) Plaintiff.

ORDER:— On 20th of December, 1968 this suit appeared in my list of suits in the Special List under Chapter X of the Rules of the Original Side of this Court. This suit was filed on 2nd of February, 1951. Counsel appeared on that date and made oral submissions before me that I should adjourn the suit till the next date for taking up suits in the Special List as his client was not in a position to place the facts relating to the non-prosecution of the suit. As there was no affidavit I was not inclined to accept the oral submissions made on behalf of the plaintiff in this suit and as no cause was shown why the suit had not been prosecuted so long, I directed that the suit be dismissed. On the 20th of January, 1969 this application was noted as made and a notice of motion was taken out for recalling and setting aside the said order made on the 20th of December, 1968 and further praying for review of the said order dated 20th December 1968 and for directions for the hearing of the above suit.

2. It appears that the suit was filed on the 2nd of February 1951 by the petitioner as administrator to the estate of Raja Profulla Nath Tagore, since deceased, against one Kumar Purnendu Nath Tagore, for an account of all realisations made by the defendant in respect of "Tagore Villa" from the Military Authorities as well as other tenants between the death of Raja Profulla Nath Tagore and the institution of this suit, for further accounts and for certain other incidental reliefs. It appears that Messrs. Mukharji and Lahiri, a firm of Solicitors, having office at 10, Old Post Office Street, Calcutta was the Attorney on record of the plaintiff. Mr. A. B. Lahiri, since deceased, was the sole proprietor of the said firm. It has been stated in the petition that except Mr. Lahiri there was no other Solicitor in the said firm. It has been further stated that the said Mr. Lahiri looked after all the legal matters of the estate of Raja Profulla Nath Tagore and was entrusted with the suits and proceedings in connection thereof. The petitioner states in the petition that Mr. Lahiri died on or about 4th of February, 1966.

3. This petition which was noted as being made on the 20th of January, 1969 is verified by one Balaknath Paramanik, who has described himself as Head assistant in the employment of the Administrator General of West Bengal. In paragraph 4 of the petition it has been stated that the petitioner caused enquiries to be made to find out if any other Solicitor was looking after the business of Messrs. Mukherjee and Lahiri. In paragraphs 4 to 10 the petitioner has stated about certain enquiries being made and how the petitioner tried to contact the family of

late A. B. Lahiri. Unfortunately there is no particulars as to the dates when these enquiries were made. Certain correspondence are annexed to the petition. The first letter which I find is a letter dated 30th of April, 1968, written to Mrs. A. B. Lahiri by the Administrator General of West Bengal. It has been stated that certain cause papers in respect of the estate of Raja P. N. Tagore were lying with late Mr. Lahiri and Mrs. Lahiri was requested to hand over those papers. The next letter is dated 19th of December, 1968 written to the son of late Mr. Lahiri.

It appears that on or about 18th December, 1968 the petitioner received the notice from this Court that the above suit had been set down in my list of 20th December, 1968. The petitioner states that the said letter was addressed to Messrs. Mukherjee & Lahiri and most presumably have been served on the petitioner because the office of Messrs. Mukherjee & Lahiri was found to be closed. The matter appeared in my list, as mentioned hereinbefore on the 20th of December, 1968 and the petitioner was not in a position to instruct the present Solicitor about the steps taken in respect of the suit. In the petition the petitioner has stated about how certain enquiries and searches of the records were made. The petitioner has however stated that before 20th December, 1968 the petitioner was not able to get the cause papers of the suit in the question. There was a supplementary affidavit affirmed on the 18th June, 1969 by one Balaknath Paramanik. He has stated in this supplementary affidavit in paragraph 15 that on the 30th of May, 1969 he persuaded Mr. Subodh Kumar Chatterjee, who is supposed to have been formerly the Managing Clerk of Messrs. Mukherjee & Lahiri to go to the office room occupied by late Mr. Lahiri. He has further stated in paragraph 16 that he made certain searches and found out the several dates on which the suit had appeared in the peremptory list.

From the list given by him, it appears the said suit appeared in the list on the 3rd of August, 1961. He further stated in paragraph 17 that he had come to know on enquiries made by him that this suit along with several other suits between the parties were directed by the P. C. Mallick, J., to be placed in the list of his Lordship. It further appears that on 3rd August, 1968 P. C. Mallick, J., had directed that this suit along with several other suits save and except those mentioned in the subsequent paragraph were directed to go out of the peremptory list. He has further stated that as searches were made by him he could not place the information earlier before this Court. Learned Advocate General, who appeared on behalf of the Administrator General

of West Bengal, placed before me a copy of the minutes of the 3rd August, 1968. It is in the following terms:—

"O.S. No. 41 of 1953 (Cal.), A. G. v. Purnendu Nath Tagore.

Mr. I. P. Mukherjee, for the applicant also appear Mr. Sudhamay Basu, Mr. Ajit Ganguli, Mr. B. C. Dutta, Mr. R. K. Ghosh and Mr. T. K. Ghosh.

Court — The order dated 8-6-1969 will not be drawn up until the disposal of this application. Nor the Report of Mr. G. K. Dutt the Special Referee appointed herein, be given effect to.

The A. G. is directed to write to the Land Acquisition Collector at Varanashi enquiring when the money will become payable because without that the administration is being held up and the Court is prevented from disposing of the suits. Similar letter be written to the Certificate Officer. The application is adjourned to Monday next.

A. G. to take steps for substitution of the heirs of Anjali Tagore since deceased in the consolidated suit. Mr. Ganguli will supply the names of the heirs to the A. G. by this week. Other Tagore suits to go out of the list."

4. There is an affidavit in opposition affirmed by one Charu Chandra Basu Roy on 9th July, 1969. In paragraph 11-A of the said Affidavit he stated that the solicitor for the Administrator General died in 1966 and it appears that until January, 1969 the Administrator General had taken no steps for filing a fresh Warrant of Attorney. In paragraph 15 he has also stated that the office of the Administrator General got the Cause List at his Office. In subsequent paragraphs of the affidavit he had stated that Mallick, J., did not fix any period as to how long the suit was not to appear in the peremptory list. According to Mr. Charu Chandra Basu Roy, many of these suits, excepting this suit, specifically mentioned by Mallick J., appeared in the Daily List of suits. He had given certain names of those suits in paragraphs 23-25 of the said affidavit.

5. Learned Advocate General, appearing for the Administrator General of West Bengal, drew my attention to the Bench decision of this Court in the case of Nanalal M. Varma and Co. (Gunnies) P. Ltd. v. Gordhandas Jerambhai, AIR 1965 Cal 547. The first point that requires consideration in this case is whether the suit can be restored by me under the provisions of Order 9 of the Code of Civil Procedure. On a proper reading of the relevant rules of Order 9 of the Code of Civil Procedure it appears to me that in the facts and circumstances of the case Order 9 can have no application. Rule 3 states that where neither party appears when the suit is called on for hearing, the Court may make an order for dismissal of the suit. Rule 4 empowers

the plaintiff to bring a fresh suit on the same cause of action subject to the law of limitation. It also empowers the plaintiff to make an application for restoration of the suit provided he is able to satisfy the Court that there are sufficient causes either for not paying the Court-Fee and the postal charges or for non-appearance. Rule 8 empowers the Court to dismiss the suit, unless the defendant admits the claim or any part thereof, in case the defendant appears and the plaintiff does not appear when the suit is called on for hearing. Rule 9 of Order 9 similarly empowers the plaintiff to make any application for restoration provided he is able to satisfy the Court about the cause of his non-appearance when the suit was called on for hearing.

It is evident therefore that Order 9 deals with the dismissal of the suit in case the parties do not appear when the suits are "called on for hearing" and in case of the applications for restoration, the scope of enquiry is limited to finding out whether there is "sufficient cause for non-appearance" when the suit is called on for hearing. Therefore in order to attract the provisions of Order 9 suits must be called on for hearing and in order to grant restoration of the suits dismissed under Order 9, the Court must be satisfied that there are sufficient causes for non-appearance at the time when the suits were called on for hearing. Under Rules 35 and 35-A of Chapter X of the Rules of the Original Side of this High Court the scope of enquiry is entirely different. When a Court exercises its power under Rule 35 or Rule 35-A the Court is concerned with the reasons for non-prosecution of the suit. Suits are not called on for hearing when they appear in the list of the Judge under R. 35 or Rule 35-A. In considering whether a suit should be dismissed either under Rule 35 or 35-A the Court is concerned with the question whether there has been non-prosecution after the length of time mentioned in those rules and whether there are sufficient reasons for such non-prosecution. Therefore, on the construction of the rules, I am of the opinion, that Order 9 cannot be attracted to this case, even though the application was made within 30 days from the date of dismissal of the suit in the special list. It should be mentioned here that the suit was dismissed on the 20th of December, 1968 and the present application was noted as being made on 20th January, 1969, 19th January, 1969 being a Sunday. In the decision in the case of AIR 1965 Cal 547 (supra) their Lordships of the Division Bench so observed but the Court further observed that even if Order 9 applied, against an order refusing to restore a suit under Rule 4 of Order 9, no appeal lies.

6. The next point that has to be borne in mind in this case is that the order has been drawn by, signed and perfected. A point incidentally was taken that in respect of the settlement of this order no notice had been given to the plaintiff. But as was observed in the aforesaid Bench decision that amounts to a mere irregularity and does not affect the validity of the order drawn up. Until an order has been drawn up and/or perfected the Court exercising the jurisdiction in the original side of this Court retains power to alter or amend or vary that order if the Court considers it necessary for any sufficient cause or in the interests of justice. But after the order has been drawn up and perfected, the Court has no such authority to vary the decision and/or recall the order as such. These propositions are well settled. I need not discuss the several authorities cited from the Bar on this aspect of the matter.

7. Learned Advocate General appearing for the plaintiff submitted before me that this is a case where I should exercise my power under O. 47 of the Code of Civil Procedure and review my order of dismissal. According to him there is sufficient reason for his client's not being able to place before the Court facts relating to non-prosecution of the suit. According to him if these facts were placed before the Court then the Court would not have dismissed the suit. The question, therefore, is: can I exercise powers under Order 47 of the Code of Civil Procedure and if so whether there is sufficient reason to review or recall my order of dismissal made on the 20th of December, 1968? Order 47 of the Code of Civil Procedure empowers the Court to review its judgment or order on certain conditions. Rule 1 of Order 47 empowers the Court to review its order if it can be shown that new and important matters or evidence have not been produced at the time of the passing of the order in spite of due diligence on the part of the party seeking to adduce such material or if it can be shown that there was mistake or error apparent on the face of the record, or for any other sufficient reason. Therefore, only in three cases review can be permitted, that is to say, where important and new materials were overlooked, by misfortune not due to laches of the party or where there are mistakes or errors apparent on the face of the record, or for any other sufficient reason. Proviso (b) of Rule 4 of Order 47 enjoins that no application shall be granted on the ground of discovery of a new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation. Here the material on which review is being sought is the

minutes of the order dated 3rd of August 1961 passed by Mallick J., as I indicated before. The plaintiff urged that the plaintiff due to the death of its Solicitor and due to the difficulty resulting from the death of Mr. A. B. Lahiri, could not bring this fact to the knowledge of the Court at the time of the passing of the order on the 20th of December, 1968. Having regard to the averments in the petition and in the affidavit it cannot be said, in my opinion, that the plaintiff has been able to prove strictly that the plaintiff after due diligence could not have brought to the notice of the Court that fact. In law the knowledge of the Solicitor is deemed to be the knowledge of the client in matters like this. Therefore if strict proof is required of the fact that in spite of exercise of the due diligence the purport of the order of Mallick J. could not have been adduced by the plaintiff before the Court, it cannot be said that the plaintiff has been able to prove strictly that the plaintiff could not have brought this fact to the notice of the Court on the 20th of December, 1968. I am, therefore, of the opinion that the first ground on which a review can be sought under Rule 1 of Order 47 of the Code of Civil Procedure, has not been made out. Therefore the fact that there has been discovery of new and important matters which, after the exercise of the due diligence, was not within the knowledge of the plaintiff has not been established. It is not a case also where there is any mistake or error apparent on the face of the record.

The question, therefore, is, Is there any other sufficient reason in the facts and circumstances of this case? In the case of Chhajju Ram v. Neki, 49 Ind App 144 = (AIR 1922 PC 112), the Judicial Committee held that Rule 1 of Order 47 of the Code of Civil Procedure must be read as in itself definitive of the limits within which review of a decree or order is now permitted, and the words "any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified in the rule. A Court hearing an application for a review has, therefore, no jurisdiction to order a review because it is of opinion that a different conclusion of law should have been arrived at. The Judicial Committee reiterated the same view in the case of Bisheshwar Pratap Sahi v. Parath Nath, 61 Ind App 378 = (AIR 1934 PC 213). The Supreme Court also in the case of M. M. B. Catholicos v. M. P. Arthanasiy, AIR 1954 SC 526 reiterated the same view. In the case of Bindubashini Roy v. Secy. of State, (1924) ILR 51 Cal 70 = (AIR 1924 Cal 774), there was an enquiry under Sec. 19-H of the Court-fees Act where the Government Pleader was not ready to go on with the case on the date fixed and the Court dis-

missed it, but afterwards granted a review "for other sufficient reason" and restored the case. It was held that the order was bad in form and in substance. Rankin J., delivering the judgment at p. 75 of ILR Cal = (at p. 775 of AIR) of the report observed:

"The question of law is whether the facts as found constitute within the meaning of the rule "other sufficient reason" remembering that the Privy Council in the case of 49 Ind App 144=(AIR 1922 PC 112) have laid it down that those words are to be construed in the light of the previous words and on the principle of ejusdem generis. The case is perhaps near the border line. The effect of Chhajju Ram's case, 49 Ind App 144=(AIR 1922 PC 112) in my judgment, is that, under the words "other sufficient reason", the reason must be one having sufficiency of a kind analogous to the two specified cases, that is to say, analogous to excusable failure to bring to the notice of the Court new and important matter or analogous to error on the face of the record."

His Lordship further observed:

"In this case, there is not merely an element of negligence, that is to say, it is not merely that by greater diligence the person could have had better knowledge of his case or a better chance of producing evidence which he knew not, but the present case seems to me on the findings to be a case where for no adequate reason the party had not been ready on the date solemnly fixed for the purpose and had no real excuse for not being ready."

In that view of the matter the learned Judge was of the opinion that there was no ground for review.

In the case of Benoy Krishna Rohatgi v. Surajbali Misra, AIR 1963 Cal 100, S. P. Mitra, J., had to construe provisions of Order 47. The Court observed that the phrase "ejusdem generis" is more restricted than the word "analogous". Mr. Das, appearing for the defendant also drew my attention to the case of Hriday Kanta v. Jogesh Chandra, AIR 1959 Cal 150. But the facts in that case were entirely different. The expression "analogous" means bearing same correspondence or resemblance, similar in certain circumstances. An analogous reason therefore does not mean the same reason but similar reason. A reason therefore which is similar in nature but does not strictly come within the first two reasons mentioned in Rule 1, Order 47 is also covered by the expression "sufficient reason."

In the Minutes of Order dated 3rd of August, 1961 passed by Mallick J., it was provided that other Tagore suits would go out of list. Mr. Das contended before me that on a proper construction of the Minutes it appears that Rule 35-A of

Chapter X of the Rules would be attracted to the facts of this case because if no period has been mentioned by the Judge then if the suit remains out of the peremptory list for more than 3 months and the plaintiff does not take any step to bring the suit to a hearing, the suit is liable to be dismissed, if no sufficient cause is shown to the contrary. Mr. Das has urged that in this case no period had been fixed by the learned Judge, and no steps had been taken to bring the suit to a hearing after 3 months and no sufficient cause has been shown, so the suit is still liable to be dismissed. It is true that the last sentence of the order of Mallick J. dated 3rd August, 1961, read by itself, would indicate that no period had been fixed. But in my opinion this last sentence cannot be read independently of the context. It appears to me that the intention of the learned Judge was the Tagore matters should be heard after certain proceedings as indicated in the said order have been taken. It has been contended that some of the other Tagore suits which had appeared on that date, namely 3rd of August 1961, have since been disposed of. But I do not find any material to indicate under what circumstances these were disposed of; whether they were disposed of because they automatically came in the list of any learned Judge or whether they were disposed due to any special direction or orders by any learned Judge. It thus appears to me that the order of Mallick J., dated 3rd of August, 1961 is not very clear and specific. Speaking for myself, I have no hesitation in saying that had I known of this order of Mallick J., I would not have dismissed the suit on the 20th of December, 1968.

The next question that requires consideration is, could the plaintiff have brought this fact to the knowledge of the Court on the 20th of December, 1968? On this aspect the facts are that Mr. A. B. Lahiri has died. He died sometime in 1966. He was the sole proprietor of his firm, nobody seems to be looking after his affairs. Members of his family are not obviously in the legal profession. There is some evidence that even before the suit had appeared in the Special List the plaintiff was trying to get the Cause Papers of the suit as alleged in paragraphs 4 to 9 of the petition and letter was written to Mrs. Lahiri in April, 1968. Therefore, though it is true that the plaintiff has not been able to prove strictly so as to come within the first limb of Rule 1 of Order 47, there is evidence to justify to come to the conclusion that there is sufficient reason for exercising my power under Order 47, Rule 1 of the Code of Civil Procedure, in the interest of justice.

8. Under Art. 124 of the Limitation Act of 1963 period of limitation is 30 days

from the date of the order for an application for review. Therefore, there is no bar of limitation in this case. Mr. Das contended that the application for review is not in the prescribed form. In my opinion, that is not fatal to the maintainability of this application. In paragraph 19 of the petition it has been stated that there is sufficient cause for this Hon'ble Court to consider and review the said order. In the premises and in the facts and circumstances of this case I am of the opinion that the said order dated 20th of December, 1968 passed by me should be reviewed. I hereby recall the said order dated 20th of December, 1968 and direct the suit to appear at the top of the prospective list and I give parties liberty to mention for hearing. In this case respondent has incurred certain expenses due to no fault of his own; therefore I direct that the applicant will pay the costs of this application which I assess at 50 Gold Mohurs, which should be paid within 3 weeks after the long vacation.

Order accordingly.

AIR 1970 CALCUTTA 236 (V 57 C 46)
AMARESH ROY AND S. N. BAGCHI, JJ.

Pritish Kumar Mitra, Petitioner v. Prosanto Kumar Mitra and another, Opposite Parties.

Civil Rule No. 2964 of 1969, D/- 16-9-1969.

(A) Court-fees and Suits Valuations — Court-fees Act (1870), Section 19-II — Scope — Succession of steps and events in probate proceeding.

The succession of steps and events in a Probate proceeding are:— An application for probate or letters of administration is made to Court; the Court shall cause notice of the application to be given to the Collector; the Collector shall hold an enquiry into the matter and if he is of opinion that the value of the property has been under estimated may require the petitioner to amend the valuation; if the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court, the Court when so moved shall hold or cause to be held an enquiry and record a finding as to the true value. That finding of the Court shall be final. (Para 8)

(B) Court-fees and Suits Valuations — Court-fees Act (1870), Section 19-I — Application for probate or letters of administration — Section does not prevent Court from hearing application — It only prevents it from making order granting probate until court-fees have been paid. AIR 1955 Pat 362, Dissent, from.

S. 19-I does not prevent the Court from hearing the application for probate but

only prevents it from making an order granting probate until court-fees have been paid. AIR 1943 Cal 19 (21) & ILR (1956) Punj 1356, Rel. on. (Para 8)

Though hearing culminates in the order made upon such hearing, the order may not only be an order entitling the petitioner to the grant of Probate, but also an order rejecting his application for Probate. If latter is the result obtained in the Probate proceeding then Sec. 19-I is not attracted. AIR 1955 Pat 362, Dissent, from. (Para 9)

When an application for Probate of Letters of Administration is made to any Court, ad valorem Court-fees on the value of the assets of the estate of the testator, be it according to the valuation put in the Affidavit of Assets or be it the valuation fixed by the Collector or finally, decided by the Court under Sec. 19-H, is not payable until the Court has proceeded with the hearing of the application by taking evidence affording opportunity to the propounder to prove the will and also his right to an order entitling him to the grant of Probate or Letters of Administration. Only when the Court has arrived at the decision that the propounder is entitled to the grant of Probate or Letters of Administration, then only, but before the order entitling the petitioner to the grant of Probate or Letters of Administration is made the Court-fees mentioned in Art. 11 of the First Schedule of the Court-fees Act need be paid upon the valuation found by the Court under Section 19-H. In a Probate proceeding Court-fees are paid on the grant but not on the application. An unsuccessful propounder of a Will is not liable to pay Court-fees mentioned in Section 19-I of Court-fees Act. (Para 12)

Cases Referred: Chronological Paras

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| (1956) ILR (1956) Punj 1356, Sushela Dantayagi v. State | 9 |
| (1955) AIR 1955 Pat 362 (V 42)—ILR 34 Pat 205, Mundrika Prasad Singh v. Mst. Kachnar Kuer | 8, 9 |
| (1943) AIR 1943 Cal 19 (V 30)—ILR (1942) 2 Cal 194, In the Goods of Mrs. Lillian Singh | 7, 8, 9 |
| Bijan Behari Das Gupta and Sibdas Ghosal, for Petitioner; Lala Hemanta Kumar, Rabindra Nath Mitra and Ranen Mitra, for Opp. Party No. 1; Sushil Chandra Dutta and A. K. Matilal, for Opp. Party No. 2. | |

AMARESH ROY, J.:— This Rule Issued upon an application under Sec. 115 of the Code of Civil Procedure against an order passed by the learned Additional District Judge of Alipore in a pending probate proceeding numbered as Other Suit No. 6 of 1969. In that proceeding Pritish Kumar Mitra has applied for grant of Letters of Administration with a copy of the Will annexed propounding

therein a Will which he alleges is the last testament of his uncle Probodh Kumar Mitra. When that proceeding was pending, the propounder Pritish Kumar Mitra made an application to Court stating that the requisite Court-fees have already been paid in a proceeding No. 131 of 1949 under Act XXXIX of 1925, and that he would deposit the ad valorem Court-fees on the Affidavit of Assets in the present proceeding at the appropriate stage. That matter was heard by the learned Additional District Judge on 14th of August, 1969.

2. The background of that petition made by Pritish Kumar Mitra was that in the previous proceeding No. 131 of 1949 the same Will of Probodh was propounded by Pritish's eldest brother Prafulla Kumar Mitra who was named as an Executor in the Will. There was no contest raised in that proceeding and the District Delegate made a grant of Probate upon a stamp duty of Rs. 5460/- being paid in that proceeding. Thereafter there was an application for revocation of the grant by a person who was a brother of the testator Probodh and the grant was revoked. The Probate proceeding was at that stage contentious and was therefore being dealt with in the Court of the District Judge or a specially authorised Subordinate Judge. During the pendency of that contentious Probate proceeding which started upon the application by Prafulla, Prafulla died. Thereupon Pritish Kumar Mitra made a fresh application praying for Letters of Administration with a copy of the Will annexed and the present proceeding has commenced upon that application.

3. The learned Additional District Judge in his Order No. 144 dated 14th of August, 1969 held that a stamp duty of Rs. 5460/- was deposited in the case No. 131 of 1949 in December, 1949 upon a valuation of Assets at Rs. 1,42,000/- in the Affidavit of Assets, while the Collector after enquiry assessed that valuation at Rs. 4,47,200/-. Consequently the Executor Prafulla in that proceeding was directed to pay the additional stamp duty of Rs. 17,258/-. That stamp duty, it appears, has not been paid.

4. In the present proceeding the propounder Pritish Kumar Mitra has estimated the value of the estate of the deceased at Rs. 3,64,500/- in his Affidavit of Assets. The learned Additional District Judge has noted in that order that a copy of the application for Letters of Administration or Affidavit of Assets have not been forwarded to the Collector under the provisions of Section 19-H of the Court-fees Act. He, therefore, directed that the said copies should be forthwith forwarded to the Collector for necessary action under sub-sec. (3) of Sec. 19-H of that Act.

5. When the learned Additional District Judge has by that Order No. 144 held that the plaintiff may be directed at this stage to pay the deficit Court-fee being the difference between the Court-fee payable on the valuation made in the Affidavit of Assets filed in the previous case No. 131 of 1949 and the valuation made in the Affidavit of Assets filed in the present proceeding. The propounder Pritish Kumar Mitra was directed to pay the difference of Court-fees on the valuation between Rs. 1,42,000 and Rs. 3,64,500 by 18th of August, 1969. In the same order the learned Additional District Judge has directed that the copy of the application for Letters of Administration and Affidavit of Assets together with the Order No. 144 be forwarded to the Collector, 24-Parganas for enquiry and necessary action under Sec. 19-H (3) of the Court-fees Act.

6. After that Order no. 144 was made Pritish Kumar Mitra filed an application under Section 151 of the Code of Civil Procedure before the learned Additional District Judge praying for modification of the Order no. 144 dated 14th of August, 1969. It was contended on behalf of the petitioner that only after the Will has been proved and the decision has been arrived at by the Court that the propounder is entitled to the grant, be it Probate or be it Letters of Administration with a copy of the Will annexed, then only before an order entitling the petitioner to grant a Probate or Letters of Administration is made that the Court-fees according to Art. 11 of the first Schedule of the Court-fees Act upon the valuation of property in the estate need be paid under Sec. 19-I of the Court-fees Act. The learned Additional District Judge has, however, taken a view that he would not proceed to hear the Probate proceeding by taking evidence until the Court-fees according to the value of the estate in the Affidavit of Assets have been paid and has rejected the application under S. 151 of the Code of Civil Procedure by his Order No. 146 dated 18th of August, 1969. Against that order Pritish Kumar Mitra moved this Court and the present Rule issued.

7. At this hearing the learned Advocate for the petitioner Mr. Bijan Behari Das Gupta has drawn our attention to the impugned order. It appears that in support of the proposition that in a Probate proceeding application for Probate or for the matter of that, application for Letters of Administration with a copy of the Will annexed, need not bear on it ad valorem Court-fees according to the valuation of the estate of the Testator at a stage when such application is presented to Court a decision of this Court in the Goods of Mrs. Lilian Singh (otherwise known as Mrs. Lila Singh), AIR 1943 Cal

19 was cited before the learned Additional District Judge. The learned Additional District Judge has noticed the passage in that judgment delivered by Sen, J. in which it was observed:

"In my opinion the provisions of S. 19-I, Court-fees Act, instead of supporting Mr. Banerjee's contention destroys it. The section says that the Court shall not grant Probate until the fees are paid. It does not say that the Court shall not try an application for Probate or Letters of Administration until the fees are paid or that the payment of the fees is a condition precedent to the making of the application."

But the learned Additional District Judge was of the view that those observations were in the nature of 'obiter dicta' and also that the observations cannot be regarded as *ratio decidendi* and those observations cannot be considered to be an authority for the proposition sought to be made out by the plaintiff. In this view the learned Additional District Judge is astonishingly in error. The passage to which he has made reference was dealing with an argument raised before the learned Judge Sen, J. that the Court-fee has not been paid and therefore there was no competent application before the Court. That contention needed to be dealt with for the decision of the case and was dealt with by the learned Judge by holding that even though at that stage *ed valorem* Court-fees on the value of the Assets of the testator had not been paid, there is a properly constituted application for Letters of Administration before the Court. What astonishes us is that such a decision of this Court could be thought by the Additional District Judge to be only an 'obiter dicta'.

8. The learned Additional District Judge has also been in error in understanding the plain meaning of Sec. 19-I which has been quoted by him, and also the clear and unambiguous decision of this Court upon that language of the section. The reason for the error apparently is that the learned Additional District Judge has confused between the right to prove a Will to be entitled to a decision that a grant should be made and order entitling the petitioner to the grant of Probate or Letters of Administration occurring in Sec. 19-I of the Court-fees Act. That distinction has been recognised and emphasised by the Legislature also as would have appeared clearly to the learned Additional District Judge if he had taken care to examine other relevant sections in the Court-fees Act itself and had noticed that in Sec. 19-C the language employed is "whenever a grant of Probate or Letters of Administration has been or is made" whereas in Sec. 19-I the words are "No order entitling the petitioner to the grant of Probate

or Letters of Administration". Not only so, if the learned Additional District Judge's attention had been drawn to Sec. 19-II, it should have been clear to him that the succession of steps and events in a Probate proceeding are:—

(1) An application for Probate or Letters of Administration is made to Court;

(2) The Court shall cause notice of the application to be given to the Collector;

(3) The Collector shall hold an enquiry into the matter and if he is of opinion that the value of the property has been under estimated may require the petitioner to amend the valuation;

(4) If the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court;

(5) The Court when so moved shall hold or cause to be held an enquiry and record a finding as to the true value.

That finding of the Court shall be final. All these are clearly appearing in the several sub-sections of Sec. 19-II. Then the next Sec. 19-I says:

"No order entitling the petitioner to the grant of Probate or Letters of Administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation."

That Section does not prevent the Court from hearing the application for Probate but only prevents it from making an order granting Probate until Court-fees have been paid, that is what has been clearly pointed out by Sen, J. in the judgment reported in AIR 1943 Cal 19 at p. 21 by observing

"The section says that the Court shall not grant Probate until the fees are paid. It does not say that the Court shall not try an application for Probate or Letters of Administration until the fees are paid or that the payment of the fees is a condition precedent to the making of the application."

In fairness to the learned Additional District Judge we also notice that he was swayed by the decision of the Patna High Court reported in AIR 1955 Pat 362, *Mundrika Prasad Singh v. Mst. Kachnar Kuer*.

9. We have examined that decision of the Patna High Court but we cannot agree with the view that has prevailed there but we hold that the view of law taken by Sen, J. in the decision, AIR 1943 Cal 19 is the correct view. Without entering into a detailed discussion of the reasons mentioned in the judgment of the Patna High Court AIR 1955 Pat 362, we need only say that though hearing culminates in the order made upon such hear-

ing, the order may not only be an order entitling the petitioner to the grant of Probate, but also an order rejecting his application for Probate. If latter is the result obtained in the Probate proceeding then Sec. 19-I is not attracted. Their Lordships of the Patna High Court do not appear to have considered that aspect. The view that has been consistently held in our High Court and which we are following is also the view that prevailed in Punjab High Court as it appears in the case of Sushela Dantyagi v. State, ILR (1956) Punj 1356.

10. We need also to point out that the Court-fees Act is a piece of legislation where the State Legislatures in the different States of India have been given power to carry out their own amendments and there have been such amendments galore in the various provisions of the Court-fees Act. So on questions arising out of Court-fees Act, for relying on decisions of other High Courts in the other States it is necessary to take care to compare the particular sections as they prevail in that particular State. The learned Additional District Judge has not done so. That however need not detain us, because though the language of the section prevailing in the State of Bihar is the same as the language in the Court-fees Act in the relevant sections prevailing in the State of West Bengal, even then when there is a clear and unambiguous authority of the High Court to which the learned Additional District Judge is subordinate, it is his bounden duty to follow that decision and he cannot proceed to express contrary views or decide cases according to such contrary view by relying on decisions of other High Courts. To that extent the learned Additional District Judge has revealed impropriety.

11. We may mention here that at the hearing before us all the parties have appeared. On behalf of the propounder Pritish Kumar Mitra, the learned Advocate Mr. Bijan Behari Das Gupta has assailed both the orders i.e., order No. 144 and order No. 146 passed by the learned Additional District Judge. Opposite Party No. 1 Prosanta Kumar Mitra is represented before us by the learned Advocate Mr. Lala Hemanta Kumar. At the outset Mr. Lala has made his position clear that he will not make any endeavour to support the view of the learned Additional District Judge and that his position is neutral. While saying so Mr. Lala also pointed out that the view that has prevailed with the learned Additional District Judge was not a contention raised by his client before that Court. Opposite Party No. 2 Mrs. Dorothea Mitra is represented by the learned Advocate Mr. Sushil Chandra Dutta. He also has been in the same position as Mr. Lala before us

by pointing out that his client Mrs. Dorothea Mitra did not even participate in the hearing in which the Order No. 144 and Order No. 146 were passed by the learned Additional District Judge.

12. We will also point out here that by the reason of procedure clearly laid down by the sections of the Court-fees Act to which we have made reference invariable practice in the Courts subordinate to this High Court has been that when an application for Probate or Letters of Administration is made to any Court, ad valorem Court-fees on the value of the assets of the estate of the testator, be it according to the valuation put in the Affidavit of Assets or be it the valuation fixed by the Collector or finally decided by the Court under Sec. 19-H, is not payable until the Court has proceeded with the hearing of the application by taking evidence affording opportunity to the propounder to prove the Will and also his right to an order entitling him to the grant of Probate or Letters of Administration. Only when the Court has arrived at the decision that the propounder is entitled to the grant of Probate or Letters of Administration, then only, but before the order entitling the petitioner to the grant of Probate or Letters of Administration is made the Court-fees mentioned in Art. 11 of the First Schedule of the Court-fees Act need be paid upon the valuation found by the Court under Sec. 19-H. That practice has very weighty reasons behind it both in the provisions of law, as also in the principles that apply to Probate proceedings. An application for Probate or Letters of Administration with a copy of the Will annexed cannot be equated to a Plaint or for the matter of that a Memorandum of Appeal. In Sec. 8 of Court-fees Act the Legislature has employed the language "amount of fee payable under this Act on Memorandum of Appeal." In Sec. 8-A the language employed by the Legislature is "in every suit in which ad valorem Court-fee is payable under this Act on the Plaint". In Sec. 19 which makes exemptions of certain documents, in Cl. (viii). That exemption is not an application for Probate or for Letters of Administration, but exemption is in the language 'Probate of a Will', Letters of Administration. Then in Sec. 19-C of the Court-fees Act which gives relief in case of several grants the language occurs "whenever a grant of Probate or Letters of Administration has been or is made in respect of whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon." That language clearly shows that in a Probate proceeding Court-fees are paid on the grant but not on the application. An unsuccessful propounder of a Will is not liable to pay Court-fees mentioned in Sec. 19-I of Court-fees Act.

13. We, therefore, hold that the order moved against i.e., Order No. 146 dated 18th of August, 1969 is an erroneous order. The source of the error is in order No. 144 which was passed by the learned Additional District Judge on 14th of August, 1969. When that error was brought to the notice of the learned Additional District Judge by the application under Section 151 of the Code of Civil Procedure praying for modification of that previous order No. 144, the only correct and proper order that should have been made by the learned Additional District Judge is that the application under Section 151 of the Code of Civil Procedure should have been allowed and the Order No. 144 should have been modified by accepting the contention of the petitioner Prithvi Kumar Mitra that the Court-fees according to the valuation fixed under Sec. 19-H of the Court-fees Act will be payable at a stage if and when an order entitling the grant of Probate or Letters of Administration would be made and not at any previous stage. Hearing of the proceeding should continue till that stage is reached.

14. We, therefore, direct that order No. 146 passed by the learned Additional District Judge be set aside and the order No. 144 dated 14th of August, 1969 stands modified as indicated above. The proceedings for hearing and disposal of the application for Letters of Administration with a copy of the Will annexed should go on in accordance with the law and at the proper stage the provisions of Sections 19-H and 19-I of the Court-fees Act should be complied with.

15. The Rule is accordingly made absolute.

16. There will be no order as to costs in this Rule.

17. Let this order be sent down without delay.

18. BAGCHI, J.: I agree.

Order accordingly.

AIR 1970 CALCUTTA 240 (V 57 C 47)

S. K. CHAKRAVARTI, J.

Smt. Fulzoria Dasi, Petitioner v. Smt. Tarubala Bose, Opp. Party.

Civil Rules Nos. 772 and 773 of 1965, D/- 21-8-1969.

Civil P. C. (1908), S. 151 — Proceeding under Calcutta Thika Tenancy Act, 1949 — Application by tenant for review of ejectment order dismissed for default — Tenant filing application under S. 151 for setting aside order of dismissal — Held though order was appealable, scope of appeal was limited and point of absence

could not usually be considered in appeal and, therefore, in the circumstances application under S. 151 was competent: Civil Rule No. 3828 of 1967, D/- 11-7-1969 (Cal), Foll.; (1964) 68 Cal WN 1064, Not foll. (Para 4)

Cases Referred: Chronological Paras

(1960) Civil Rule No. 3828 of 1967, D/- 11-7-1969 (Cal) 4

(1964) 68 Cal WN 1064, Sibani Rani Dutta v. Balalchandra Dutta 1, 3

(1958) Civil Rule No. 1901 of 1957, D/- 23-7-1958 (Cal) 2, 4

Mohini Mohan Mukherjee, for Opp. Party.

ORDER:— The short point that arises for determination in these two cases is as to whether an application under Sec. 151 of the Code of Civil Procedure would lie to set aside an order of dismissal of an application for review filed by the tenant in a proceeding under the Calcutta Thika Tenancy Act. There was an order for ejectment passed on terms and thereafter the present petitioner filed an application for review. That application was set down for hearing on the 1st August, 1964 and on that date the parties had filed Hazira and though the opposite party was found to be present, the petitioner was found to be absent and the learned Judge, therefore, dismissed that Misc. case for default. Thereafter the petitioner filed an application under S. 151 of the Code of Civil Procedure for setting aside that order of dismissal. The learned Controller held that there was no scope for an application under Sec. 151 of the Code of Civil Procedure and accordingly rejected that application. The present Rules were issued in respect of that order. On behalf of the opposite party, Mr. M. M. Mukherjee relies on a decision of this Court as (1964) 68 Cal WN 1064, Sibani Rani Dutta v. Balal Chandra Dutta. Clearly, if this decision holds the ground, the learned Munsif's opinion that there was no scope for an application under Sec. 151 of the Code of Civil Procedure, would stand.

2. It would however appear that there is a contrary decision of this Court by another Division Bench in Civil Rule No. 1901 of 1957 (Cal). That matter was disposed of on the 23rd July 1958 and there an application under Order 21, Rule 90 was dismissed for default and an application under Sec. 151 of the Code of Civil Procedure filed by the judgment-debtor was rejected by the learned Subordinate Judge on the ground that an application under Sec. 151 of the Code of Civil Procedure did not lie. But this Court held that though an appeal did lie against such an order still there was scope for application under Section 151 of the Code of Civil Procedure.

3. In this case Mr. Mukherjee has further pointed out that every order passed by the Thika Tenancy Controller is appealable and accordingly this impugned order in this case was appealable and as such Section 151 of the Code of Civil Procedure would have no application. He relies on the decision (1964) 68 Cal WN 1064.

4. It is clear that there is a conflict of decisions between the Division Benches on the point in issue. In Civil Rule No. 3828 of 1967 (Cal) disposed of by me on the 11th July, 1969, I have preferred to follow the unreported decision of this Court in Civil Rule No. 1901 of 1957 (Cal). To me it appears that the scope of an appeal is limited and the point of absence cannot be usually considered. But an application under Sec. 151 of the Code of Civil Procedure would enable the Court to do that and would lie in the circumstances, and the application should have been considered by the learned Controller on merits.

5. The result, therefore, is that both these Rules are made absolute. The impugned order passed by the learned Controller is set aside and he is directed to dispose of the applications on merits. As the matter is dragging for long, he should dispose of the applications within two months from the date of the arrival of the records. If the petitioners take no steps to adduce evidence on the applications under Section 151 of the Code of Civil Procedure, the learned Controller would have every jurisdiction to dismiss that application for default.

Order accordingly.

AIR 1970 CALCUTTA 241 (V 57 C 48)

R. N. DUTT AND A. K. BASU, JJ.

Punyananda Avadhut, Petitioner v. State and others, Opposite Parties.

Criminal Misc. Case No. 501 of 1969. D/- 18-9-1969.

(A) Criminal P. C. (1898), S. 526 — Mistake in heading of application — Application intended to be one under Section 526(1)(e) stated to be by mistake as one under S. 526(1)(a) — High Court can still pass appropriate order for transfer. (Para 3)

(B) Criminal P. C. (1898), S. 526(3) — 'Party interested' — Meaning of — Person who lodges F.I.R. is 'party interested' in case prosecuted by State — AIR 1920 Pat 836 & AIR 1953 All 698, Dissent. from — Even assuming that such person is not competent to make application under Section 526, there is no bar to make order of transfer if High Court is otherwise

satisfied that facts and circumstances of case justify such transfer.

The person who lodges a first information report, is a "party interested" within the meaning of S. 526(3) of the Code in a case prosecuted by the State.: AIR 1955 Assam 116 & AIR 1962 All 288, Rel. on.; Criminal Misc. Case No. 86 of 1946 (Cal) & AIR 1930 Lah 873, Disting.; AIR 1920 Pat 836 and AIR 1953 All 698, Dissent. from.

The word "party" is not defined in the Code. The dictionary meaning is "each of the two or more persons making two sides in legal action". But then, in subsec. (3) the word "party" is qualified by the word "interested". The person at whose instance the prosecution was started is certainly interested in the case and the "party interested" should also include such a person.

Even assuming that such a person is not competent to make an application under S. 526 of the Code, there is no bar to High Court making an order for transfer if it is otherwise satisfied that the facts and circumstances of the case justify such a transfer. (Para 4)

(C) Criminal P. C. (1898), Ss. 526(1), 270(c) — Grounds of transfer — Expedient for the ends of justice — No Public Prosecutor available to conduct prosecution before Sessions Judge — Furthermore one of accused who was at time of incident Local Block Development Officer, continuing as Sub-Deputy Collector at that place — Though accused had nothing to do with Sessions Judge hearing case witnesses would be people of locality where accused was Block Development Officer at relevant time and was still officer where trial was to be held — Held it would be expedient for ends of justice that trial should be held elsewhere though that meant inconvenience to accused who had already engaged lawyers and paid their fees. (Para 5)

Cases Referred: Chronological Paras

(1962) AIR 1962 All 288 (V 49) = 1962 (1) Cri LJ 703, Bhushan Jain v. State 4

(1955) AIR 1955 Assam 116 (V 42) = 1955 Cri LJ 923, N. C. Bose v. Probodh Dutta Gupta 4

(1953) AIR 1953 All 698 (V 40) = 1953 Cri LJ 1553, Sri Krishna v. Baijnath 4

(1930) AIR 1930 Lah 873 (V. 17) = 31 Cri LJ 1174, Ram Sarup v. Mohd. Mehr Dil Khan 4

(1946) Criminal Misc. Case No. 86 of 1946 (Cal), Beharilal Mondal v. Brindaban Pramanik 4

(1920) AIR 1920 Pat 836 (V 7) = 20 Cri LJ 648, Jamuna Kanth Jha v. Rudra Kumar Jha 4

N. C. Banerjee and Arun Kumar Mukherjee, for Petitioner; Kishore Mukherjee, for Opposite Parties Nos. 2 to 33; S. N. Banerjee, D.L.R., for State.

R. N. DUTT, J.:— On some first information report lodged by the petitioner, the police made an investigation and thereafter submitted a charge-sheet against the opposite parties Nos. 2 to 33. There was an enquiry under Chapter XVIII of the Code of Criminal Procedure and the said opposite parties were committed to the Court of Session at Purulia under Sections 120-B, 147, 148, 149, 302 and 436 of the Indian Penal Code. The case is now pending trial before the Sessions Judge, Purulia.

2. The petitioner has obtained this Rule with a view to get the case transferred from the Sessions Court at Purulia to some other Sessions Court for trial. The State has entered appearance and Mr. Banerjee, the learned Deputy Legal Remembrancer, informs us that the State neither supports nor opposes the Rule. Mr. Mukherjee appears for the opposite parties Nos. 2 to 33 and opposes this Rule.

3. Mr. Mukherjee at the outset takes two preliminary objections. He submits that the petitioner makes no aspersion or allegation against the Sessions Judge and so, there is no scope for transfer of the case from his Court under Sec. 526(1)(a) of the Code. We find that the petitioner's application bears a heading "an application under Sec. 526(1)(a) of the Code of Criminal Procedure." Mr. Banerjee, who appears for the petitioner, concedes that the application is not really an application under Sec. 526(1)(a) of the Code but is an application under Sec. 526(1)(e) of the Code and the heading contains an unfortunate mistake. It is true that there is no aspersion or allegation against the Sessions Judge, Purulia, before whom the case is now pending for trial and so, the case does not really fall under CL (a) of Section 526(1) of the Code. Since the matter is now before us, we will have to consider if it does fall under CL (e) of Sec. 526(1) of the Code and if it does, we do not think that we are incompetent to make an appropriate order for transfer only because the heading of the application makes it an application under CL (a) of Sec. 526 (1) of the Code. This objection raised by Mr. Mukherjee does not, therefore, lead us to discharge the Rule on that ground.

4. Mr. Mukherjee's other preliminary objection is that the petitioner has no locus standi to make an application for transfer under Sec. 526 of the Code in the instant case. The case is being conducted by the State. But the police took cognizance of the case on some first information report lodged by the petitioner. The question for consideration, therefore,

arises if the petitioner can be said to be a "party interested" within the meaning of sub-sec. (3) of Sec. 526 of the Code. Sub-sec. (3) reads as follows:—

"A High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative."

Mr. Mukherjee submits that the words "party interested" do mean and include only the State and the accused persons; the person on whose information the police took cognizance is not a "party interested", because at the trial he is not interested as it is a State prosecution. It is difficult to accept this interpretation of the words "party interested". The word, "party" is not defined in the Code. The dictionary meaning is "each of the two or more persons making two sides in legal action". But then, in sub-sec. (3) the word "party" is qualified by the word "interested". The person at whose instance the prosecution was started is certainly interested in the case and the "party interested" should also include such a person. Mr. Mukherjee refers to the unreported decision of a Division Bench of this Court in Criminal Misc. Case No. 86 of 1946 (Cal), *Bihari Lal Mondal v. Brindaban Pramanik*, where this Court said that when a prosecution is founded on a complaint of a Court under Sec. 476 of the Code of Criminal Procedure, a person moving the court to take the action cannot be considered to be a "party interested" within the meaning of sub-sec. (3) of Sec. 526 of the Code. He also refers to the decision of the Lahore High Court in *Ram Sarup v. Mohammad Mehr Dil Khan*, 31 Cr LJ 1174=(AIR 1930 Lah 873), which also says the same thing. But then, these cases are not on all fours with the present case. Here, the petitioner is not such a person; but he is a person on whose first information report the instant prosecution was started and so, those decisions are not attracted to the facts of this case. Mr. Mukherjee thereafter refers to the decision of the Patna High Court in *Jamuna Kanth Jha v. Rudra Kumar Jha*, 20 Cr LJ 648=(AIR 1920 Pat 886) and the decision of the Allahabad High Court in *Sri Krishna v. Baijnath*, AIR 1953 All 698, and submits that both the Patna and the Allahabad High Courts have held that a person, who lodges the first information report, is not a "party interested" within the meaning of Sec. 526(3) of the Code. Not only these cases but there are some other cases of some other High Courts also which have taken this view. But then, the contrary view has been taken in various other cases by the different High Courts. We will refer to the decision of the Assam High Court, in *N. C. Bose v. Probodh Dutta Gupta*, AIR 1955 Assam 116, where the Assam High Court has

considered not only the cases referred to by Mr. Mukherjee but various other cases and finally came to the conclusion that a person on whose information a prosecution is started is a "party interested" within the meaning of Sec. 526(3) of the Code. The Allahabad High Court in a Division Bench decision in 1962 has also found this. This we find in the decision in *Jag Bhushan Jain v. State*, AIR 1962 All 288. The question whether a person, who lodges a first information report, is a "party interested" within the meaning of Section 526(3) of the Code in a case prosecuted by the State was referred to a Division Bench and the Division Bench on a consideration of all the relevant decisions on this point came to the conclusion that such a person is a "party interested". With respect we agree with the reasonings and the findings of the Assam and the Allahabad cases reported in the aforesaid decisions. Furthermore, this point is more or less academic in this case because, as we have quoted sub-sec. (3) of Section 526 of the Code, it will be clear that the High Court can make an order for transfer even on its own initiative. Even if it be held that the petitioner is not a "party interested" within the meaning of Sec. 526(3) of the Code, now that the matter is before us and if we think that this is a case which should be transferred from the district of Purulia, we can do that on our own initiative. The fact that the matter was brought to our notice by the petitioner, will not bar or prevent us from exercising that jurisdiction and so, even if we hold that the petitioner was not competent to make the instant application under Section 526 of the Code, there is no bar to our making an order for transfer if we are otherwise satisfied that the facts and circumstances of the case justify such a transfer. We will, therefore, consider the matter on merits now.

5. We find that the enquiry before the committing Magistrate at Purulia was conducted by the Public Prosecutor of Bankura who was appointed by the State Government to conduct this prosecution at Purulia. We find, however, that after the commitment was made the Public Prosecutor, Bankura, is no longer available for conducting the prosecution before the Sessions Judge and Mr. Banerjee, the learned Deputy Legal Remembrancer, informs us that the State has engaged one Assistant Public Prosecutor from Asansol to conduct the case before the Sessions Judge, Purulia. It thus appears that no Public Prosecutor will be available at Purulia for conducting this prosecution. Furthermore, we find that one of the accused persons, who was the local Block Development Officer at the time of the incident and against whom serious allegations have been made,

is now a Sub-Deputy Collector posted at Purulia, Sadar. True, the case is to be heard by the Sessions Judge with whom the said accused person has nothing to do. But the prosecution witnesses will be the people of the locality where the accused was the Block Development Officer at the relevant time and he is still an officer at Purulia where the trial is to be held. We feel that it would be expedient for the ends of justice that the trial should be held elsewhere than at Purulia. Mr. Mukherjee no doubt tells us that the accused persons will be much prejudiced in view of the fact that they have engaged their lawyers who have been paid their fees. That is certainly of some consideration. But then, for the other reasons which we have said, we feel that even if that means some inconvenience to the accused persons the trial should be held elsewhere. We hold, therefore, that it is expedient for the ends of justice that this case should be transferred for trial from the district of Purulia.

6. In the result, the Rule is made absolute. Let the instant sessions case be transferred from the district of Purulia to the district of Midnapore to be tried by the Sessions Judge at Midnapore as expeditiously as possible.

7. Let the records be sent down at once.

8. AJAY K. BASU, J.:— I agree.

Order accordingly.

AIR 1970 CALCUTTA 243 (V 57 C 49)
MASUD, J.

East India Construction, Co. (P) Ltd.,
Petitioner v. Union of India, Respondent.
Matter No. 114 of 1969, D/- 15-9-1969.

Arbitration Act (1940), Ss. 8 (1) (b), 8 (1) (a), 9 and 20 — Arbitrator refusing to act — Appointment of two arbitrators by General Manager of Railway, as contemplated by arbitration agreement — After entering upon reference, refusal by one to continue as arbitrator — Agreement not providing that vacancy should not be filled in — Held, S. 8 (1) (b) was attracted and not S. 8 (1) (a), 9 or 20 — Court was competent to appoint arbitrator in vacancy caused and not General Manager.

The arbitration clause provided that for the purpose of appointing two Arbitrators, the Railway will send a panel of more than three names of officers of the appropriate status to the Contractor who will be asked to suggest a panel of three names out of the list so sent by the Railway. The General Manager will appoint one Arbitrator out of this panel as Contractor's nominee and then appoint a second Arbitrator of equal status as a Rail-

way nominee either from the panel or from outside the panel. The clause did not provide that the vacancy caused by refusal of one of arbitrators, after entering upon the reference, should not be filled in.

The General Manager appointed two arbitrators as contemplated by the clause. Sometime after the said arbitrators entered upon the reference, one of them expressed his inability to continue to work as arbitrator in the matter. On a question whether the General Manager or the Court was competent to appoint arbitrator in the vacancy caused,

Held, Section 8 (1) (b) of the Arbitration Act was attracted and the Court was competent to appoint the arbitrator in the vacancy caused, and not the General Manager. As arbitrators were not to be appointed by the consent of the parties, Section 8 (1) (a) was not attracted. Section 8 (1) (b) did not contemplate cases where arbitrators were to be appointed by consent of the parties. Even assuming that Section 8 (1) (b) did contemplate such cases, the parties in the case might be said to have consented to the appointment of two arbitrators. AIR 1965 Cal 183, Rel. on; AIR 1943 Cal 484 & AIR 1958 Cal 620 & AIR 1964 All 477 & AIR 1961 Pat 228 & (1892) 1 QB 81, Disting. (Para 6)

Held further that in absence of specific provision in agreement giving General Manager power to fill up vacancy, power to appoint arbitrator got exhausted once it was exercised by the General Manager and in such a situation Court only was competent to appoint arbitrator.

(Para 7)

The power of an appointing authority to appoint successive arbitrators could not be lawfully exercised unless there was special clause to that effect in the arbitration clause itself. There must be some evidence to show that the parties had intended that, in such a case, the power of the appointing authority to appoint a new arbitrator was revived and the arbitration clause itself was the proper medium where such intention could find its expression. Further, there were good reasons why the power of the appointing authority should be exhausted, once he had exercised that power. If the power was not exhausted, a difficult situation might arise; for instance, if the Union of India was not satisfied with the conduct of the appointed arbitrator, such arbitrator might be transferred by the Union of India to enable the appointing authority to have a substituted arbitrator on the plea of the first arbitrator's inability to continue as arbitrator. AIR 1954 Punj 190 & (1892) 1 QB 81, Rel. on; AIR 1925 Sind 12 & AIR 1965 Cal 183, Ref. (Para 7)

Held further that Sections 9 and 20 were not attracted. Section 9 contemplated cases where disputes were referred to two arbitrators, one to be appointed by each

party. Here, arbitrators were to be appointed by General Manager and not by respective parties. Section 20 also did not apply when reference had already commenced. AIR 1964 All 108 (FB), Rel. on. (Para 4)

- Cases Referred: Chronological**
- (1965) AIR 1965 Cal 183 (V 52),
Surendra Nath Paul v. Union of India 2, 6, 7
- (1964) AIR 1964 All 108 (V 51) =
ILR (1964) 1 All 34 (FB), Mangal Prasad v. Lachman Prasad - 2
- (1964) AIR 1964 All 477 (V 51) =
ILR (1964) 1 All 564, Union of India v. Gorakh Mohan Das 3, 8
- (1961) AIR 1961 Pat 228 (V 48),
Union of India v. D. P. Singh 8
- (1958) AIR 1958 Cal 620 (V 45) =
62 Cal WN 773, Ram Chandra R. N. R. R. and C. Mills v. H. O. Mills 3, 8
- (1954) AIR 1954 Punj 190 (V 41) =
56 Pun LR 187, Shamjimal v. Sefton and Co. Ltd. 2, 7
- (1943) AIR 1943 Cal 484 (V 30) =
47 Cal WN 570, Subal Chandra v. Md. Ibrahim 3, 8
- (1925) AIR 1925 Sind 12 (V 12) =
76 Ind Cas 261, M/s. A. Ramji Bhai & Co. v. Yusuf Ali Md. Ali Antra and Bros. 2, 7
- (1892) 1 QB 81 = 61 LJQB 237,
Wilson and Sons v. Eastern Counties Navigation and Transport Co. 7, 8
- M. Hazra, for Petitioner; P. K. Sen and Bachawat, for Respondent.

JUDGMENT:— This application raises an important point of law which, on the facts of the present case, appears to be a matter of first impression. The petitioner company has made the present application under Section 8 of the Indian Arbitration Act, 1940 for the appointment of one Mr. N. S. Tyebji, retired Chief Engineer, Eastern Railway as the Arbitrator in place of one of the appointed arbitrators Mr. K. Ramani. The circumstances under which this application has been moved may be stated as follows:—

The petitioner entered into an agreement on February 2, 1963 with the respondent for construction of certain railway quarters at Dhanbad. The said agreement contains an arbitration clause which is Cl. 63, the relevant provisions of which are stated below.

"Arbitration: (a) Matters in question, dispute or differences to be arbitrated upon shall be referred for decision to:—

- (i)
- (ii) Two arbitrators who shall be Gazetted Officers of equal status to be appointed in the manner laid down in Cl. 3 (b) for all claims of Rs. 50,000 and above, and in all claims irrespective of the amount or value of such claims, if the issues involved are of a complicated nature, the General Manager shall be the sole Judge to

decide whether the issues are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matters in dispute will be referred to an Umpire to be appointed in the manner laid down in Cl. 3 (b) for its decision.

(a)

(b) For the purpose of appointing two Arbitrators as referred to in sub-clause (a) (ii). The above Railway will send a panel of more than three names of officers of the appropriate status of different departments of the Railway to the Contractor who will be asked to suggest a panel of three names out of the list so sent by the Railway. The General Manager will appoint one Arbitrator out of this panel as Contractor's nominee and then appoint a second Arbitrator of equal status as a Railway nominee either from the panel or from outside the panel, ensuring that one of the Arbitrators not nominated is invariably from the Accounts Department. Before entering into reference the two Arbitrators shall nominate an Umpire to whom the case will be referred in the event of any difference between the two Arbitrators

(e) Subject as aforesaid, the Arbitration Act, 1940 and the Rules thereunder and any statutory notification thereof shall apply to the arbitration proceedings under this contract."

In accordance with the said procedure for appointment of two Arbitrators the General Manager appointed Mr. Ramani, Officer on Special Duty, South Eastern Railway, Garden Reach as the Arbitrator, being the Contractor's nominee and also appointed Mr. K. C. Bose, Deputy Finance Adviser, Eastern Railway as Arbitrator, being Railway's nominee and the disputes and differences between the parties were referred to the said Arbitrators in terms of the said agreement. The said Arbitrators entered upon the reference on or about August 5, 1966. On August 24, 1968, Mr. Ramani wrote a letter to the General Manager, Eastern Railway informing him his inability to continue as Arbitrator in the said matter. On March 1969 the Chief Engineer, Eastern Railway wrote a letter to the petitioner company stating that the General Manager would take steps to appoint another Arbitrator in place of Mr. Ramani in accordance with the procedure mentioned in the said Arbitration Clause. On March 24, 1969 the petitioner wrote a letter to the respondent that, as Mr. Ramani had refused to act any further, the company gave the Railway their notice to concur in the appointment of the said Mr. Tyebji in place of Mr. Ramani. In the said notice, it was also stated that if the respondent did not concur in the said appointment within 15 days from the date of service the company

would apply to Court for necessary orders. The respondent did not reply to the said letter and the petitioner has moved the present application on 25th April, 1969.

2. It may be stated here that the facts in this case are not disputed. The short point to be decided in this application is whether it is lawful for the General Manager to appoint an Arbitrator in place of Mr. Ramani in accordance with the procedure mentioned in the Arbitration Clause or whether the Court will appoint an Arbitrator in place of Mr. Ramani. Mr. M. Hazra, counsel for the petitioner, in moving the present application has contended that this is a fit case for the Court under Section 8 of the Arbitration Act to appoint an arbitrator in the vacancy caused by refusal of Mr. Ramani to continue as arbitrator. In support of the said contention he has relied upon *Shamjimal v. Sefton & Co. Ltd.*, AIR 1954 Punj 190, *M/s. A. Ramji Bhai & Co. v. Yusuf Ali Md. Ali Antra & Bros.*, AIR 1925 Sind 12 and *Surendra Nath Paul v. Union of India*, AIR 1965 Cal 183.

3. Mr. P. K. Sen in the present application and also Mr. Bachawat in a similar application in the next matter on behalf of the respondent, Union of India, have, on the contrary, contended that, in the facts and circumstances of the present case, both under the said arbitration clause and also under the provisions of the Indian Arbitration Act this application is not maintainable and should be dismissed. In support of their contention they have distinguished the cases cited by Mr. Hazra and also relied upon *Subal Chandra v. Md. Ibrahim*, AIR 1943 Cal 484, *Union of India v. Gorakh Mohan Das*, AIR 1964 All 477, and also *Ram Chandra R. N. R. R. & C. Mills v. H. O. Mills*, AIR 1958 Cal 620.

4. It is now for me to examine the contentions of the counsel for both parties. The cases relied on by the counsel are certainly relevant but they mostly refer to cases of arbitration where the arbitration clause provided the appointment of a sole Arbitrator or the appointment of joint arbitrators at the initial stage of the reference. The facts in the present case, as stated above, stand on a different footing inasmuch as a new situation has arisen after the commencement of reference proceedings by two validly appointed arbitrators in terms of the contract. Mr. Hazra had made it clear that his client has to make the present application under Section 8 of the Arbitration Act as no other section in the Act, according to him, is applicable. Mr. Sen however, has argued that in the present case the application should have been made under Section 9 or under Section 20 of the Act. In my view, Section 9 of the Act contemplates cases where disputes are referred "to two arbitrators, one to be appointed by each party".

The arbitration clause, in the present case, clearly provides that the General Manager is authorised to appoint the Railway's nominee and also the petitioner's nominee. Thus this is not a matter where the petitioner and the respondent are to appoint their respective arbitrators under the arbitration clause. It is true that the arbitration clause provides that the contractor is to select its arbitrators from a panel of three arbitrators supplied to it by the General Manager from a panel of arbitrators exceeding three and it is also true that the General Manager will also appoint another person as an arbitrator from or outside the panel as the respondent's nominee. But the fact remains that the appointment of the two arbitrators is to be made by the General Manager. Thus, it is not a case where the petitioner and the respondent will appoint their respective arbitrators. Similarly, I accept the contention of Mr. Hazra that the application is not maintainable under Section 20 of the Act also. Section 20 does not apply to a case where the reference has already commenced. Application under Section 20 is made at the stage where, in spite of the arbitration clause, for some reason or other, the party or parties do not proceed with the arbitration. Reliance may be placed on the Full Bench decision in *Mangal Prasad v. Lachman Prasad*, AIR 1964 All 108.

5. In my view this is a case where application under Section 8 is maintainable. Section 8 of the Act reads as follows:—

"8. (1) In any of the following cases—

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an

award as if he or they had been appointed by consent of all parties."

6. Section 8 (1) provides that in any of the following cases, as set out in (a), (b) or (c), any party may serve the other party with a written notice to concur in the appointment of an arbitrator where a vacancy has arisen. If, after such notice, the other party does not concur in the appointment of the arbitrator mentioned in the notice, the party giving notice may make an application to the Court to appoint an arbitrator. Admittedly, this is not a case under Section 8 (1) (a) inasmuch as the two arbitrators are not to be appointed by consent of the parties. Mr. Hazra is right when he has stated that the present case would come under the second contingency mentioned in Section 8 (1) (b). Mr. Sen and Mr. Bachawat on behalf of the Union of India have submitted that Section 8 (1) (b) also contemplates cases where the arbitrators are to be appointed by consent of the parties. According to them, the appointment of arbitrators under the arbitration clause in this case is not to be made by consent. In my view, this contention cannot be accepted. The two contingencies mentioned in S. 8 (1) (a) and 8 (1) (b) mentioned in the said sections have been expressed in disjunctive form. Section 8 (1) (a) has specifically mentioned the words, "one or more arbitrators to be appointed by consent of the parties", whereas Section 8 (1) (b) does not mention the said words. Obviously where the arbitrators are not to be appointed by consent, Section 8 (1) (b) is attracted and, as such, there is nothing unlawful for the petitioner to serve the respondent with a written notice to concur in the appointment of Mr. Tayebji as the petitioner's nominee. As the respondent has not concurred in the said appointment, the petitioner has validly moved the present application for appointment of the arbitrator by Court. My attention has been drawn to some of the observations of Mr. Paruck where opinions have been expressed that Section 8 (1) (b) is also referable to cases where the arbitrators are to be appointed under the arbitration clause by consent of the parties. In my view those observations are not warranted by the words expressed in Section 8 (1) (b). Even assuming that Section 8 (1) (b) applies to cases where the joint arbitrators are to be appointed by consent of the parties, there is nothing which debars the Court to appoint an arbitrator under Section 8 (1) (b) of the Arbitration Act, vide AIR 1965 Cal 183 (supra, at para. 17, p. 183). Further, it may also be argued that the appointment of the arbitrators in the present case has been made as a result of consent of the parties themselves. The parties not only have entered into the arbitration agreement but also have agreed to the pro-

cedure to be adopted in the appointment of arbitrators. The petitioner and the respondent have agreed that for appointment of arbitrators the General Manager will supply a panel of more than three persons to the contractor for the latter's selection and the contractor will select three persons from the said panel, out of which the General Manager will appoint one as the contractor's nominee. It is also agreed that the General Manager will appoint another person from within or outside the said panel as the respondent's nominee. Thus the parties under the Arbitration Clause may be said to have consented to the appointment of two arbitrators by following the said procedure, vide AIR 1965 Cal 183 (supra, at para. 11, p. 186).

7. There is another reason why the petitioner ought to succeed in the present application. The parties in the present case are petitioner-company and the respondent Union of India and they have agreed to have two arbitrators appointed by a third party, a persona designata, namely, the General Manager of the Railways. The General Manager, for the purpose of this reference, has already appointed the two arbitrators, namely, Mr. K. Ramani as the contractor's nominee and Mr. K. C. Bose as the Railway's nominee. During the pendency of the reference, a vacancy has been caused and the arbitration agreement does not state that the vacancy would not be supplied. Nor the agreement provides that the parties would not supply the vacancy. Admittedly Mr. Ramani has neglected or refused to act or is being incapable of acting on account of alleged pressure of work as set out in Mr. Ramani's letter dated 24th August, 1968. In the premises, if the vacancy of Mr. Ramani has again to be filled up by the General Manager, who strictly speaking, is not a party in dispute, such exercise of authority by the General Manager will be outside the Arbitration Agreement. If parties have empowered a third party to appoint two arbitrators under the Arbitration clause and the said third party has exercised that power by appointing them and if, after exercise of such power, one of the appointed arbitrators fails or neglects or is incapable to continue and a vacancy is caused, the Court alone can supply the vacancy unless there is a machinery provided in the Arbitration Clause itself to meet such a contingency, vide *Wilson & Sons v. Eastern Counties Navigation & Transport Co.*, (1892) 1 QB 81 at p. 83. In such a case, the power of a third party is exhausted after the exercise of his power or authority under the agreement. The proper construction of Section 8 (1) (b), in my view, is that where the appointed arbitrator neglects or refuses to act or is incapable of acting or dies and there is no machinery in the arbi-

tration clause itself providing for such contingency, the Court may appoint an arbitrator. The Arbitration agreement may specifically provide a procedure to appoint an arbitrator if a vacancy arises after one of the appointed arbitrators expresses his inability to continue arbitration. In the present case the arbitration clause does not provide such a contingency and, as such, the third party's jurisdiction to appoint another arbitrator in supplying the vacancy is ousted. Reliance may be placed on the observations of Bhandari, C. J. in AIR 1954 Punj 190 (Supra) at para 192 where the learned Judge in a similar situation has made the following observations:—

"The Director General having exercised the power of nomination vested in him by appointing Mr. Rao exhausted his power and had no power to appoint Bakhsh Shihcharan Singh or any other arbitrator."

In this connection very often some learned Judges have expressed their view that if the arbitration clause provides the appointment of an arbitrator by third party with the qualification that such person is authorised to appoint an arbitrator "willing to act" then in such a case the power of such third party is not exhausted if subsequently the arbitrator appointed by him expresses his unwillingness to act. Reference may be made to AIR 1925 Sind 12 and also AIR 1965 Cal 183 (Supra). With great respect to the learned Judges it seems to me that, logically speaking, the addition of the words "willing to act" should not make any substantial difference on the legal position. Whenever an appointing authority appoints a particular person as an arbitrator, it is obvious that such appointment is subject to his willingness to act. There is no sense in appointing a person who is unwilling to act. It is true that willingness to act means willingness to continue to act till the award is made. But the main point is that after a particular person is appointed an arbitrator who at initial stage has expressed his willingness to act can the appointing authority again exercise its power to appoint another arbitrator, if subsequently the appointed arbitrator expresses his unwillingness to act? In my view, the authority to appoint an arbitrator, once executed, cannot be executed again, unless, of course, the arbitration agreement itself provides for such a situation. The power of an appointing authority to appoint successive arbitrators cannot be lawfully exercised unless there is special clause to that effect in the arbitration clause itself. There must be some evidence to show that the parties have intended that, in such a case, the power of the appointing authority to appoint a new arbitrator is revived and the arbitration clause itself is the proper medium where

such intention could find its expression. Further, there are good reasons why the power of the appointing authority should be exhausted, once he has exercised that power. If the power is not exhausted, a difficult situation might arise; for instance, if the Union of India is not satisfied with the conduct of the appointed arbitrator, such arbitrator might be transferred by the Union of India to enable the appointing authority to have a substituted arbitrator on the plea of the first arbitrator's inability to continue as arbitrator. Even assuming that the additional qualification "willing to act" makes a difference, in the instant case before me, there is no such additional qualification in the arbitration clause and, as such, the power of the General Manager to appoint another arbitrator as the contractor's nominee has already been exhausted.

8. Before I conclude, reference may be made to some of the decisions on which the counsel for the petitioners and the respondent have relied. As stated earlier, the facts in those decisions are all distinguishable from the facts of the present case. In AIR 1943 Cal 484 the arbitration clause provided for reference of disputes to a single arbitrator in case if the parties agreed upon one, and otherwise to two arbitrators one to be appointed by each party to the differences. But in that case there were three parties to the differences and, as such, the arbitration clause became unworkable. Das, J. rightly came to the conclusion that an application under Section 8 of the Arbitration Act was not maintainable in such a case. The learned Judges in the Bench decision of the Calcutta High Court in AIR 1958 Cal 620 (supra) and also the Full Bench decision in AIR 1964 All 477, have held that Section 8 of the Arbitration Act has no application where the arbitration clause provides that two arbitrators, one to be nominated by each of the two parties, were to be appointed inasmuch as such joint appointment is not a case of appointment by consent of the parties. It may be stated here that in both these cases the question of an appointment of an arbitrator arose before the commencement of the reference. Similarly the decision in Union of India v. D. P. Singh, AIR 1961 Pat 228 relates to a case of the appointment of an arbitrator under Section 3 (1) (a) of the Act. In that case the arbitration clause contemplates a reference of the disputes to the sole arbitration of an officer nominated by the General Manager, Railways. The learned Judge has come to the conclusion that as the parties had agreed to have the nominee of the General Manager as the sole arbitrator the appointment of such arbitrator was deemed to have been made by consent of the parties under Section 3 (1) (a) of the Act. Or, in other words, the word

"consent" in Section 3 (1) (a) of the Act was construed to include implied consent also. The decision in (1892) 1 QB 81 (Supra) refers to the principal question there whether the conduct of an arbitrator who has gone abroad is to be construed as refusal to act as an arbitrator. In the said decision, however, the learned Judges have held that unless there is a machinery in the arbitration clause itself to supply the vacancy in a case where the appointed arbitrator refuses to act, the Court has the jurisdiction to appoint a new arbitrator in such a contingency. The arbitration clause in the said case specifically says that "the differences should be referred to Mr. Martineau, or failing him, a person to be nominated by the President of the Institution of Civil Engineers." On the construction of the said arbitration clause, the learned Judges came to the conclusion that the arbitration clause there clearly provided that in the event of failure of Mr. Martineau to act, a nominee of the President of the Institution of Civil Engineers would be the arbitrator and, as such, it was held that the Court had no jurisdiction to appoint an arbitrator.

9. For the reasons stated above the contention of Mr. Hazra should be accepted. The parties have not made any submission on the question whether Mr. N. S. Tayabji, retired Chief Engineer, Eastern Railway, should be appointed by the Court as the arbitrator in place of Mr. Ramani as set out in paragraph "A" of the petition. No comment has been made on the proposal to appoint Mr. Tayabji nor any allegation has been made against him. In the premises, there will be order in terms of prayer "A". It may be added here that no argument has been made on the question whether Mr. Tayabji should be appointed as the sole arbitrator under Section 8 of the Arbitration Act. As the present application involves substantial point of law I direct that each party will bear its own costs.

Order accordingly.

AIR 1970 CALCUTTA 248 (V 57 C 50)

N. C. TALUKDAR, J.

Sukarnal Kanti Ghosh, - Petitioner v. Shoulmari Ashram and another, Opposite Parties.

Criminal Revn. Case No. 40 of 1968, D/- 29-8-1969.

(A) Criminal P. C. (1893), S. 198 — "Person aggrieved by such offence" — Institution of proceedings under S. 500, Penal Code on complaint alleging defamation of Ashram — Complaint filed by member of Ashram — Complainant not being a "person aggrieved" cognizance taken under S. 198 is improper and vitiates proceedings. AIR 1970 Cal 216, Rel. on.

(Paras 3 and 4)

LM/AN/G98/69/GKC/M

(B) Penal Code (1860), Ss. 499-500, Expl. 2 — Imputation concerning class or collection of individuals — Allegation as to defamation of Ashram in complaint filed by member of Ashram — Action not maintainable as Ashram is an indeterminate body. AIR 1970 Cal 216, Rel. on. (Paras 3 and 4)

(C) Constitution of India, Art. 20 (2) — Separate proceedings under S. 500, Penal Code over same publication against same accused — Maintainability — It is bad and improper and may lead on to double jeopardy. (Para 5)

Cases Referred: Chronological Paras

(1970) AIR 1970 Cal 216 = Cri. Revn.
Case No 1244 of 1967, D/- 29-8-1969, Dharendra Nath Sen v. Rajat Kanti Bhadra 3

Ajit Kumar Dutt, Prasun Chandra Ghosh and Birendranath Banerjee, for Petitioner; Ramendra Kumar Roy, for Opposite Party No. 2.

ORDER:— This Rule is connected with the other Rule disposed of by me viz., Criminal Revision Case No. 1244 of 1967 and is for quashing the proceedings under Section 500 of the Indian Penal Code, pending before Sri A. K. Roy, Magistrate, 1st Class, Mathabhanga, Cooch Behar, in case No. C. R. 4 of 1966.

2. The facts leading on to the present Rule are short and simple. The complainant Jnanendra Chandra Banerjee, claiming himself to be a member and worker of the Shoulmari Ashram, P. S. Mathabhanga and also to represent the said Ashram, filed a complaint under Section 500, I. P. C. on 4-1-1966 in the Court of Sri H. R. Dass, Magistrate, 1st Class, Mathabhanga, Cooch Behar, against the two accused, Sookomal Kanti Ghose, Editor of a Bengali Daily called the "Jugantar" and Dhirendranath Sen, Printer and Publisher of the said Daily. The impugned publication is an item of news served by the P. T. I. and U. N. I., news agencies, and appeared in the issue of the above mentioned Daily dated the 7th December, 1965 under the sub-heading "Shoulmari Sadhu", the English translation whereof is as follows: "The Foreign Minister stated that the Sadhu of Shoulmari who calls himself to be Subhaschandra Bose is not Netaji and the Government has no least doubt about this fact that he is not". The complainant alleged that as the offending publication containing harmful and defamatory imputations concerned the Ashram and therefore, the complainant as a member thereof, the said complainant, on his own behalf and on behalf of the Ashram, was the "person aggrieved" and as such a competent person to file the complaint. The learned Magistrate observed that he was not competent to take cognizance and directed the file to be put up before the learned Sub-Divisional

Magistrate who examined the complainant on solemn affirmation on 17-3-66 and summoned the two accused persons under Section 500, I. P. C. The two accused thereafter appeared before the learned Sub-Divisional Magistrate and were released on P. R. Bond and granted personal exemption, on being represented by their lawyers. An application thereafter was filed by the complainant praying for summons to be issued against two other accused persons viz., K. S. Ramchandram and Kuldeep Nayar and on going through the said petition Sri H. R. Dass, Magistrate, 1st Class, Mathabhanga, Cooch Behar, by his order dated the 27th February, 1967 issued summons against the said two accused persons also under Section 500, I. P. C. The said proceedings under Section 500, I. P. C. were impugned and the present Rule was obtained.

3. Mr. Ajit Kumar Dutt, Advocate (with Messrs Prasun Chandra Ghosh and Birendranath Banerjee, Advocates) appearing on behalf of the accused-petitioners in support of the Rule made a three-fold submission, same as in the connected Rule, viz., that there has been no proper cognizance of the case due to a non-conformance to the mandatory provisions of Section 198 of the Code of Criminal Procedure inasmuch as the complainant is not a "Person aggrieved" within the meaning of that section and the relevant proceedings have been vitiated thereby; that even if it be assumed that the petition of complaint discloses a defamation of the Ashram, thereby touching the complainant as a member thereof, no action would lie under Section 500, I. P. C. as the Ashram is an indeterminate body; and that the impugned publication is not in any way defamatory and in any event, the proceedings are not maintainable in law in the absence of the two news agencies which served the news item. Besides the three grounds referred to above, Mr. Dutt raised two ancillary grounds that the institution of the present proceedings at the instance of the two complainants has been bad in law and improper; and that two separate proceedings over the same subject-matter and for the same offence are not maintainable against the same accused inasmuch as apart from unnecessary harassment, the same may lead on to double jeopardy. Mr. Ramendra Kumar Roy, Advocate, appearing on behalf of the complainant-opposite party No. 2, adopted the arguments made by Mr. Jana in Cri. Revn. Case No. 1244 of 1967 (reported in AIR 1970 Cal 216 and submitted inter alia that there has been no non-conformance to the provisions of S. 198 of the Code of Criminal Procedure inasmuch as the complainant-opposite party No. 2, Jnanendra Chandra Banerjee, being a member of the Ashram, is a "person aggrieved" because the Head of

the Ashram has been lowered in public estimation by the impugned publication; that the defamation alleged is not of an indeterminate body but of a particular Ashram, the religious Head whereof has been defamed, lowering all the members of the Ashram in public estimation thereby; and that on merits whether the impugned publication is defamatory or not, is a question of fact and as such is premature at this stage.

4. Having heard the learned Advocates appearing on behalf of the respective parties and on going through the legal materials on the record, I find that there is much force behind the first two contentions of Mr. Dutt, reasons wherefor have already been given in details in the judgment of the connected Rule and as such the present proceedings should be quashed. I hold however, that the third ground, being based ultimately on facts, is premature at this stage.

5. I will now deal with the two ancillary grounds raised by Mr. Dutt. The first one relating to the institution of the proceedings, on a joint complaint by two complainants, is more technical than real and has not vitiated the resultant proceedings. The accused persons have not been prejudiced thereby. As to the maintainability of two separate proceedings over the same publication against the same accused persons and over the same offence, it is bad and improper and may lead on to double jeopardy under Art. 20 (2) of the Constitution of India. This contention of Mr. Dutt therefore, also succeeds.

6. In the result, I make the Rule absolute; and I quash the proceedings under Section 500, I. P. C. pending in the Court of Sri A. K. Roy, Magistrate, 1st Class, Mathabhangha, Cooch Bebar, in case No. C. R. 4 of 1966.

Rule made absolute.

AIR 1970 CALCUTTA 250 (V 57 C 51)

D. BASU, J.

Kamal Mukharji, Petitioner v. Union of India and others, Respondents.

Civil Rule No. 277 (W) of 1967, D/- 30-9-1969.

(A) Constitution of India, Arts. 14, 16(1) — Posts of Upper Division Assistant and Junior Stenographer having same pay — Posts, in practice, classed together for further promotions — Non-statutory Rules subsequently framed making differentiation between those posts for purpose of promotion — Retrospective application of the Rules to employee appointed before the Rules are promulgated will be in contravention of Arts. 14 and 16 (1).

LM/AN/G339/69/MLD/M

Once recruits from different sources are integrated into one class, no discrimination can thereafter be made in favour of recruits from one source as against the other in the matter of promotion or other conditions of seniority. AIR 1967 SC 1889, Rel. on. (Para 13)

Where the posts of Upper Division Assistant and Junior Stenographer, having same pay, are classed together, in practice, for further promotion and the petitioner, initially appointed as typist and later confirmed as Lower Division Assistant, is promoted as Junior Stenographer without giving him an opportunity to choose between those two lines, then subsequent non-statutory rules, making differentiation between Stenographers and Upper Division Assistants for the purpose of promotions, cannot be applied retrospectively to the petitioner who has been appointed before the rules are promulgated. Retrospective application of the Rules will be a contravention of Arts. 14 and 16 (1). In view of the fact that there is nothing in the Rules to show that they shall have retrospective effect, to affect the petitioner by application of those Rules will both be ultra vires and unconstitutional. (Paras 14, 15)

(B) Constitution of India, Arts. 226, 16 (1) — Posts of Upper Division Assistant and Junior Stenographer having same pay classed together, in practice, for further promotions — Confirmed Lower Division Assistant promoted as Junior Stenographer — Subsequent non-statutory Rules, making differentiation between posts of Upper Division Assistant and Junior Stenographer for the purpose of promotion, erroneously applied retrospectively to such employee — Employee's only right under Art. 16 (1) is to be considered for promotion equally with Upper Division Clerks without being affected by those Rules. — Court cannot issue direction to promote that employee unless there is any statutory rule which gives him right to be promoted. (Para 19)

Cases Referred: Chronological Para

(1969) AIR 1969 SC 212 (V 56) — W. P. No. 31 of 1967, D/- 15-7-1968 = 1969 Lab IC 319, Sham Sunder v. Union of India 11

(1967) AIR 1967 SC 1889 (V 54) — 1968-1 SCR 185, Roshan Lal v. Union of India 12

(1965) AIR 1965 SC 868 (V 52) — 1964-7 SCR 471, State of Mysore v. M. H. Bellary 21

(1962) AIR 1962 SC 1139 (V 49) — 1962-44 ITR 532, Kishori v. Union of India 12

Arun Prokash Chatterjee, Manoranjan Basu, Bhupendra Kumar Das and Prafulla Kumar Roy (Jr.), for Petitioner; Prasanta Kumar Ghosh, for Respondents.

ORDER:—The prayers in this Petition are—

(a) That the Respondents be restrained from giving effect to the non-statutory Rules of 1952 (Annexure A to the Petition) for recruitment to non-Gazetted posts in the Department of Commercial Intelligence and Statistics under the Union of India (Respondent No. 1) and the order at Annexure H, dated July 19, 1957, modifying the Rule (the reference in the Prayer clause of the Petitioner to Annexure G is wrong); and

(b) That the Respondents be commended to promote the Petitioner to the post of Deputy Superintendent in that Department with effect from the year 1954.

2. The petitioner was initially appointed a Typist and confirmed as such in 1940. Later on, he was allowed to officiate as Lower Division Clerk and eventually the two posts of Typist and Lower Division Clerk were merged and the petitioner was confirmed in the post of Lower Division Clerk from June 1, 1948 (para. 2 of the affidavit-in-opposition).

3. The petitioner says that he has additional qualification in Stenography and that in view thereof, the petitioner was allowed to officiate occasionally as an Upper Division Assistant as well as a Junior Stenographer, till November, 1951, when he was confirmed as Junior Stenographer.

4. The Petitioner's case is that he was given no opportunity to choose between the two lines, Upper Division Assistant and Junior Stenographer, in the matter of promotion and that he accepted promotion as Junior Stenographer in consideration of the fact that the pay of the two posts was the same and that they were classed together, in practice, for further promotion, and upon the belief that his lien on his permanent post of Lower Division Clerk would not be terminated by reason of promotion to the post of Junior Stenographer. He further states that even after his promotion to the latter post, he was, during the period from December, 1951 to January, 1952, allowed to officiate as Upper Division Assistant.

5. The Petitioner complains that his chances of getting promotion to higher posts in the Clerical line have been obviated by the promulgation of the Rules at Annexure A, in 1952. The substance of these Rules is that—

(i) The post of Stenographer has been segregated from that of Upper Division Clerk, though both carry the same Pay-scale of Rs. 80 to 220.

(ii) For promotion to the higher post of Deputy Superintendent at the scale of Rs. 250 to 400, Upper Division Clerks shall be eligible, — on the recommendation of the Departmental Promotion Committee,—but not Stenographers.

(iii) Lower Division Clerks are eligible for promotion as Upper Division Clerks.

6. In 1953, the Petitioner was promoted to officiate as Stenographer and on the strength of that appointment, on April 23, 1954, the Petitioner made a representation to the Director-General of the Department (Respondent No. 3) for being considered for promotion to the post of Deputy Superintendent, but this representation was turned down (Annexure B) on the ground that under the Recruitment Rules at Annexure A, "Stenographers cannot be considered for promotion to the post of Deputy Superintendent." The Petitioner eventually appealed to the President of India against the decision at Annexure B and in reply thereto he was informed (Annexure G of October 10, 1956) that the question of amending the Recruitment Rules, so as to ensure that Upper Division Clerks and Stenographers could be treated at par for promotion to the post of Deputy Superintendent was already under consideration and that so long as the Rules were not so amended, the Petitioner's request for promotion could not be entertained.

7. Eventually, in response to his further representation, the Petitioner was informed by the letter at Annexure H, dated July 19, 1957 that the Petitioner has been assigned a position in the Seniority List, on the basis of the following principles—

(a) Stenographers should be considered for promotion to all posts for which Upper Division Assistants are eligible for promotion;

(b) While so ranking with Upper Division Assistants, the seniority dates of Stenographers shall be postponed by one year "to make up the difference in the minimum educational qualifications between the two posts".

8. Subsequently, some intermediate posts were created between the post of Upper Division Assistant and Deputy Superintendent and, in 1959, the Petitioner was given an officiating appointment to one such intermediate post, namely, that of a Junior Investigator, on June 1, 1959, but even then no retrospective effect was given to such promotion, and his representation for promotion to the post of Deputy Superintendent since 1954 has been turned down finally by the letter at Annexure N, dated October 3, 1966.

9. The Petitioner challenges the validity of the Rules at Annexure A and the order at Annexure H, on various grounds. The Petition is opposed by an affidavit on behalf of all the Respondents filed by Respondent No. 3.

10. I. The principal ground upon which the Petitioner's case has been fought is that the impugned Rules read with

Annexure H are discriminatory inasmuch as Cl. (b) of the Rules seeks to make a discrimination between Stenographers and Upper Division Assistants, in the matter of seniority while they, in fact, constituted one class.

11. Initially of course, the two categories constituted separate classes, the Petitioner having been recruited as a Typist (para. 2 of the Petition). But subsequently the two categories were merged and the Petitioner was confirmed as a Lower Division Clerk (para. 2 of the Affidavit-in-opposition). It is also admitted in the counter-affidavit that until the promulgation of the new Rules in 1952, "the two posts" of Junior Stenographer and Upper Division Assistant "were borne on the same cadre". Annexure H also places the two categories together for the purpose of promotion, but a differentiation has been made by Annexure H in the matter of seniority on the ground that there is a difference in the "minimal educational qualifications between the two posts". The impugned Rules do, in fact, prescribe, that while a Matriculate may be appointed a Stenographer, and Upper Division Asstt. must possess a University degree.

12. So far as the prospective application of the impugned Rules of Recruitment are concerned, there is little to challenge (nor is the Petitioner interested to do that) since it has been laid down by the Supreme Court that neither Art. 14 nor Art. 16 debar the State from dividing employees doing the same kind of work into different classes according to superior and inferior qualifications: *Kishori v. Union of India*, AIR 1962 SC 1139, and that when this done, there is no discrimination if in the matter of promotion or seniority as between two classes so formed, preference is shown to those having superior qualifications — *Sham Sunder v. Union of India*, W.P. No. 31 of 1967, D/-15-7-1968 = (AIR 1969 SC 212).

13. But the question becomes different where retrospective application is sought to be made of the Rules in making such discrimination as between those who were recruited prior to 1952, at a time when the two categories of Typists and Clerks formed 'the same cadre', and in making inter-class appointments from one post to another, no distinction was made on the ground of difference in qualification. It has been clearly laid down in *Roshan Lal v. Union of India*, AIR 1967 SC 1889 at p. 1893 that once recruits from different sources are integrated into one class, no discrimination can thereafter be made in favour of recruits from one source as against the other in the matter of promotion or other conditions of seniority.

14. In the instant case, it is admitted in the pleading of the Respondents that

even though persons had been recruited as Typists and Clerks separately, the personnel of the two categories were treated as on the same cadre and the posts on the two lines were interchangeable. Thus, when the Petitioner who had been initially appointed as a Typist was later confirmed as a Lower Division Assistant, the Respondents did not tell him that he would have lower prospects owing to having inferior qualifications. This is patent on reading paragraphs 1-2 of the Petition with the corresponding paragraphs of the counter affidavit. If so, now to make a differentiation between the Stenographers and the Upper Division Assistants on the ground of qualifications with retrospective application to those who had been appointed before the impugned Rules of 1952 were promulgated, would be a contravention of Arts. 14 and 16(1).

15. It may be mentioned, further, that the Rules, reproduced at pp. 17-18 of the Petition, do not say that they shall have retrospective effect. To affect the Petitioner by an application of the impugned Rules would both be ultra vires and unconstitutional.

16. II. The substantive plea of the Respondents, however, is that the Petitioner is estopped from claiming any benefits by way of promotion on the Clerical line inasmuch as the Petitioner voluntarily accepted confirmation as a Junior Stenographer on November 1, 1951, while a Clerk senior to him could not get a chance of confirmation as Upper Division Clerk prior to March 1, 1953 (para. 3). But the Petitioner may rightly say that he got a chance on the Stenographer's line because he possessed the technical qualification of a Stenographer which an Upper Division Clerk, as such did not possess.

17. Any sort of estoppel or waiver might operate to the prejudice of the Petitioner only if he had been told that by accepting confirmation as a Stenographer, he would lose all further chance on the Clerical line. In fact, according to the Respondents themselves (para. 3 of the counter-affidavit), no question of giving any such option to the Petitioner at that time arose because "they were not regarded to be outside cadre".

This plea must, accordingly, be rejected.

18. III. Another point taken in para. 75 of the counter-affidavit is that the Petitioner cannot be given the benefit of his present post as Investigator with effect from any earlier date than June 1, 1959 because even though he was considered by the Departmental Promotion Committee in 1955 he was not found fit prior to 1959. If that be so, the claim made in para. 23 of the Petition cannot

be entertained, but that is no reason why the discriminatory application of the impugned Rules, read with Annexure H to reduce the seniority of the Petitioner by one year in the matter of promotion in the Clerical line should not be struck down.

19. The Petitioner has, of course, claimed that the Court should issue a direction upon the Respondents to promote the Petitioner as a Deputy Superintendent with effect from 1954. No such direction can be given unless the Petitioner succeeds in showing that there is some statutory rule which gives him a right to be promoted. His only right, under Art. 16(1), is to be considered for promotion, equally with the Upper Division Clerks, without being affected by the handicap in the matter of seniority in the combined list, which is being introduced by the impugned Rules.

20. It is not the business of this Court to fix the exact post due to him either. That would be done administratively by the Respondents, in compliance with the direction issued by the Court relating to the impugned Rules.

21. I must say, in this context that the alternative claim made by the Petitioner for application of the 'next below rule' or the decision in *State of Mysore v. Belary*, AIR 1965 SC 868 has no application here because there has been no deputation in this case.

22. In the result, the Rule is made absolute in a modified form, as follows, and without any order as to costs. Respondents are restrained from applying the impugned Rules of 1952 to the prejudice of the Petitioner and are directed to consider him for promotion to posts superior to Upper Division Assistants, taking him at par with Upper Division Assistants, in the matter of seniority, — regardless of the discrimination sought to be made by Cl. (2) of the letter at Annexure H, dated July 19, 1957.

Rule made absolute.

AIR 1970 CALCUTTA 253 (V. 57 C 52)

K. L. ROY, J.

Manmal Bhutoria, Petitioner v. State of West Bengal and others, Respondents.

Matter No. 669 of 1967, D/- 15-9-1969.

Prevention of Corruption Act (1947), S. 5(2) — Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4(1) and Cl. 7 of the Schedule — Military Officer charged with an offence under S. 5(2) of Corruption Act — Notification made by State Government allotting the case to Special Court under Act (21 of 1949) — Accused ceasing to be public

officer at the time of issue of notification — Offence being one prescribed under Cl. 7 of Schedule to the Special Courts Act case can be tried only by special Court and not by ordinary Criminal Court by virtue of S. 4(1) (Para 3)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 1395 (V 48)=

(1961) 2 SCJ 649=1961 (2) Cri LJ

571, Keshab Lal Mohanlal Shah v.

State of Bombay

(1958) AIR 1958 SC 107 (V 45)=

1958 SCR 1037=1958 Cri LJ 254,

Venkataraman v. State

Bose, for Respondent.

ORDER: This application raises an interesting point which, I am informed, is of the first impression. The petitioner, one Manmal Bhutoria, along with one C. R. Bhattacharjee, who was a Major in the Indian Army and who was invalidated from the Military Service with effect from the 14th February, 1966, were charged with an offence under S. 5(2) of the Prevention of Corruption Act 1947, (hereinafter referred to as the Prevention Act) and by a notification in the Calcutta Gazette dated the 15th June, 1967 the State Government allotted the case of the State v. (1) Ex-major Chittaranjan Bhattacharjee and (2) Manmal Bhutoria to the Calcutta Fourth Additional Special Court on a report submitted by the Deputy Superintendent of Police Central Bureau of Investigation, Special Division, Calcutta dated the 27th May, 1967. In the said report it was alleged that ex-Major Bhattacharjee, in collusion and conspiracy with the petitioner Manmal Bhutoria, had accepted certain tenders from a fictitious nominee of the petitioner for supply of certain articles to the military authorities at prices exceeding the prices quoted by other tenders and thereby causing loss to the military authorities. It was further alleged that by these acts the two accused had committed the offence of conspiracy of criminal misconduct by a public servant by dishonestly abusing his position as a public servant for obtaining undue pecuniary advantage under S. 5(2) of the Prevention Act. In this petition the jurisdiction of the State Government to make the aforesaid allotment of the case of the petitioner to the Special Court is challenged inter alia on the ground that as on the date of the allotment Sri Bhattacharjee had ceased to be a public servant the offence was not one cognizable by the Special Courts and that the proceedings are bad as no sanction under S. 6 of the Prevention Act was obtained. Before I proceed to consider the submissions made by learned counsel in this case it would be necessary to set out certain material provisions of the two Statutes which need consideration in this case. Under the West Bengal Criminal Law Amendment (Special Courts) Act,

1949, (hereinafter referred to as the Special Courts Act) the State Government was authorised to constitute Special Courts having jurisdiction throughout the whole of the State of West Bengal to try certain offences specified in the Act. S. 4(1) of the above Act is the material section and is as follows:—

"4(1). Notwithstanding anything contained in the Code of Criminal Procedure 1898 or in any other law, the offence specified in the Schedule shall be triable by Special Courts only;

Provided that when trying any case, a Special Court may also try any offence other than an offence specified in the Schedule, with which the accused may under the Code of Criminal Procedure be charged at the same trial."

The schedule above referred to specified the offences triable by such Special Courts and Cl. 7 thereof includes an offence punishable under S. 5 of the Prevention Act, 1947.

2. The material provisions of the Prevention Act are: (1) S. 4 which raises the presumption that where a public servant accepts gratification other than legal remuneration he is guilty of a corrupt practice; (2) S. 5 which defines criminal misconduct in discharge of official duty. Under sub-sec. (1) of the latter Section a public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

(a) ...

(b) ...

(c) ...

(d) If he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

Sub-sec. (2) of that Section provides that any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to a fine while S. 6 provides that no Court shall take cognizance of an offence punishable under S. 161 or S. 164 or S. 165 of the Indian Penal Code or under sub-sec. (2) of S. 5 of that Act, alleged to have been committed by a public servant, except with the previous sanction of either the Central Government or the State Government or of the authority competent to remove such public servant from his office. Mr. Banerjee submitted that certain special offences have been created by the Prevention Act in the case of public servants acting in the course of their duty as such public servants which have been made triable by Special Courts apart from the ordinary Courts and an accused in such a case is liable to a much heavier punishment on conviction than by the

ordinary Criminal Courts of the land. It must, therefore, follow that not only must the offence be committed while the accused was a public officer but that he would also continue to be such a public officer when the proceedings for committal are started by the concerned Government allotting the matter to a Court for trial. If at the time of such allotment it is found that the accused has ceased to be a public officer then the ordinary criminal procedure should apply and the case would be triable by the ordinary Criminal Courts of the country. So far as the second ground, viz., the want of sanction is concerned, both the learned counsel agree that the two decisions of the Supreme Court in Venkatarama's case, AIR 1958 SC 107=1958 SCR 1037 and Keshab Lal Mohanlal Shah's case, AIR 1961 SC 1395= (1961) 2 SCJ 649 have now finally decided that no such previous sanction is necessary for a Court to take cognizance of an offence committed by a public servant while acting or purporting to act in the discharge of his official duty if he had ceased to be an officer at the time the complaint is made or the Police report is submitted to the Court, that is, at the time of taking cognizance of the offence committed. Mr. Banerjee submitted that if the correct position is that no sanction to prosecute is necessary in a case where the public officer has ceased to be a public officer at the time of the prosecution, the jurisdiction of the Special Courts to try such a public officer must cease after he had also ceased to be a public officer. In my opinion, there is a great deal of substance in this contention and unless I am compelled to hold to the contrary such contention should prevail. But, as pointed out by Mr. Bose, the learned counsel for the respondents, the matter is concluded so far as the State of West Bengal is concerned by the language of S. 4(1) of the Special Courts Act which provides that notwithstanding anything contained in any other law the offences specified in the Schedule shall be tried by Special Courts only. The words are clear and unambiguous. If an offence is an offence as defined by any of the clauses in the Schedule to the Special Courts Act, it can only be tried by a Special Court set up under that Act. Mr. Bose referred to the observations of the Supreme Court in Venkatarama's case, AIR 1958 SC 107=1958 SCR 1037 for his contention that an offence under S. 5(2) of the Prevention Act continues to be an offence under that section even though the accused has ceased to be a public officer. Referring to the Prevention Act the Supreme Court observed as follows:—

"The object of the Act was to suppress bribery and corruption. Its provisions are severe. Certain presumptions of guilt of offences committed under Ss. 161, 165-A,

of the Indian Penal Code were enjoined by S. 4 of the Act unless the contrary was proved by the accused. S. 5 of the Act created an offence of criminal misconduct on the part of public servant, an offence unknown to any of the provisions of the Indian Penal Code dealing with bribery and corruption. Sub-sec. (2) made such an offence punishable with imprisonment which may extend to a term of seven years or with fine or with both..... These provisions of the Act indicate that it was the intention of the legislature to treat more severely than heretofore corruption on the part of the public servant and not to condone it in any manner whatsoever. If S. 6 had not found a place in the Act it is clear that cognizance of an offence under Ss. 161, 164 or S. 165 of the Indian Penal Code or under S. 5(2) of the Act committed by a public servant would be taken by a Court even if he had ceased to be a public servant. The mere fact that he had ceased to be a public servant after the commission of the offence would not absolve him from his crime."

3. I have to accept the contention of Mr. Bose. There can be no doubt that an offence prescribed under Cl. 7 of the Schedule to the Special Courts Act, which is also defined as an offence by S. 5(2) of the Prevention Act, is an offence triable under the criminal law no matter whether the accused has ceased to be a public servant or not. If that is the position then even if Sri Bhattacharjee in the present case had ceased to be a public officer when the impugned notification was made by the State Government he was still an accused in respect of an offence under S. 5(2) of the Prevention Act and as such under the clear words of S. 4(1) of the Special Courts Act the only Court competent to try him would be the Special Court set up under that Act. In this view this application must be dismissed. The Rule is discharged and all interim orders are vacated. There will be no order as to costs. On the oral application of the learned counsel for the petitioner the operation of this order is stayed for three weeks.

Rule discharged.

AIR 1970 CALCUTTA 255 (V 57 C 53)

A. N. SEN, J.

Debendra Nath Singha and others, Petitioners v. Dwijendra Nath Singha and others, Respondents.

Matter No. 151 of 1967, D/- 25-7-1968.

Arbitration Act (1940), S. 41(b)—Power and jurisdiction of Court to appoint receiver or to pass interim injunction.

By virtue of S. 41(b), the Court has the power and jurisdiction to appoint a receiver or to make any order of interim injunction or to make orders in respect of other matters set out in the Second Schedule in appropriate cases for the purpose of, and in relation to arbitration proceedings; but this power and jurisdiction of the Court cannot be exercised, if the exercise of any such power would prejudice any power which might be vested in an arbitrator or Umpire for making orders with respect to any of such matter. Further, in view of the provisions contained in Section 41 of the Arbitration Act, the power and jurisdiction of the Court to appoint a receiver or to make any order of interim injunction or any order in respect of the matters set out in the Second Schedule are now governed, controlled and regulated by the said section, and apart from the power and jurisdiction conferred by the said section, the Court has no power and jurisdiction independently of the provisions contained in the said Section 41 to appoint a receiver, to make any order of interim injunction or any order in respect of the other matters set out in the Second Schedule. (Para 33)

Where the parties in a suit, concerning disputes between them with regard to partnership properties and businesses, agreed to refer them to arbitration and under one of the terms of settlement, the arbitrator had been empowered, to give necessary interim direction for the protection and/or conduct of the joint business, management of the joint properties and/or to enhance the monthly payment to the parties and subject to that clause the partnership business was to be continued as it was being done till then:

Held that it could not be contended that the powers which had been conferred on the Arbitrator under that clause could not be vested in a Arbitrator. If any receiver was appointed by the Court, pending arbitration proceedings the powers vested in the Arbitrator under that clause of the "Terms of Settlement" were bound to be prejudiced; and in that event, the Arbitrator would not be in a position to exercise the said powers vested in him, as the exercise of those powers would amount to interference with the possession and duties of the receiver appointed by Court. In this view of the matter, the Court was not competent to appoint any receiver because of the provisions contained in S. 41 (b) of the Arbitration Act and more particularly in the proviso therein. AIR 1928 Cal 256, Rel. on.

(Question whether the power to appoint a receiver or to make any order of injunction can be vested in an arbitrator or not, left open). (Para 34)

- Cases Referred: Chronological Paras
- (1965) AIR 1965 Cal 333 (V 52)=68
Cal WN 858, Bank of Commerce Ltd. (In Liquidation) v. Arun Kumar Chaudhury 20
- (1964) AIR 1964 Madh Pra 219 (V 51)=1962 Jab LJ 580, Daulat Ram Phoolchand v. Shriram 21
- (1949) AIR 1949 All 70 (V 36)=ILR (1948) All 401, Budhulal v. Jagannath 27
- (1946) AIR 1946 Cal 427 (V 33)=50 Cal WN 287, Prafulla Chandra Karmakar v. Panchanan Karmakar 27, 31, 32
- (1928) AIR 1928 Cal 256 (V 15)=ILR 55 Cal 249, Surendra Kumar Roy Chowdhury v. Sushil Kumar Roy Chowdhury 26, 28
- (1909) 13 Cal WN 63=1 Ind Cas 371, Hurdwary Mull v. Ahmed Musaji Salaji 15
- (1873) 8 Ch App 473=42 LJCh 447, Willesford v. Watson 27

A. N. Bose, for Petitioners; Standing Counsel, A. C. Mitra, and Subrata Roy Choudhary, for Respondents.

ORDER:— This is an application for the appointment of a Receiver and for injunction. This application has been made under the Arbitration Act in the matter of an arbitration agreement between the parties.

2. The parties to the dispute are brothers, some are own brothers and some are step brothers. The disputes between the brothers are with regard to joint family or joint properties or businesses or properties and businesses in which all the brothers claim to be equally interested.

3. One Dharendra Nath Singha who was the father of the petitioner and also of all the respondents was a Hindu governed by the Dayabhaga School of Hindu Law and he had various properties and businesses. The said Dharendra Nath Singha had three wives. His first wife Sushila Bala died without any issue. Dwijendra, Dwipendra, Dikendra and Digendra the respondents Nos. 1 to 4 herein are the sons of the said Dharendra Naht Singha by his second wife Smt. Rose Bala who is dead. Debendra the petitioner, Dishendra and Dinendra the respondents Nos. 5 and 6 are the sons of the said Dharendra Nath Singha by his third wife Smt. Nirmala Bala who is alive. Dharendra Nath Singh died in 1941 leaving a Will. Dwijen the eldest son was appointed the executor under the said Will provided that so long as Dinendra the youngest son of Dharendra Nath Singha did not complete the age of 25 years, the estate would remain under the control and management of Dwijen as executor. By the said Will Dharendra Nath Singha had given all his properties to his seven sons in equal shares. At the time of the

death of Dharendra Nath Singha, the eldest son Dwijen who was appointed the executor was about 23 years old, the second son Dwipendra was about 15 years old, the third son Dikendra was about 13 years old, the fourth son Digendra was about 12 years old, the fifth son Debendra was about 7 years old, the sixth son Dishendra was about 6 years old and the youngest son Dinendra was of only 3 years of age. The youngest son Dinendra has attained the age of 25 years. There is no dispute to the fact and it is common case that the properties have now vested in the seven brothers in equal shares.

4. It appears that two several documents were executed on the 2nd of March 1966 by all the brothers and one of the said deeds is a deed of partnership between the brothers in respect of the business and the other is one of indemnity and release.

5. Disputes and differences have arisen between the brothers with regard to the properties including the businesses in which the brothers are all jointly interested. Dinendra the youngest brother instituted a suit in this Court on or about the 29th of May 1967 in respect of the various properties claimed to be joint family properties or joint properties or properties in which the brothers are all jointly and equally interested. In the said suit filed by Dinendra, Dipendra also challenged the validity of the two documents dated the 2nd of March 1966 on the ground of fraud, collusion and conspiracy. The nature of the disputes between the parties and the reliefs that have been claimed by Dinendra will appear more particularly from the plaint filed in the suit. In the said suit the plaintiff Dinendra made an application on or about the 30th of June 1967 for the appointment of a Receiver, for injunction and for various other reliefs. An application was thereafter made by Dwijendra, Dwipendra and Dikendra in the said suit for stay of the said suit and the proceedings thereunder under Section 34 of the Arbitration Act. All the brothers agreed to refer the disputes in the said suit to the arbitration of Mr. B. Das, Barrister-at-Law and on or about the 30th of August 1967 an order was made by consent of all the parties to the following effect:—

1. The suit No. 1161 of 1967 (Dinendra Nath Singha v. Dwijendra Nath Singha and others) is stayed.

2. All matters in dispute in the said Suit No. 1161 of 1967, including the question of the validity of the Partnership Deed and the Agreement of Indemnity and Release both dated 2nd March 1966 are hereby referred to the sole arbitration of Mr. B. Das, Barrister-at-Law.

3. The Arbitrator shall determine the value of the joint businesses, properties and assets particulars whereof are set out in the plaint either by appointing an Engineer, Valuer, Accountant and other experts or any such other manner as he may think best at such remuneration at his sole discretion.

4. The parties shall be entitled to withdraw and/or be paid a sum of Rs. 5,000/- per month on or before the 7th day of each month commencing from September, 1967 out of the funds of the joint business and properties until the final Award is made.

5. The Arbitrator is empowered to give necessary interim direction for the protection and/or conduct of the joint business, management of the joint properties and/or enhance the monthly payment as mentioned in preceding clause if the funds permit and his decision shall be final.

6. Subject to clause 5 above the partnership business will be continued as it is being done now.

7. The petitioners and the respondent No. 2 shall out of the joint businesses and funds forthwith pay within seven days from the day hereof through the Arbitrator Rs. 5,000/- to each of the respondents Nos. 1 and 3 (Dinen and Deben), through their respective Solicitors M/s. J. N. Mitra & Co. and Mr. J. Mitra.

8. All monies payable under the clauses aforesaid shall be adjusted against the shares of the respective parties.

9. The Arbitrator shall have power to direct and allot a motor car to each of the parties for his use until the final Award.

10. The Arbitrator shall be paid a consolidated sum of Rs. 15,000 by way of his remuneration to be paid by the parties out of the joint estate.

11. The Arbitrator is to file his final Award within six months.

12. All costs, charges and expenses of the parties of and incidental to the said suit and of this application and the arbitration proceedings including all conferences, consultations with counsel and/or clients and all correspondences as between attorney and client and the remuneration of Engineer, Valuer, and Accountant or other experts as mentioned in clause 3 hereof would come out of the joint estate in proportion to the shares of the respective parties and costs to be assessed by the Arbitrator.

6. Pursuant to the said order and on the basis of the said agreement between the parties Mr. B. Das, Barrister-at-Law duly entered on the said reference and the said Arbitrator has already held three meetings and had been proceeding with the arbitration. The period of six months fixed by the said order on the basis of the said agreement

for making and filing the Award by the Arbitrator has expired. Before the time had expired an application was made on behalf of Dwijendra, Dwipendra, Dishendra and Digendra for an order extending the time to the Arbitrator to make and file his Award. During the pendency of the said application, Dinendra the youngest brother and the plaintiff in the suit, made an application for leave to revoke the authority of the Arbitrator Mr. B. Das, for his removal or discharge, for revocation or cancellation or supersession of the reference to arbitration and the arbitration proceeding and for proceeding with the suit in Court.

7. During the pendency of the said proceedings this application has been made by Debendra.

8. The application for extension of time to the Arbitrator to make and file his award and the application for leave to revoke his authority and for supersession of the arbitration proceeding and for proceeding with the suit in Court were heard together. On the said applications I have made an order extending the time of the Arbitrator to make his Award and I have rejected Dinen's application for leave to revoke the authority of the Arbitrator and for supersession of the arbitration proceeding for reasons recorded in my judgment.

9. It may be noted that in this unfortunate dispute between the brothers Dinen and Deben are on one side and the other brothers including Dishendra who is one of the own brothers of Deben and Dinen are on the other side.

10. Mr. A. N. Bose, learned counsel appearing in support of this application on behalf of Deben has submitted that in the instant case there is no dispute as to the fact that Deben and Dinen have each 1/7th share in the properties and the businesses, whether the said properties and businesses are joint family properties or partnership properties, Mr. Bose contends that as Deben and Dinen both have an admitted share in the properties, they are entitled to be in possession and to remain in possession, enjoyment and management of the properties. Mr. Bose argues that Deben and Dinen have been ousted from the said properties and are being denied the benefits of the said properties which are all under the control and management of Dwijen and his group. Mr. Bose points out that serious allegations have been made by Deben and Dinen against Dwijen and the other brothers of Dwijen. He states that grave allegations of fraud, collusion, conspiracy, misappropriation and dishonest dealings on the part of Dwijen and his brothers with regard to the said properties have been made and Deben and Dinen have lost complete confidence in Dwijen and his brothers. He has argued that there

are enough materials on record to substantiate the allegations made against Dwijen and his brothers and to justify the lack of confidence on the part of Deben and Dinen in Dwijen and his other brothers. He has contended that with the joint funds and assets Dwijen and his brothers have been carrying on various other businesses and have been making secret profits for themselves to the exclusion of Deben and Dinen. Mr. Bose has argued that Deben has given particulars of these benami businesses which are being carried on by Dwijen and his group and some of the documents which have been annexed to the petition justify this contention of Deben and Dinen. He argues that the account with the Bank of India Limited with its Bowbazar branch is only in the name of Dwijen, although admittedly all the monies lying in the said account belong to all the brothers jointly and he contends that taking advantage of that position Dwijen has misappropriated a sum of Rs. 2 lakhs from the said account. He comments on the different cases made by Dwijen at different stages and points out that Dwijen now admits withdrawal of the said amount from the said account and makes a case that the said sum was invested in the joint businesses from time to time. He has argued that various joint funds have been secreted from time to time and such amounts have been kept in fixed deposits in various names and the total amount of such deposits comes to over 12 lakhs. He argues that duplicate sets of books are being maintained and he comments on the different versions of Dwijen at different stages in course of the various proceedings. He points out that though on an earlier stage there was a denial by Dwijen of maintaining double sets of books of accounts, Dwijen is now forced to admit the existence of these books when they were produced in Court and Dwijen is now seeking to explain away the said books as supplementary books of accounts maintained for the benefit of all. He further argues that Dwijen and his group had also refused to produce various other books in violation of the direction of the Arbitrator and had denied the existence of such books but the Interim Receiver who was appointed for the purpose of making an inventory of the books, vouchers, papers, documents, machinery and stock-in-trade and assets relating to the said business of D. N. Singha and Company and Bharat Iron & Steel Corporation did take possession of such books the existence of which had earlier been denied by Dwijen and his group and did make an inventory thereof. Mr. Bose has also argued that there is enough evidence to show that the goods and materials and funds are being diverted and secreted for the benefit of Dwijen and his

group and Deben and Dinen who are completely excluded and ousted from the businesses and their management are suffering greatly. Mr. Bose refers to the photographs annexed to the petition and argues that these photographs will show how finished goods are being kept and diverted. Mr. Bose contends that in view of the aforesaid conduct of Dwijen and his group they should not be allowed to continue to remain in charge and control of the properties and the businesses and if the properties and the businesses continue to be under the control and custody of Dwijen and his group, the interest of Deben and Dinen will be irreparably prejudiced. Mr. Bose submits that Deben and Dinen have justifiably lost their confidence in Dwijen and his group and are not prepared to leave the said properties and the businesses, in which Deben and Dinen have admittedly 1/7th share each, under the control and management of Dwijen and his group. It is the contention of Mr. Bose that in view of the fact that the title of Deben and Dinen to the properties is admitted and it is also admitted that they have 1/7th share each in the said properties, the said properties should not be allowed to remain under the control and management of Dwijen and his group in view of the serious allegations made against them. Mr. Bose argues that in the facts of the instant case, as Deben and Dinen have an admitted share in the properties and they have justifiably lost confidence in Dwijen and his group, the Court should not allow Dwijen and his group to remain in charge and control of the said properties to the detriment of the interest of Deben and Dinen and the Court should take charge of all the said properties by appointing a Receiver for the preservation of the said properties. It is the argument of Mr. Bose that any of these allegations made, namely, ouster of Deben and Dinen, misappropriation, falsification of accounts and benami business by Dwijen and his group with joint funds, if established, will justify the appointment of a Receiver in the instant case which concerns joint properties in which Deben and Dinen have an admitted share. Mr. Bose argues that all the aforesaid allegations are sufficiently established for the purpose of making out a proper prima facie case at this stage to justify the appointment of a Receiver over the said properties for the preservation of the said properties for the benefit of all.

11. Mr. Bose has next argued that the agreement between the parties to refer the disputes to arbitration and the reference of the disputes to arbitration does not preclude the Court from appointing a Receiver in an appropriate case. He contends that the Court alone enjoys the power of appointing a Receiver and to

make an appropriate order of injunction and this power is retained by the Court even though the disputes have been referred to arbitration. He refers to Sec. 41 of the Arbitration Act and argues that the Court's power to appoint a receiver in all appropriate cases, which has been recognised even before the said section had come into existence, is now clearly provided by the said section. He contends that the proviso contained in Section 41 of the Arbitration Act cannot be said to constitute any bar to the appointment of a receiver and to the making of any appropriate order of injunction in the facts of the instant case, as the power to appoint a receiver and to make any order of injunction is not and cannot be any of the powers which may be vested in an Arbitrator or Umpire. He argues that the said proviso contained in Section 41 speaks of and contemplates powers which may be vested in an Arbitrator or an Umpire; and the power to appoint a receiver or to make any order of injunction is a power which cannot be so vested in any Arbitrator or Umpire and an Arbitrator or Umpire can never have the power to appoint a receiver and make an order of injunction. It is his argument that a receiver is an officer of the Court and derives his authority and power as such from Court and any interference with the receiver in the matter of possession or discharge of his duties becomes an act of contempt of court and punishable by the Court as such. Similarly, he argues that the violation of an order of injunction which operates in personam amounts to contempt of Court. It is his argument that the Arbitrator cannot and does not have the power or authority to punish for contempt and is, therefore, not in a position to enforce any order appointing a receiver or making any order of injunction. In support of his contention that the Arbitrator does not have any power to appoint a receiver or to make an order of injunction, Mr. Bose has referred to Article 54 at page 23 in Halsbury's Laws of England, (3rd Edition), Vol. 2. The said Article may be set out:—

"54. Ancillary relief and variation of order to stay. When making any order to stay, or at any time thereafter the Court may grant any relief which would not be obtainable from the arbitrator, such as the appointment of a receiver, or an injunction."

12. Mr. Bose has also referred to the following passage at page 204 under the heading 'Interlocutory and Auxiliary Relief' from Russell on 'the Law of Arbitration' (17th Edition):—

"In addition to its powers to make orders relating to merely procedural matters the Court has wide powers to make orders for the purpose of preserving of the status quo pending arbitration.

These powers include those of making orders for the preservation, interim custody or sale of any goods, the subject-matter of the reference, or for the detention or preservation of any property or thing concerned in the reference of appointing a receiver; and of granting an interim injunction. Quite apart from these express powers, the Court has always been willing to assist in this way in appropriate cases."

13. Mr. Bose also relies on the following passage at page 72 in Kerr on 'The Law and Practice as to Receivers' (13th Edition):—

"Disputes referable to arbitration.— A receiver may be appointed in an action for dissolution notwithstanding a reference of disputes to arbitration; but it may now be more convenient to apply in the arbitration for the appointment of a receiver under the Arbitration Act, 1950. The Court will, by one and the same order, appoint a receiver and stay all proceedings in the action except for the purpose of carrying out the order for a receiver."

14. He also relies on the following observations at page 84 of the same book:—

"Pending reference to arbitration.— The Court has jurisdiction to appoint a receiver pending a reference to arbitration, if an appropriate case is made out for doing so. Where there is an agreement to refer all matters in dispute under a contract to arbitration, and an action is subsequently brought on the contract, in which it is found to be desirable, for the protection of the property which is the subject-matter of the contract, that a receiver should be appointed, it is competent for the Court to appoint a receiver, and by the same order to stay all further proceedings in the action, except for the purpose of carrying out the order for a receiver. After a reference to arbitration a receiver can be appointed."

15. Mr. Bose has argued that Section 12 of the English Act contains provisions similar to those contained in Section 41 of the Indian Act and, therefore, the aforesaid principles are clearly applicable. Mr. Bose has also argued that if by agreement any power is sought to be vested in the Arbitrator authorising him to appoint a receiver or to make any order of injunction such agreement must be held to be bad and unenforceable and the Court will not give any effect to such agreement. In this connection Mr. Bose has referred to the decision in the case of Hurdwary Mull v. Ahmed Musaji Selaji, reported in (1909) 13 Cal WN 63; and he has drawn my attention to clause (o) of the agreement in question in that case. The said clause (o) which appears at page 66 of the report reads as follows:—

"No Award shall be set aside or varied or attempted to be set aside or varied by

reason or on account of any informality or omission or delay or error of the proceedings in or about the same or in relation thereto or any other ground or for any misconduct, sort of collusion or fraud on the part of the arbitrators."

16. He has argued that the said clause was held not to be any bar to Court's jurisdiction and the Court while dealing with this particular clause observed at pages 70 and 71:—

"But, then, it is said by the applicant that whatever misconduct there may have been on the part of the arbitrators, that is cured by Rule 6(o). As I have already pointed out this Rule does not apply, as the present application is not one to set aside or vary the Award. But even if the application were one to set aside the award, I am of the opinion that Rule 6(o) would be no bar to the jurisdiction of the Court to do so, if misconduct on the part of the arbitrators were shown or if it were shown that the Award were improperly procured.

Section 14 of the Indian Arbitration Act vests in the Court a discretion to do so in any case where the arbitration is proceeding under that Act and it is not competent for the parties by agreement to oust this jurisdiction. If they desire that the Award should be enforced under the provisions of that Act."

17. Mr. Bose has next argued that as the arbitrator had become *functus officio* at the time when this application was made, as the time to make the Award had expired, he would not be in a position to exercise any of the powers vested in him; and in view of the fact that the arbitrator had become *functus officio* no power can be said to remain vested in the arbitrator any longer. He contends that in view of the aforesaid fact that the arbitrator has become *functus officio* and as such does not have any power and cannot exercise any power, the Court has in any event the power in the facts of the instant case to appoint a receiver and to make other appropriate orders.

18. Mr. B. K. Ghosh, learned counsel appearing on behalf of Dinan who supports the applicant Deben wholly, has adopted the arguments of Mr. Bose. He has submitted that in the facts and circumstances of this case Deben and Dinan have justifiably lost confidence in Dwijen and his group and it is a fit and proper case where a receiver should be appointed to take possession of all the properties and assets for proper preservation thereof for the benefit of all the parties. Mr. Ghosh has cited the following passage from Kerr on 'the Law and Practice as to Receivers' (13th Edition) at page 68:—

"Receiver not ordered as of course.—The Court will not, as a matter of course, appoint a receiver of the partnership as-

sets, even where a case for dissolution is made. The very basis of a partnership contract being the mutual confidence reposed in each other by the parties, the Court will not appoint a receiver, unless some special ground for its interference is established. It must appear that the member of the firm against whom the appointment of a receiver is sought has done acts which are inconsistent with the duty of a partner, and are of a nature to destroy the mutual confidence which ought to subsist between the parties."

19. Mr. Ghosh has also relied on the following observations at pages 562-63 in Lindley on 'The Law of Partnership' (12th Edn.) under the head 'Effect of Excluding a Partner':—

"Moreover, even although there be no misconduct jeopardising the partnership assets, the Court will appoint a receiver if the defendant wrongfully excludes his co-partner from the management of the partnership affairs."

20. Mr. Ghosh has also referred to the decision in the case of Bank of Commerce Ltd. (In Liquidation) v. Arun Kumar Chowdhury, AIR 1965 Cal 333 and has relied on the following observations at page 339:—

"It is true that where a receiver is appointed, the effect of the appointment is that the parties are restrained from dealing with the properties over which a receiver is appointed. But in a partnership action if the appointment of a receiver operates as an order of injunction, it operates as such for both parties to the suit. Besides the receiver is appointed by the Court to receive and preserve a property in litigation *pendente lite*, when it does not seem reasonable to the Court that either party should hold it. The receiver is a representative of the Court and he is not a representative of either party to the litigation. A receiver is appointed not for the benefit of any party to the litigation but to protect the property and preserve it for equal benefit of those who are interested in its distribution and to keep the property within the control of the Court."

21. Reference has been made to a decision of the Madhya Pradesh High Court in the case of Daulat Ram Phoolchand v. Shriram, AIR 1964 Madh Pra 219 and this decision was cited by Mr. S. P. Banerjee the learned junior of Mr. B. K. Ghosh and reliance has been placed on the following observations at page 221:—

"The arbitrators have not been vested by the Act with any powers to grant interim orders for the protection and safety of the subject-matter of the dispute. Such powers had, therefore, to be vested in the Court under Section 41(b) of the Act read with the Second Schedule. I do not find anything in that section or in

the Second Schedule to justify the view that the power to grant interim orders for the protection and safety of the properties in dispute cannot be exercised until proceedings under some other section of the Act are started. To import such a limitation into the provisions of Section 41(b) of the Act and the Second Schedule would have the effect of introducing therein words which do not find place in the said provisions. Such a limitation cannot, in my opinion, be placed upon the powers vested in the Court under Section 41(b) of the Act read with the Second Schedule."

22. The learned Standing Counsel appearing on behalf of one of the respondents Dwipendra who opposed this application, has raised the contention that because of the provisions contained in clauses (5) and (6) of the 'Terms of Settlement' under which and on the basis of which the disputes in the instant case have been referred to arbitration, the Court has no power to appoint a receiver in the present case in view of the provisions contained in the proviso to Section 41(b) of the Arbitration Act. He has next contended that in any event in the facts of the instant case the Court should not exercise its power to appoint any receiver in view of the said provisions contained in the 'Terms of Settlement' and the proviso to Section 41(b) of the Arbitration Act. The learned Standing Counsel has argued that the power which the Court enjoyed in the matter of appointment of receivers and in making other interim orders before the introduction of Section 41 in the Act, is now recognized, regulated and governed by the said section. It is his argument that the said Section 41(b) read with the Second Schedule referred to therein, clearly and undoubtedly empowers the Court to appoint a receiver, to make any order of injunction and to make any other appropriate orders in respect of the matters set out in the Second Schedule but his further argument is that the exercise of any such powers is controlled by the proviso to the said section 41(b). He argues that this power conferred on the Court to appoint any receiver or to make any order of injunction or other interim orders in relation to matters set out in the Second Schedule is restricted and curtailed by the proviso to the said Section 41(b) and cannot be exercised by the Court, if the exercise of any such powers prejudices any power which has been vested in the Arbitrator. He submits that by clause (5) of the Terms, the Arbitrator in the instant case has been empowered to give necessary interim direction for the protection and/or conduct of the joint family business, and management of the joint properties and for enhancement of the monthly payment to the parties; and it is

his submission that the appointment of a receiver will undoubtedly prejudice these powers vested in the Arbitrator. He submits that if the Court appoints any receiver, the Arbitrator cannot exercise any of these powers as exercise of any of these powers in effect will amount to interference with the possession or the duties of the receiver and will amount to an act of contempt on the part of the Arbitrator. The learned Standing Counsel, therefore, contends that the Court has no power to appoint a receiver in the instant case.

23. The learned Standing Counsel has next argued that even assuming that the Court has the power to appoint a receiver, the exercise of the power by the Court is entirely discretionary and the Court should not exercise the discretion in favour of appointing any receiver, in view of the said clauses (5) and (6) in the 'Terms of Settlement'. He contends that it is not now open to Deben and Dinen to invoke the power and jurisdiction of the Court after having entered into the said Terms. It is his contention that Deben and Dinen with full knowledge of all the facts and all their charges and grievances against Dwijen and his group have agreed to those 'Terms of Settlement' on the basis of which the Court has made an order referring the disputes to arbitration and Deben and Dinen should not now be permitted to go back from the arrangement agreed upon in those Terms. The learned Standing Counsel has submitted that if Deben or Dinen wanted any direction with regard to protection or management of the properties, they should have gone to the Arbitrator and should have asked for an interim Award. The learned Standing Counsel has argued that Deben and Dinen had tried to back out from the arbitration agreement by initiating proceedings for leave to revoke the authority of the Arbitrator, for supersession of the arbitration proceeding, for recalling and/or setting aside the order made on the 30th August 1967 by consent of all the parties and also by opposing the application for extension of time to the Arbitrator to make his Award. He argues that in the said attempts they failed and the Court has made an order extending the time to the Arbitrator to make his Award. It is his argument that as the Court has refused to recall or set aside the order made on the 30th of August 1967 by the consent of the parties, the said order remains valid and in full force and the Court should not now appoint any receiver or make any other order which will have the effect of nullifying the said order made on the 30th of August, 1967.

24. Mr. A. C. Mitra, learned counsel appearing on behalf of Dipendra, has adopted the arguments of the learned

Standing Counsel. He has further argued that the businesses over which a receiver is asked, does not form the subject-matter of the suit and therefore, no receiver can be appointed over the said businesses. It is his submission that the businesses in question are the partnership businesses of the brothers and the said businesses cannot be said to form a part of the subject-matter of the suit. He has also argued that Dinen and Deben had made all kinds of allegations against Dwijen and the other brothers in the suit. In the earlier application for the appointment of receiver and the proceedings for stay of this suit; and notwithstanding the fact that they had made all such allegations against them, they had agreed to clause (6) of the Terms which provides that subject to clause (5), the partnership business will be continued as it is being done now. It is the contention of Mr. Mitra that clause (5) which empowers the Arbitrator to give appropriate directions contemplates only cases of misconduct during arbitration proceedings. Mr. Mitra, therefore, submits that no order should be made on this application.

25. Mr. Subrata Roy Choudhury, learned counsel appearing on behalf of Dwijendra, Digendra and Dishendra has submitted that no proper grounds have been made out for the appointment of any receiver. He has argued that all the allegations that have been made are primarily against Dwijen and the same are absolutely baseless and all the allegations against Dwijen and his group are unjustified and without any foundation. It is his argument that when the father died, Deben was about seven years old and Dinen's age was only about three; and Dwijen as the eldest brother shouldered the entire responsibility of the family and brought up all his brothers. He argues that Dwijen has developed the businesses and has brought the same to their present position and the brothers are all enjoying the benefits of Dwijen's hard, honest and able labour. Mr. Roy Choudhury comments that if Dwijen had wanted to deprive any of his brothers, he could have done so, when the brothers were all very young; but Dwijen, on the other hand like a true elder brother, has looked after every brother's interest and has willingly shared the fruits of his labour with all his brothers. He further comments that the very fact that all the other brothers including Dishendra who is one of the own brothers of Deben and Dinen are supporting Dwijen, clearly indicates and establishes that Dwijen has been honest and faithful to all his brothers and has not deprived any of his brothers of their legitimate shares. Mr. Roy Choudhury contends that the conduct of Dwijen also clearly shows that Dwijen is absolutely fair and honest, as Dwijen never disputes

that the banking account with Bank of India, Bowbazar Branch which stands only in his name, really belongs to all the brothers and all the brothers have an equal interest in not only the said banking account in the name of Dwijen with Bank of India but also various fixed deposit accounts which stand in the names of various persons. Mr. Roy Choudhury argues that there is no truth in the allegation of any benami business and also in the allegation of misappropriation of Rs. 2 lakhs by Dwijen from the said banking account with Bank of India. The sum of Rs. 2 lakhs which have been withdrawn from the said account, according to Mr. Roy Choudhury, has been invested in the business. Mr. Roy Choudhury denies that there has been any exclusion or ouster of Deben and Dinen from any of the businesses and Mr. Roy Choudhury contends that Deben and Dinen are both aware of the existence of the supplementary books and of the way in which the businesses have been managed. Mr. Roy Choudhury has referred to certain vouchers and documents to show that Deben and Dinen have been participating in the business; and referring to the fact that Deben and Dinen could produce the supplementary books and various other papers and documents he contends that this fact clearly establishes that they had full knowledge of the existence of these books and they have access to all books, documents and papers. Mr. Roy Choudhury finally submits that appointing any receiver over the businesses which are running concerns and which enjoy huge credit facilities from the bank, will mean complete ruination for the businesses and any appointment of receiver will have the effect of destroying these businesses instead of preserving or protecting them. Mr. Roy Choudhury, therefore, contends that on the merits no case has been made out for the appointment of any receiver.

26. Mr. Roy Choudhury has next contended that in any event because of the provisions contained in the 'Terms of Settlement' no receiver can be or should be appointed in the instant case in view of the provisions contained in Sections 21 and 41 of the Arbitration Act. He argues that under Sec. 23(2) of the Act, where a matter is referred to arbitration, the Court does not have any power to deal with such matter in suit, save in the manner and to the extent provided in the Act. It is his argument that the manner and the extent are provided in Section 41 and in view of the proviso contained in Section 41(b), the Court cannot and in any event should not appoint a receiver in the instant case. He adopts the argument of the learned Standing Counsel. In support of the submission that in view of the provision contained in Cl. (5) of the 'Terms of Settlement', the Court should not ap-

point any receiver in the instant case and the petitioner is disentitled to ask the Court for any such relief. Mr. Roy Choudhury has referred to the decision in the case of Surendra Kumar Roy Chowdhury v. Susil Kumar Roy Chowdhury, ILR 55 Cal 249 = (AIR 1928 Cal 256) where a Division Bench of this Court had observed that if the Court would find that the question of interim management was also referred, it might defer the consideration of the question of appointment of a receiver in the view that the parties by agreement between themselves had disentitled themselves to the auxiliary relief which otherwise they could have from the Court. Mr. Roy Chowdhury has placed particular reliance on the following observations at p. 258 (of ILR) = (at p. 259 of AIR) of the report:—

"It being the duty of the Court to act upon the agreement entered by the parties themselves it will have to be ascertained in each individual case as to what was actually referred. If the Court finds that the question of management interim was also referred it may defer the consideration of the question of appointment of a receiver in the view that the parties by agreement between themselves had disentitled themselves to the auxiliary relief which otherwise they could have from the Court."

27. Mr. Roy Chowdhury has also submitted in answer to the argument of Mr. Bose that the Arbitrator has no power to appoint a receiver or to make any order of injunction, that it is undoubtedly true that the Arbitrator by himself cannot make any effective order appointing a receiver or granting any injunction, but there is nothing in law to prevent an Arbitrator from making any Award by which a receiver or any injunction may be directed and they will become effective as soon as the Court pronounces judgment on any such Award. In support of this contention, Mr. Roy Choudhury has referred to the decision in the case of Willesford v. Watson, (1873) 8 Ch 473 and to the decision in the case of Budhulal v. Jagan Nath, AIR 1949 All 70. For the purpose of explaining the scope of Section 41 of the Arbitration Act, Mr. Roy Choudhury has referred to the decision in the case of Prafulla Chandra Karmakar v. Panchanan Karmakar, AIR 1946 Cal 427.

28. The main question for determination on this application is whether in the facts and circumstances of this case a receiver should be appointed or not. This question has to be considered from two aspects. The first aspect is the factual side, that is to say, whether the materials on record call for the appointment of a receiver; and the other aspect and the more important one, is whether in view of the provisions contained in Cls. (5) and (6) of the 'Terms of Settlement' and in view of

the provisions contained in Section 41 particularly in the proviso to Section 41 (b) of the Arbitration Act, the Court can, or in any event should, appoint a receiver, even if the facts of the case might otherwise justify the appointment of a receiver.

29. I shall first deal with the factual aspect. It is true that when the father died, Deben and Dinen were both very young. It may also be true that Dwijen had shouldered the entire responsibility, when the father died and he might have brought up the younger brothers. There may also be some force in the contention that the businesses had prospered and developed and have reached the present position due to the ability and efforts of Dwijen. It is, however, equally clear that Deben and Dinen have now fallen out with the other brothers for reasons best known to them. It cannot also be disputed and it is not disputed that Deben and Dinen have each 1/7th share in all the properties including the businesses whether the said businesses are partnership businesses or joint family businesses. These admitted co-sharers have made various serious allegations against Dwijen and the other brothers. Prima facie, some of these allegations appear to be not without any foundation. It is admitted that the banking account with Bank of India Ltd., Bowbazar branch stands in the name of Dwijen alone, although it is not disputed that the said account is one in which all the brothers are equally interested. It is also established that Dwijen had withdrawn from the said account a sum of Rs. 2 lakhs, though Dwijen seeks to make the case that the said amount has from time to time been invested in the joint business. It also appears that there are various fixed deposit accounts in the names of various persons, although it is not disputed that the said accounts really belong to all the brothers. Though it is admitted that the amounts in the several fixed deposit accounts in the names of various persons belong to the brothers jointly and equally, it is to be noted that the said several accounts are not in equal proportion amongst the respective branches of the brothers. The existence of two sets of books is also not now seriously disputed, although the said fact is sought to be explained away by calling one set as the supplementary set of books maintained for the benefit of all. The allegation of ouster and exclusion also appears to be not without any justification and it appears clear that in any event Deben and Dinen do not and cannot have any effective control and participation in the management of the businesses. There are also the serious allegations of benami and secret profits. On this state of affairs, the case of Deben and Dinen that they have lost confidence in Dwijen and the other brothers, however, uncharitable and

unfortunate, cannot be said, in my opinion, to be without any basis or justification. On the factual aspect, therefore, I am of the opinion, particularly in view of the fact that Deben and Dinen have both an admitted share, that a case fit for the appointment of a receiver has been made out; and the Court would have been justified in appointing a receiver in the suit, if the suit had been pending in the Court. The contention of Mr. A. C. Mitra that no receiver can be appointed over the businesses, as the businesses do not form any part of the subject-matter of the suit, do not appear to be sound and convincing; and I am also not impressed by the argument of Mr. Subrata Roy Choudhury that any appointment of receiver will necessarily ruin the businesses.

30. I shall now take up for consideration that other aspect of the matter which relates to the interpretation of Section 41 of the Arbitration Act. As I have already indicated, it has been the contention of the learned Standing Counsel that even if it be otherwise a fit case for the appointment of a receiver, the Court cannot and in any event should not appoint any receiver in the instant case in view of the provisions contained in Cls. (5) and (6) of the 'Terms of Settlement' and in Sec. 41 of the Arbitration Act particularly the proviso to Section 41 (b). I have already set out the clauses contained in the 'Terms of Settlement' including the said Cls. (5) and (6). It will be convenient to set out the said Section 41 which reads as follows:—

"Section 41. Procedure and powers of Court — Subject to the provisions of this Act and of rules made thereunder—

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court.

Provided that nothing in Cl. (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."

31. The Second Schedule referred to therein may also be set out:—

"The Second Schedule. Powers of Court—

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which

any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim Injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings." A plain reading of the Section 41 makes it quite clear that the provisions of this section are subject to the provisions of this Act and of Rules made thereunder. The section itself is prefaced "subject to the provisions of this Act and of Rules made thereunder." This section came up for consideration before a Division Bench of this Court in the case of AIR 1946 Cal 427, which has been relied on by Mr. Subrata Roy Choudhury, Chakravarti, J. (as he then was) observed at p. 432 of the report:—

"In the first place, the operative part of Section 41 is prefaced by the words 'subject to the provisions of the Act' and therefore, the Civil Procedure Code can apply only subject to the provisions of Sections 23 (2) and 32. Since those provisions forbid interference with the reference and the award except as provided for in the Act, to that extent the Civil Procedure Code is excluded. Indeed, it seems to me that the scope of Section 41, is limited to attracting the procedural rules of the Code to proceedings before the Court under the Arbitration Act."

32. It may be noted that in this case the Court was concerned with an application for recording a compromise under Order 23, Rule 3 of the Code of Civil Procedure in a suit which has been referred to arbitration through Court and the Court was not concerned with the proviso contained in Section 41 (b). Section 23 (2) and Section 25 of the Arbitration Act are not of any particular importance in the present case. Section 41 (b) of the Act itself makes provision for Court's powers in the matter of appointment of receiver and making orders of injunction and in respect of the other matters which are all set out in the Second Schedule. This decision in the case of AIR 1946 Cal 427 is, therefore, not of any great assistance in the instant case.

33. The instant case concerns and involves the interpretation of Section 41 (b), particularly the proviso contained therein. Section 41 (b), to my mind, clearly empowers the Court to make appropriate orders in respect of any of the

matters set out in the Second Schedule and matters set out in the Second Schedule include interim injunction and appointment of a receiver. By virtue of Sec. 41 (b) the Court, therefore, enjoys, for the purpose of, and in relation to, arbitration proceedings, the same power of appointing any receiver or making any order of interim injunction, as the Court has for the purpose of, and in relation to, any proceedings before the Court. There cannot, therefore, be any question, in my opinion, as to the power and jurisdiction of the Court to appoint a receiver or to make any order of interim injunction, for the purpose of, and in relation to arbitration proceedings. This undoubted power and jurisdiction, which have been conferred on the Court by Section 41 (b), do not, however, appear to be unrestricted or unqualified. The later part of Section 41 (b), containing the proviso, qualifies the exercise of the power and jurisdiction; and this proviso contained in Section 41 (b) curtails this power and restricts the exercise of this power to the extent stated in the said proviso. The proviso lays down that the power and jurisdiction conferred on the Court by Section 41 (b) shall not prejudice any power which may be vested in an Arbitrator or umpire for making orders with respect to any of such matters. This proviso to the section, to my mind, therefore, curtails or limits the power and jurisdiction of the Court conferred by the said section in the matter of appointing any receiver or making any order of interim injunction and the same, in any event, controls the exercise of the said power and jurisdiction; and the said power and jurisdiction are not to be exercised, if the exercise of the said power and jurisdiction prejudices any powers which may have been vested in an Arbitrator or Umpire for making any orders with regard to such matters. On a proper construction of Section 41 of the Arbitration Act and of Section 41 (b) in particular, I am of the opinion, that the Court has the power and jurisdiction to appoint a receiver or to make any order of interim injunction or to make orders in respect of other matters set out in the Second Schedule in appropriate cases for the purpose of, and in relation to arbitration proceedings; but this power and jurisdiction of the Court cannot be exercised, if the exercise of any such power would prejudice any power which might be vested in an Arbitrator or Umpire for making orders with respect to any of such matters. I am further of the opinion that in view of the provisions contained in Section 41 of the Arbitration Act, the power and jurisdiction of the Court to appoint a receiver or to make any order of interim injunction or any order in respect of the other matters set out in the Second Schedule are now governed, controlled and

regulated by the said section, and apart from the power and jurisdiction conferred by the said section, the Court has no power and jurisdiction independently of the provisions contained in the said Section 41 to appoint a receiver, to make any order of interim injunction or any order in respect of the other matters set out in the Second Schedule.

34. In the instant case under CL (5) of the 'Terms of Settlement' the Arbitrator has been empowered, to give necessary interim direction for the protection and/or conduct of the joint business, management of the joint properties and/or to enhance the monthly payment to the parties. It cannot be contended that the powers which have been conferred on the Arbitrator under CL (5) cannot be vested in an Arbitrator. If any receiver is now appointed, by the Court, the powers vested in the Arbitrator under CL (5) of the 'Terms of Settlement' are bound to be prejudiced; and in that event, the Arbitrator will not be in a position to exercise the said powers vested in him, as the exercise of these powers will amount to interference with the possession and duties of the receiver appointed by Court. In this view of the matter, I am, therefore, of the opinion that in the instant case, the Court is not competent to appoint any receiver because of the provisions contained in Sec. 41 (b) of the Arbitration Act and more particularly in the proviso therein.

35. I am unable to accept the contention of Mr. Bose that the proviso contained in S. 41 (b) cannot apply or act as a bar to the Court's power to appoint a receiver or make any order of interim injunction, as neither of these powers can be vested in an Arbitrator or Umpire. The said proviso applies, in my opinion, whenever the exercise of any of the powers conferred by Section 41 (b), prejudices any power which is vested in an Arbitrator. Whether the power to appoint a receiver or to make any order of injunction can be vested in an Arbitrator or not, may raise an interesting question; but this question does not arise in the instant case and I do not, therefore, consider it necessary to deal with the question on this application. In the instant case no such power to appoint a receiver or to make any order of interim injunction has been vested in the Arbitrator. The powers that have been vested in the Arbitrator under CL (5) of the 'Terms of Settlement' may, in my opinion, be properly vested in an Arbitrator. In this view of the matter, I do not consider it necessary to deal with the various authorities cited from the Bar on this aspect of the matter.

36. Even if I had held that the proviso contained in Section 41 (b) did not act as a bar and the Court could have appointed a receiver, I would have in the instant

case refused to exercise my discretion in favour of appointing a receiver in view of the said Cls. (5) and (6) of the 'Terms of Settlement', in spite of my coming to the conclusion that it was otherwise a fit case for the appointment of a receiver. If the matter had not been referred to arbitration and if the suit had been pending in Court and this application had been made in the suit, I would have exercised my discretion on the facts of the instant case in favour of appointment of a receiver. Even when the disputes had been referred to arbitration, I would have been inclined to appoint a receiver in the arbitration proceedings. If Cls. (5) and (6) were not there in the 'Terms of Settlement', with knowledge of all the grievances, charges and allegations that have been made against Dwijen and his group, the petitioner and Dinen have entered into the said 'Terms of Settlement' containing the aforesaid Cls. (5) and (6). The petitioner and Dinen by entering into the said agreement have, in my opinion, disentitled themselves to any relief on this application. If the petitioner and Dinen want to have any interim direction for the protection and/or conduct of the joint business and management of the joint properties, they have to apply before the Arbitrator for an Interim Award in terms of Cl. (5) of the 'Terms of Settlement'. The observations of the Division Bench of this Court at p. 258 in the case of ILR 55 Cal 249 referred to and relied on by Mr. Subrata Roy Chowdhury and quoted by me earlier in this judgment, support, to my mind, the view that Deben and Dinen have disentitled themselves to any relief on this application.

37. The other contention raised by Mr. Bose that the Court should exercise its discretion, as the Arbitrator was functus officio at the time when the application was made, is, in my opinion, not tenable. The Arbitrator might have become functus officio for the time being, but the agreement remains subsisting; and it is the duty of the Court to act upon and give effect to the agreement between the parties. In any event, in view of the subsequent order made by me extending the time to the Arbitrator to make and file his Award, this argument loses its force and is of no avail.

38. I, therefore, agree with the contention of the learned Standing Counsel that the Court in the instant case cannot and in any event should not appoint any receiver in view of Cl. (5) of the 'Terms of Settlement' even though the appointment of a receiver might otherwise have been justified. In view of the provisions contained in the 'Terms of Settlement' and more particularly in the said Cl. (5), I am also of the opinion that it will not be proper for me to make any interim order of injunction, as any such order of injunc-

tion may also prejudice the powers vested in the Arbitrator and may fetter the hands of the Arbitrator and will lead to unnecessary complication in the arbitration proceeding. I may only note that the prayers for injunction were not very seriously pressed at the hearing of the application and Deben and Dinen had really wanted a receiver only. I am, therefore, of the opinion that the petitioner is not entitled to any relief on this application. There will, therefore, be no order on this application. The parties will pay and bear their own costs.

39. Mr. Mathuranath Banerjee, the Interim Receiver, is directed to complete the inventory within a fortnight from date in terms of the order previously made in this regard. After he has made the inventory he will give a copy of the said inventory to each of the parties and will thereupon be discharged. Filing of accounts by the Interim Receiver is dispensed with. The Interim Receiver will be entitled to a further remuneration of 20 G. Ms. to be paid by Mr. P. N. Mitter's client. The sum of 20 G. Ms. paid initially by the applicant and this further sum of 20 G. Ms. aggregating to 40 G. Ms. will be paid to the Interim Receiver in full satisfaction of his remuneration. This total sum of 40 G. Ms. will be ultimately debited to the shares of each of the parties.

40. The Interim Receiver will start making the inventory and initialling the books of account after giving one day's notice to the parties.

41. Interim Receiver and all parties to act on a signed copy of the minutes.

Application dismissed.

AIR 1970 CALCUTTA 266 (V 57 C 54)
BIJAYESH MUKERJEE AND
S. K. DATTA, JJ.

Jyotish Chandra Guha, Appellant v. Sm.
Meera Guha, Respondent.

A. F. O. D. No. 375 of 1964, D/- 3-10-1969.

(A) Special Marriage Act (1954), S. 51
(1) (a) — Marriage solemnised under repealed Act of 1872 is deemed to have been solemnised under 1954 — Divorce proceedings are governed by 1954 Act.
(Para 10)

(B) Special Marriage Act (1954), S. 31
(1) (c) — Divorce proceedings by wife — Delay of 21 months — Reason that her sister was to be married and settled and the avoidance of scandal of a divorce — No acquiescence in marital offences of husband — Delay held not unnecessary and improper — (Divorce Act (1869), S. 14) — (Hindu Marriage Act (1955), S. 23).

CN/CN/A921/70/RGD/A

The delay to be a bar to relief must be unnecessary and improper in the circumstances of the case. (Para 16)

The delay of 21 months in filing an action for divorce by the wife, after the final rupture with the husband which was on 16-5-1955 was due to the fact that the younger sister of the wife was yet to be married and settled in life, which marriage took place in 1956. Further, the natural reluctance of the wife to be the subject of public scandal rather than endure the agony, the honour of the family, and the status of the divorced wife as unwanted woman in our society, all these considerations kept away the wife from rushing to Court for relief of divorce and other reliefs to which she might be otherwise entitled in law. It was not established that the wife was acquiescing in the marital offences of the husband or talking from the husband any advantage of her position as the injured spouse or retaliating for some other injury caused by the husband but on the contrary, the wife, who after prolonged years of the miserable life of a wrecked marriage, simply wanted the freedom from husband who had blasted her life:

Held, that there was no lack of sincerity in the complaint of the wife and that her suffering of an unfruitful and painful married life was genuine. In this background and looking at the marriage which was already dead, a delay for a period of about 21 months (January 1957 to September 1958) was of no consequence, and was neither unnecessary nor improper when she was going to take, of her own, the most fateful decision in her life. AIR 1968 Cal 133 & (1885) 10 AC 171 & AIR 1920 Cal 439, Rel. on. (Para 16)

(C) Special Marriage Act (1954), S. 35 — Divorce petition by wife — Relief as in petition is available to respondent husband only on compliance with provisions of Special Marriage Act (Calcutta High Court) Rules (1955) incorporated in Civil Rules and Orders, Vol. 1 as Rule 340-A — Relief is not available at appellate stage — (Divorce Act (1869), S. 15) — (Hindu Marriage Act (1955), S. 13).

Under Section 35, the husband respondent, in the petition for divorce by wife, is entitled to get the same relief against the wife as if he had presented a petition seeking such relief. But his answer to the petition should contain particulars of adultery, cruelty or desertion on the part of the petitioner-wife, as if it were a petition *mutatis mutandis*. Further, if the husband alleges adultery by the petitioner, he shall have to give the name, address and description of the alleged adulterer. The relief must be sought by the respondent in strict compliance with the provisions of the Special Marriage Act (Calcutta High Court) Rules, 1955, which are incor-

porated in the Civil Rules and Orders Vol. 1 as Rule 340-A. It is however not open to the respondent to seek for such a relief at the hearing of the appeal from a decree for divorce passed on the petition of the wife. (Paras 17, 18, 19)

(D) Special Marriage Act (1954), S. 27 (b) — Desertion — What amounts to — Constructive desertion — Desertion has to be proved beyond reasonable doubt — (Divorce Act (1869), S. 10) — (Hindu Marriage Act (1955), S. 10).

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be, termed, for short, "the home" The person who actually withdraws from cohabitation is not necessarily the deserting party.

As a ground for divorce desertion must exist for a period of at least three years immediately preceding the presentation of the petition or where the offence appears as a cross-charge, of the answer.

For the act of desertion to exist there must be both the *factum* or physical separation, and the *animus deserendi* or intention to desert. All the necessary ingredients of desertion must continue throughout the statutory period. A *de facto* separation may take place without there being an *animus deserendi*, as where there is a separation by mutual consent or a compulsory separation, but if that *animus supervenes*, desertion will begin from that moment, unless there is consent to the separation by the other spouse. On the other hand there may be *animus deserendi* without separation, as where the parties live as two households under the same roof.

If one spouse is forced by the conduct of other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. It is constructive desertion. AIR 1957 SC 176, Foll.

(Para 23)

Where the husband created a situation in his house that it was impossible for the wife to stay there any longer the husband, thus forcing the wife by his conduct to leave the matrimonial home, becomes himself really guilty of desertion, even though it is the wife who had in fact deserted the house. The requisites of desertion in law, *factum* of desertion and *animus deserendi* are present in the case. If the statutory period of three years had passed away prior to the presentation of the petition for divorce without any attempt on the part of the husband to determine the desertion at any time there is no legal bar or any other impediment or ground in the way of the wife having the relief she prays for, namely, divorce. (Para 35)

In any proceedings for divorce, the plaintiff must prove the offence of desertion like any other matrimonial offence, beyond all reasonable doubt. Further though corroboration is not regarded as an absolute rule of law, the Courts insist upon corroborative evidence, as a matter of precaution, unless its absence is accounted for to the satisfaction of the Court.

(Para 23)

(E) Special Marriage Act (1954), Section 27 (d) — Cruelty — Legal cruelty — What amounts to, stated — (Divorce Act (1869), Section 10) — (Hindu Marriage Act (1955), Section 10).

The legal conception of cruelty, which is not defined by statute, is generally described as conduct of such character as to have caused danger to life, limb, or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. It may be mental, such as indifference and frigidity towards wife, denial of company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage, however, mindless of the consequences, has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in a case of cruelty: from the petitioner's side, ought this petitioner to be called on to endure the conduct; from the respondent's side, was this conduct excusable? The Court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not to be called upon to endure it.

(Paras 24, 25, 26, 35, 41 to 43)

(F) Special Marriage Act (1954), S. 27 — Adultery on the part of wife — Must be proved beyond reasonable doubt and not merely on balance of probability — (Divorce Act (1869), S. 10) — (Hindu Marriage Act (1955), S. 13).

Every matrimonial 'offence' must be proved beyond reasonable doubt. Where in defence to wife's petition for dissolution of her marriage, the husband alleges adultery on the part of the petitioner, it must be proved beyond reasonable doubt.

Mere production of love letters written to wife by a person will not prove adultery, in the absence of proof of the wife's reciprocity. This is only one way traffic. When these letters were found to have been written at the concluding stage of the married life, which had become intolerable to the wife, they cannot be the cause of desertion and cruelty on the part of the wife. AIR 1964 SC 40, Rel. on.

(Para 36)

Even a judicial personage must move with the times only to find that the latitude in the relations of sexes seen around today is something which would have perhaps shocked our grandmothers, and possibly mothers, to death. To judge therefore, a matter as this of the mid-twentieth century in the light of the rigid conventions of the mid-Victorian era will be to misjudge the whole thing. Such a common-sense perspective apart, let it not be forgotten for a moment that high standard of proof, not a mere balance of probability, is required to prove adultery. (1968) 1 WLR 1684 & (1966) AC 643 & AIR 1970 Cal 38, Ref.

(Para 36)

Cases Referred: Chronological Paras

- (1970) AIR 1970 Cal 38 (V 57) =
A. F. O. D. No. 390 of 1965, D/-
16-5-1969, Sachindra Nath Chatterjee v. Sm. Nilima Chatterjee 36
- (1968) AIR 1968 Cal 133 (V 55) =
71 Cal WN 605, Adelaide Mande Tobias v. William Albert Tobias 15
- (1968) 1968-1 WLR 1684, Bastable v. Bastable 36
- (1967) AIR 1967 SC 581 (V 54) =
(1967) 1 SCR 864, Chandra Mohini v. Avinash Prasad 36
- (1966) 1968 AC 643 = 1966-1 All ER 524, Blyth v. Blyth 36
- (1966) 1966 P 62 = 1966-2 All ER 257, Sheldon v. Sheldon 42
- (1966) 1966-1 WLR 423 = 1966-1 All ER 894, Becker v. Becker 15
- (1965) AIR 1965 SC 364 (V 52) =
(1964) 7 SCR 267, Mahendm v. Sushila 36
- (1964) AIR 1964 SC 40 (V 51) =
(1964) 4 SCR 331, Lachman v. Meena 36
- (1963) 1963-2 All ER 966 = 1964 AC 644, Gollins v. Gollins 41
- (1958) AIR 1958 SC 441 (V 45) =
1958 SCR 1410, White v. White 36
- (1957) AIR 1957 SC 170 (V 44) =
1956 SCR 838, Bipinchandra v. Prabhavati 22, 23, 36
- (1957) C. A. No. 69 of 1957, Crump v. Crump 15
- (1955) 1955-1 WLR 480 = (1955) 2 All ER 110, Llewellyn v. Llewellyn 12
- (1930) AIR 1930 Cal 418 (V 17) =
ILR 57 Cal 215, King v. King 11
- (1920) AIR 1920 Cal 439 (V 7) =
ILR 47 Cal 1068, Moreno v. Moreno 15

- (1885) 10 AC 171 = 52 LT 398,
 G. v. M. 45
 (1864) 3 SW & T 329 = 164 ER
 1302. Boulting v. Boulting 42
 (1820) 2 Hag Con 310 = 161 ER 753,
 Mortimer v. Mortimer 11

B. K. Ghosh, Samir Kumar Mookherjee and Jyotirindra Roy Chowdhury, for Appellant; Mrs. Jyotirmoyee Nag and Miss Manjuli Sen Gupta, for Respondent.

SALIL KUMAR DATTA, J.:— This is an appeal by the husband against the judgment and decree passed by the Additional District Judge, 24-Parganas allowing the wife's application for a decree of divorce.

2. The material allegations of the wife in her petition for divorce are as follows:

(a) The parties were married on 21st January, 1945, under the provision of the Special Marriage Act (Act III of 1872). It appears that the age of the wife at the time of marriage was about 21 years while the age of the husband then was 34 years. After marriage the wife came to reside at 80/D, Lansdown Road, Ballygunge, being the place of husband's residence. Within a few days, the wife found the husband cold and indifferent and sexually abnormal and perverse. Shortly thereafter, the husband left for United Kingdom on business for about three months and the wife became busy with her M. A. examination which was held in August, 1945. During the period from marriage till September, 1945, except the sojourn in foreign land, the wife found the husband cold and indifferent towards her and the husband would flare up on occasional slight protest made by the wife at his said coldness and indifference.

(b) After her examination was over, a period of unspeakable misery and agony, both physical and mental, for the wife ensued as the husband was too busy with the East Bengal Club and its young members which appeared to be the be-all and end-all of his life, avoiding the wife's company altogether. The husband would go straight from his so-called business to the club and return therefrom during late hours of night; he would then talk with his mother till late in the night returning to his room after ascertaining that the wife had fallen asleep. The occasional remonstrance by the wife and her rare expressions of desire for his company and to have a child used to upset the husband so much that he would become rude to her stating that she was too ugly to attract him. Even on such occasion he would strike her and at times strike her hard. For the wife the days rolled on in unhappiness, agony, and frustration and desperation due to the rude and cruel conduct and misbehaviour of the husband who thus practically deserted her although living in the same house. The

husband's mother sided with the husband and reprimanded her as over-sexy modern girl and selfish. Her father-in-law was reasonable in his attitude to her though he had no freedom of action and he died in 1954. The feeling between the wife and the husband became highly strained due to the attitude of the husband, who, to get rid of her, suggested that she should go to the United Kingdom for higher studies and that her education would make up her lack of beauty and the husband would be able to present her in society with his head high. For considerable time prior to the wife's starting for England she used to visit her parents then staying at Lahore and Jaipur and stay with them for long periods and beseeched them to allow her to stay with them in order that there might be an end of her miserable existence in the husband's house.

(c) The wife sailed for England in August, 1948, and got herself admitted in the London School of Economics for her Ph. D. Degree in geography. She stayed in the United Kingdom up to December, 1951 throughout except two visits in India. During the visits the wife found the husband more cruel, apathetic, negligent and cold and even her letters from England to the husband were found unopened in his desk. After her return from England there was occasional discussion by her parents with the husband for her stay with them, but all such discussions ended in physical violence to the wife and rude and rough behaviour to her parents.

(d) In August, 1952, the husband's family moved to their own house at 23, Lake Place, Tollygunge and the wife, with her parents living at Jaipur, had to reside at the said Lake Place house. The wife spent her days in frustration and agony and would have suffered a complete mental break-down but for a job as Lecturer in Geography she could secure in the University of Calcutta in the latter part of 1952, and she realized that she would have to live in a frustrated married life. She dedicated her life to her work in the said University and began to observe complete home reticence and indifference at the matrimonial home and apparently a defiant attitude to the husband. As a result of this, there was, in the husband's house, no more of physical torture and violence and mental shock to her. The wife realized that the husband wanted her to live elsewhere and that the husband had developed a feeling of hatred and abhorrence for her. In the same house, thus, they became strangers to each other and during the years of 1952, 1953 and major part of 1954 the wife was living her routine life, and each of them having his or her own way.

(e) In the early part of 1954, the wife's father was transferred from Cuttack to

Mandalay and on his way to Mandalay at the wife's request he rented a room in April, 1954 at 67, Raja Basanta Roy Road, P. S. Tollygunge, leaving there, the wife's mother and sister in order that they might occasionally give her company and console her. Thereafter the wife's father secured a flat at 51-M, Keyatala Road, Calcutta from November, 1954. By this time the wife made up her mind to desert the husband forever and from November, 1954, began to live with her mother and sister at the said flat since they had moved there.

(f) In May, 1955, the wife's father came down to Calcutta and on the morning of May, 16, 1955, he went to the husband's residence with a view to coming to some sort of understanding about the future course of life of the wife, whereupon the husband threatened the wife's father with violence and dragged him, so to speak, at the house at Keyatala Road. In the course of heated discussion held in the flat, the husband gave two alternatives to the wife—namely to sue for a divorce or to give up her employment in the University and to go to Mandalay with her father. To the said proposal the wife gave out that she could not think of divorce as her young sister was not then married nor could she ruin her career by giving up her service. At this the husband became mad with rage and struck the wife with a cricket umpire's stick which he had carried with him and when the wife's father and sister tried to prevent the stick being used against the wife, they were also struck by him repeatedly. The neighbours rushed in and came to their rescue and finally the husband was sent to Tollygunge Police Station where the wife and her father and sister made statements. The wife in the circumstances charged the husband with desertion and cruelty and apart from other marital offences, she even declared in her petition that during the first four years of married life, the husband did not cohabit with the wife for more than six occasions and that too about 3 years after marriage. The wife further stated that from November 1954, apart from the incident of May 1955, she had no contact with the husband. There are the usual averments of absence of collusion and connivance between the parties.

3. On the above allegations, the wife came to Court praying for a decree of dissolution of her marriage with the husband under Section 27 of the Special Marriage Act, 1954, (Act XLIII of 1954) her application having been filed on October, 3, 1958.

4. The application was contested by the husband who filed an elaborate written statement denying all material allegations made in the petition.

(a) It was denied that there was any act of cruelty or desertion on the part of the husband or that the wife had any

cause of action for initiation of this proceeding. The husband alleged that immediately after the marriage he found the wife cold and indifferent to him, which, he mistook as her devotion to her studies she was doing for her M. A. examination. The husband declared that during the period from January to June, 1945, he lived and co-habited with the wife in the normal and usual course except the voluntary restraint made by them in consideration of the wife's examination. In June, 1945, the husband, an international and well known football player, left for England for 3 months. On his return on September 5, 1945, the husband discovered that during his absence the wife succeeded in reviving her old love for one of her class-mates, Himangshu Roy, and his temporary absence gave opportunity to the wife and Himangshu to misbehave themselves. As he met his wife, he was surprised to find her not so responsive. On the following day, the wife left for her parents' place at Lahore and stayed there until October, 1946, when the husband again went abroad for business.

(b) During the latter part of his stay in England, the wife came to Calcutta and lived with the husband's family. But on the very day the husband returned to Calcutta from Europe, the wife again left for Lahore. The husband, on his return in January, 1947, came to learn that the wife avoided his company and did not like to live with his family but derived pleasure in the company of a person like Himangshu Roy. The husband reported the unbecoming affairs to wife's parents and he was asked by the wife's father to come to Delhi to settle the matter. The husband went to Delhi in August, 1947, when his father-in-law also came and took him to Jaipur where he was then with his family. At Jaipur the wife promised to give up her old habits and to be a dutiful wife. The husband agreed to forgive the past and on such condonation the parties on way to Calcutta came to Delhi staying there for a couple of days at Agra Hotel. Even at the hotel he found his wife writing a letter to her mother confessing that in spite of reconciliation she had sent a telegram to Himangshu for rescuing her. The husband found the wife incorrigible but the husband requested the wife to put up normal relationship till they returned to Jaipur. At Kutab Minar where they proceeded on sight-seeing, the wife, as she confessed later, wanted to take extreme liberty with her life, as she felt guilty in her conscience. This confession melted the husband's heart and on return to Agra Hotel, he forgave the wife. They enjoyed each one's company and cohabited in the said hotel and left for Jaipur instead of Calcutta. At Jaipur, they found that Himangshu had arrived in the meantime.

The parents of the wife pleaded for their daughter and the husband assured them that he would take her back. On or about August 14, 1947, the wife made an attempt to commit suicide but she was saved by the strenuous attempts made by the husband on the timely alarm by the Nepali servant. At the entreaties of her parents, the husband was persuaded to take her back and thereafter the wife and husband returned to Calcutta, the husband hoping to build up a happy home.

(c) Himangahu however persisted in his pursuit for the wife in spite of a police warning by the Deputy Commissioner of Police, Lalbazer. Even then after a short interval the telephone calls from Himangshu began to pour in. These were reported to the parents of the wife and they came down to Calcutta in May, 1948, when the husband was leaving for U. K. as Manager for the Indian Boxing Team for Olympic. As desired by her parents, the wife accompanied the husband to England where she was taken for her Ph. D. She stayed back while the husband returned and during her stay she paid two visits to India, all the expenses having been borne by the husband.

(d) The respondent received reports from his English friends that the wife was leading a gay life in England. The wife returned to India after obtaining Ph. D. but she did not join the husband for about 4 months after her return and even when she came to Calcutta she used to stay at Uttarpara with her uncle. Her parents approved the wife living independently and away from the husband pleading that she had obtained educational qualifications entitling her to live in her own way. The husband was, however, never agreeable to the wife's taking any job and wanted her to live with him like a respectable Hindu house-wife. Her parents, however, requested that the wife may be allowed for a short period to continue in her post as the lecturer in the University which she had taken in the meantime. The wife came back to the husband's family but soon picked up quarrels with the husband's parents as they did not like the extreme liberty in her movements.

(e) The husband shifted to 23, Lake Place leaving his parents at 80/D, Lansdown Road and there one Poonka alias G. S. Bhattacharjee, the younger brother of Indian Football Captain, K. Bhattacharjee, started making love to the wife. The husband went to Europe with the East Bengal Football Club and was away for some months. On his return to Calcutta, he came to know that the said Poonka misbehaved with his wife during his absence. In the meantime, Poonka went to England and started sending presents and indecent love letters to the wife.

(f) In or about October — November, 1955, the husband got a bunch of letters from the Almirh used by the wife and was staggered to find that the letters were filthy love letters written by Poonka and a Madras gentleman named Menon to the wife. As soon as the wife found that the letters had gone into the hands of the husband, she fled to her mother's house at Keyatala Road. The mother of the wife requested the husband to wait till the wife's father returned from Mandalay. On his return to Calcutta, the husband explained to him everything at the residence at Keyatala, where he had gone from his Lake Place residence. At that time the husband was suffering from high blood pressure and could only walk with the help of the stick which he carried. In the heated discussion that took place there the husband insisted that the wife should give up her service and go to Mandalay away from baneful influence. This was refused by the wife and the husband in his extreme mental and physical exhaustion, raised his stick in protest which unfortunately touched the father-in-law lightly. Local people immediately gathered inside the house and beat him and handed him over to the police.

(g) Since October, 1954, the wife has deserted the husband and has not returned to him. The husband denied the allegations made in the petition as vile and false. He denied that he was cold and indifferent to her and also denied that he suffered from any sexual abnormality and perversity. All the allegations of the wife about her suffering agony, frustration, all kinds of alleged rude conduct of the respondent or of the denial of the company by him while living with her are denied as untrue. The husband also complained that on her return from England she did not agree to come to him and there was no occasion for physical violence or rude behaviour by him as alleged. The husband further stated that he never deserted the wife nor ever intended to desert her. He again never denied his company to the wife nor bore any hatred or abhorrence for her. The husband contended that in November, 1954, or thereabout the wife deserted the husband for her misconduct which was thoroughly exposed when letters came to the hand of the husband as stated above and it was wholly incorrect to say that the wife deserted the husband for any mental or physical torture. The allegations of physical violence made by the husband on the wife and on her father and sister at Keyatala house are denied.

5. On the above pleadings, the following issues were framed:—

1. Is the suit maintainable in the present form?
2. Had the respondent actually deserted the petitioner without cause for

more than 3 years before the presentation of this petition?

3. Is the respondent guilty of cruelty towards the petitioner?

4. Is the respondent guilty of sodomy since the solemnisation of the marriage?

5. What relief, if any is the petitioner entitled to?

6. The parties went to trial before the District Judge, Fifth Additional Court, Alipore and during trial, the wife examined her father Dr. Hem Chandra Choudhury on commission, as also Dr. P. Saha, a medical practitioner, Sudhir Chandra Das, Police Officer, Tollygunge P. S., Samarendra Nath Das, an Officer of Alipore Police Hospital, her friend Suhasi and herself. On the side of the husband, S. K. Chatterjee of Agra Hotel, Mahindra Nath Datta Roy, Secretary of Football Association, Satya Ranjan Datta, a Medical Practitioner, P. K. Sen, then Civil Defence Controller, Renu Nandi, cousin (mastulu sister) of the husband, Jnan Sankar Sen Gupta, Advocate and the husband himself were examined. Documentary evidences adduced by the wife were the G. D. entries in the Police Case Hospital Register while the husband produced the G. S. entries as also register of the Agra Hotel and letters written from the wife to the husband, letters from Poonka and Menon to the wife as also other letters.

7. The learned Judge, on a consideration of the materials on record found that there was no clear averment nor any evidence to substantiate that the husband was guilty of sodomy since the solemnisation of marriage. The issue No. 5 was accordingly decided against the wife. As to the issue on cruelty, the learned Judge found that the husband had no normal sexual relationship with the wife. It was found that the wife had no sexual intercourse with the husband until about middle of 1947 and from after January 1948 in spite of her desire for his company. Further there was no convincing and just reason for the husband to withhold his marital company from the wife and not to have sexual relationship over prolonged periods and such refusal amounted to legal cruelty entitling the wife to a decree for divorce. The husband had been cold and indifferent to the wife all through and occasionally beat her and lastly assaulted her at the Keyatala house. On a consideration of the totality of circumstances, it was found that the husband since the marriage, had treated the wife with cruelty, physical and mental, entitling the wife to a decree for divorce.

8. The learned Judge also found that the husband, by his persistent refusal to give marital company to the wife and his cold and indifferent attitude to her, compelled the wife to withdraw from the

matrimonial home which she did in October/November, 1954. Such conduct on the part of the husband constituted constructive desertion and no attempt was made by him to bring her back and resume the normal married life thereby terminating desertion. The learned Judge overruled the contentions of the husband that the wife fled away when her conduct and character were revealed by the discovery of the letters, which according to written statement and evidence came to light long after in November 1955.

9. The learned Judge further found that there was no collusion or connivance between the parties nor any unnecessary or improper delay in institution of the proceeding, as the wife had to wait for sometime for the marriage of her sister before she could initiate the proceedings. Accordingly by his judgment and decree dated July 13, 1963, the suit was decreed dissolving the marriage. From the said decree the husband has preferred this appeal.

10. Mr. B. K. Ghosh, the learned counsel appearing for the appellant husband, has contended, with great emphasis, that on the application by the wife for a decree of divorce, the Court should not have granted the relief in view of the unnecessary and improper delay in instituting the proceeding. The Special Marriage Act 1954, hereinafter referred to as the said Act, while repealing the Special Marriage Act, 1872, (Act III of 1872) provides, that notwithstanding such repeal, the marriage solemnised under the earlier Act, shall be deemed to have been solemnised under this Act. Accordingly the present proceeding initiated by the wife for a decree for divorce, is to be governed by the provisions under the said Act. Section 34 of the said Act provides:—

"34. Duty of Court in passing decrees.

(1) In any proceeding under Chapter V (Restitution of conjugal rights and judicial separation) or Chapter VI, (Nullity of marriage and divorce) whether defended or not, if the Court is satisfied that—

(a) any of the grounds for granting relief exists; and

(b) there is no other legal ground why the relief should not be granted; then, and in such a case, but not otherwise, the Court shall decree such relief accordingly."

11. In support of his contentions, Mr. Ghosh relied on the decision in King (husband) v. King (wife), AIR 1930 Cal 418, where Costello J. quoted the dictum of Lord Stowell in Mortimer v. Mortimer, (1820) 2 Hag Con 310 that "the Court will be indisposed to relieve a party who appears to have slumbered

nue their business separately. This does not involve any adjudication of the rights of the landlord. Such an arrangement between the partners does not affect him at all and no third-party interest comes to be involved in such a case. It is admitted before me that the partners in this case entered into separate possessions of their respective portions of the premises in implementation of the award as far back as 1962, and rents have been paid to the landlord during all these years for the entire premises. I fail to see how the award, in these circumstances, involved the adjudication of any third-party interest. Details or the manner in which such an arrangement is worked by the parties concerned, are not at all relevant for purposes of the point in issue so long as the arrangement arrived at by the parties is not illegal or otherwise void.

Reference in this connection may also be made to *Shyam Sunder v. Brij Lal Chaman Lal Purani*, AIR 1968 Punj 28, where on the dissolution of a firm consisting of two partners due to the death of one of the partners, the surviving partner alone came to be in possession of the entire tenancy premises of the partnership and it was contended before the Court that this amounted to a transfer of the premises. The argument was repelled and it was held that in case of a dissolution of a firm where a partner came into exclusive enjoyment of the part of the joint property coming to his share, all that happened was that a person in joint possession came to be in separate and exclusive possession of the same property. There is no change either in regard to the tenancy or the conditions under which the premises is held.

6. In *Badra Narain Jha v. Rameshwar Dayal Singh*, AIR 1951 SC 186, the effect of inter se partition between the tenants came up for consideration and their Lordships observed:

"In law, therefore, an inter se partition of the mokarrari interest could not affect the integrity of the lease and it could not be said that Bisheshwar Dayal Singh under the alleged partition became a mokarraridar under another contract of lease. Such partitions amongst several lessees inter se are usually made for convenience of enjoyment of the leasehold but they do not in any way affect the integrity of the tenancy or make each holder of an interest in it as a separate holder of a different tenancy."

I am, therefore, unable to sustain the submission of the learned counsel for the respondents that in allotting different parts of the tenancy premises of the partnership to the two sets of partners, the award in any way affected the rights of the landlord or for that reason became illegal and could be set aside by the Court

suo motu in exercise of its inherent powers. The Court after holding that the objections filed by Basant Ram were barred by time should have proceeded to deal with the award in terms of Section 17 of the Arbitration Act and, in the facts of this case, should have proceeded to pronounce judgment in terms of it.

7. My attention has also been drawn to the objections to the award filed by Basant Ram. In para 1 as a preliminary objection, he submitted that the award involved division about the tenancy premises, which was beyond the competency of the Arbitrator to decide and that this could be done only with the consent and the authority of the landlord in writing and so the division of the tenancy premises was illegal, void, without jurisdiction and unenforceable in law. This objection involved questions of fact as well as law. Basant Ram's application under Section 33 already stood dismissed. His objections under Section 30 also stood time-barred. In these circumstances, therefore, it was not open to the Court to invoke its inherent powers to sustain this objection. Exactly a similar situation arose in *Madan Lal v. Sunder Lal*, AIR 1967 SC 1233. In this case the Court held:

"Assuming that the Court has power to set aside the award suo motu, that power cannot be exercised to set aside an award on grounds which fall under S. 30 of the Act, if taken in an objection petition filed more than 30 days after service of notice of filing of the award, for if that were so the limitation provided under Art. 158 of the Limitation Act would be completely negated."

This case, therefore, leaves no scope for the invocation of the inherent powers of the Court for the setting aside of the award in the circumstances of the present case.

8. The learned counsel for the respondents had placed reliance on the Bench decision of the Patna High Court in *Deep Narain Singh v. Mt. Dhaneshwari*, AIR 1960 Pat 201, where the suo motu powers of the Court were affirmed in the facts of that case and to *Premji Kumbhabhai v. Union of India*, AIR 1965 Assam and Nagaland 81. In the first case, the Court held that it had power under Section 17 itself to set aside the award without waiting for an objection to the award being filed or without considering any application for setting it aside. But that situation would arise, as observed in this very case, where the award was found to be a nullity because of the invalidity of arbitration agreement or for any other similar reason or when the award was prima facie illegal and not fit to be maintained. In the second case of Assam, the Court found that the award on the face of it

was in excess of the jurisdiction of the Arbitrator and was for that reason set aside. These cases do not in any way help the respondents.

9. In view of this position of law, I am of the view that the setting aside of the award by the Court in this case was wholly wrong and erroneous and this revision petition deserves to be accepted, but, in the circumstances of the case, the parties should be left to bear their own costs. It is ordered accordingly.

Petition allowed.

AIR 1970 DELHI 114 (V 57 C 26)

(HIMACHAL BENCH)

H. R. KHANNA, J.

Mahi Singh and others, Appellants v. Chunko and others, Respondents.

Second Appeal No. 353 of 1967, D/- 6-6-1969.

Easements Act (1882), Section 7 — Riparian rights — Water from spring only source of drinking water for the residents of a village — Construction of tank and pipe at the spring for taking water to the village for that purpose — Construction causing no obstruction to the supply of water from that spring which flows down stream — Construction cannot be objected to, by the residents of village at lower level who have only seasonal right to take water from that stream for irrigating their land.

Where water from a spring is the only source of drinking water for the residents of a village, then construction of a tank and pipe at the spring, for taking water to that village for use of water for that purpose and which has not resulted in diminution of the supply of water from that spring which flows down stream, cannot be objected to by the residents of village at lower level who have only a seasonal right to take water from that stream for irrigating their land.

(Para 7)

For use of water for drinking purpose, which relates to the ordinary and primary use of flowing water, there is no restriction. So, the construction of tank and pipe being intended to facilitate the use of water for its primary purpose, namely, drinking and not for any extraordinary or other purpose, and the only effect of which is that the residents of that village have been spared the trouble of carrying pitchers and other vessels to the spring for bringing water to village abadi, such construction cannot be objected to. 1904 AC 301 and AIR 1932 PC 46, Rel. on: (1897) ILR 24 Cal 865 (PC) and AIR 1964 Orissa 165 and AIR 1953 Bom 305, Dist. (Paras 5, 7)

AN/BN/A380/70/MLD/M

Cases Referred: Chronological Paras
(1964) AIR 1964 Orissa 165 (V 51) —
ILR (1964) Cut 518, Bhagaban Panda v. Bairagi Nalk 8
(1960) AIR 1960 Bom 480 (V 47) —
ILR (1960) Bom 441, State of Bombay v. Laxman Sakham 8
(1953) AIR 1953 Bom 305 (V 40) —
ILR (1953) Bom 913, Abbasali v. Shaikh Munir 8
(1932) AIR 1932 PC 46 (V 19) —
59 Ind App 56, Secy. of State v. Sannidhiraju Subbarayudu 8
(1904) 1904 AC 301 — 73 LJ PC
73, McCartney v. Londonderry and Lough Swilly Rly. Co. Ltd. 8
(1897) ILR 24 Cal 865 — 24 Ind App 60 (PC) Debi Pershad Singh v. Jyornath Singh 8

Chhabil Dass and D. P. Sud, for Appellants; J. K. Sharma, for Respondents.

H. R. KHANNA, J.:— This regular second appeal filed by Mahu Singh and other plaintiffs is directed against the judgment and decree of learned District Judge, Simla, reversing on appeal the decision of the trial Court whereby the suit of the plaintiff-appellants against Chaunku Ram and others defendant-respondents had been decreed. As a result of the decision in appeal, the plaintiff's suit stands dismissed.

2. The plaintiffs are the residents of village Garog, while the defendants are the residents of village Falahi, Garog is at a lower level than village Falahi. There is a spring of water known as Chashma Falahi in the area of village Falahi and water from it, after flowing through the land in village Falahi, goes down-stream to village Garog. The plaintiffs' case is that they have been using the water of the stream for irrigating their land situate in Khasra Nos. 10 and 11 since the days of their ancestors. It is stated that the defendants constructed a small cement tank (tank) at the spring and took a pipe from this tank to the village abadi. The defendants are thus alleged to have diminished the quantity of water that flowed into the natural stream and thereby obstructed the irrigation facility of the plaintiffs. As a result of that act of the defendants, the vegetable crops of the plaintiffs are stated to have got damaged. The plaintiffs accordingly prayed for a permanent injunction restraining the defendants from causing obstruction in the flow of the stream by diminishing its water. Prayer was also made for the demolition of the water tank and pipe constructed by the defendants.

3. The suit was resisted by the defendants and they averred that the plaintiffs had no right to irrigate their fields from the stream. Plea was also taken that the construction of the tank and the

pipe had been undertaken with the assistance of Block Development authorities and that the aforesaid construction had not resulted in any diminution of the water supply which flowed down the stream.

4. The trial Court held that the construction of the tank and pipe had resulted in obstruction to the flow of water and the diminution of its quantity. The plaintiffs were further held to have a right to irrigate their fields from the stream since the time of their ancestors. As such the injunction prayed for by the plaintiffs was granted. On appeal the learned District Judge held that the water of the stream was used by the plaintiffs for irrigating their fields. It was further held that the construction of the tank and the pipe had not resulted in diminishing the quantity of water flowing down stream. As the irrigation of the plaintiff's land was held not to have been affected, the learned District Judge came to the conclusion that the relief of injunction prayed for could not be granted. The learned District Judge also held that the residents of village Falahi could construct the tank and take water for drinking purposes. The Falahi stream was held to be the only source of drinking water for the people of village Falahi. The District Judge accordingly took the view that it would be wrong exercise of discretion to grant injunction and to deprive the residents of village Falahi of their source of drinking water. In the result, the appeal was accepted and the suit of the plaintiffs dismissed.

5. I have heard Mr. Chhabil Dass on behalf of the appellants and Mr. Sharma on behalf of the respondents, and am of the view that no case has been made for interference with the judgment and decree of the lower Appellate Court. Shri Jasmer Singh (P. W. 6) was appointed a Local Commissioner in this case and his report shows that the pipe constructed by the plaintiffs is 1" wide and the construction of the tank and pipe has not resulted in any decrease in the flow of water down stream. The report further shows that the residents of village Falahi had a right of getting drinking water from Chashma Falahi. The fact that the water from Chashma Falahi is the only source of drinking water for the residents of village Falahi and their cattle, is also proved by the statement of Nathu Ram (D. W. 4). Even Jawahar Lal, plaintiff, as P. W. 5 admits that the residents of village Falahi have no other source of water. This fact is also borne out by the statement of D. W. 5 Lajja Ram, overseer, according to whom the spring "Chashma Falahi" is the main source of drinking water for the residents of Falahi. His evidence also shows that the construction made by the

defendants has resulted in increased depth of water in the spring. On the basis of the material on record and the findings of fact arrived at by the lower Appellate Court it can be held to have been established:

1. Water from Chashma Falahi is practically the only source of drinking water for the residents of village Falahi and their cattle.
2. The tank and the pipe in question have been constructed by the residents of village Falahi for the domestic use of water, namely, for drinking.
3. The construction of the tank and water pipe has not resulted in diminution of the supply of water which flow down stream.

On the above facts the lower Appellate Court, in my view, rightly declined to grant the injunction prayed for by the plaintiffs. The question of use of water by riparian owner was dealt with by the House of Lords in the case of *McCartney v. Londonderry and Lough Swilly Rly. Co. Ltd.*, 1904 AC 301. Lord Macnaghten observed—

"There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes — sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all." It was further observed:—

"In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

The above observations were followed by their Lordships of the Privy Council in the case of *Secy. of State v. Sannidhiraju*

Subbarayudu, AIR 1932 PC 46. In the present case the construction of the tank and pipe was for a domestic purpose and as such was for a purpose of the first category enumerated by Lord Macnaghten. For such a purpose, which relates to the ordinary and primary use of flowing water, there is, in the words of Lord Macnaghten, no restriction. Mr. Chhabil Dass on behalf of the appellants contends that if the residents of village Falahi want to take water from Chashma Falahi or the stream flowing from it, they can only carry it in pitchers or other vessels; they have no right to construct tank and pipe near the spring for the flow of water to the village abadi. This contention, in my opinion, cannot be accepted because the construction in question is intended to facilitate the use of water for its primary purpose, namely, drinking and not for any extraordinary or other purpose. Had the construction been made for the use of water for a purpose other than domestic, there might possibly have been some force in the contention advanced on behalf of the appellants but as in the present case the construction is intended only to facilitate the consumption of water for domestic purposes, the defendants cannot be compelled to demolish the construction. The only effect of the construction of the tank and pipe is that the residents of village Falahi have been spared the trouble of carrying pitchers and other vessels to the spring for bringing water to village abadi.

6. Reference on behalf of the appellants has been made to the case of Debi Pershad Singh v. Joynath Singh, (1897) ILR 24 Cal 865 (PC). This was a case of riparian owners. The upper proprietor claimed the right to dam up a stream on his own estate, and to impound so much of its water as he might find convenient, for irrigation, leaving only the surplus, if any, for the use of the proprietors below. It was held that he had no such right, in the absence of a right obtained by him in virtue of contract with the lower proprietors or as a consequence of prescriptive use. The facts of the case reveal that the dam was sought to be constructed not for domestic use of water but for irrigation. As such the appellants cannot derive much help from the above authority. Reference on behalf of the appellants has also been made to the cases of Bhagaban Panda v. Balraj Naik, AIR 1964 Orissa 165, and Abbasali v. Shaikh Munir, AIR 1953 Bom 305. In the case of Bhagaban Panda the riparian owner wanted to use water for the purpose unconnected with his riparian tenement and an injunction was issued against him. In the case of Abbasali Hasanali Peerjade, AIR 1953 Bom 305, the plaintiffs were seeking to build a "bandhara" and store water of the stream so that

the water might be made available even to such of them who were not riparian owners for their agricultural operations. It was held that the plaintiffs were not entitled to store or collect water for the above-mentioned purposes by the construction of a dam. In none of these two cases the impugned construction was for facilitating use of water for drinking purposes. As such, the above authorities are clearly distinguishable. I may also observe that the dictum in Abbasali Hasanali Peerjade's case, AIR 1953 Bom 305, which is a Single Bench decision, was dissented from by a Division Bench of Bombay High Court in The State of Bombay v. Laxman Sakharani, AIR 1960 Bom 490.

7. The report of Shri Jasmer Singh, Tehsildar, shows that the source of irrigation of the land of the plaintiffs is Katool, which means that water flows into that land only for 3 or 4 months in a year. It would, therefore, follow that plaintiffs have only a seasonal right to take water from the stream in question for irrigating their land. As against that, the defendants depend upon the water of Chashma Falahi throughout the year for drinking purposes. As the construction of the tank and pipe in question is intended to facilitate the use of water of Chashma Falahi for drinking purposes of the defendants and has not resulted in diminishing the supply of water for the land of the plaintiffs, I see no cogent ground to interfere with the order of the Court below when it came to the conclusion that no injunction should be issued against the defendants compelling them to demolish the tank and pipe in question. The appeal consequently fails and is dismissed, but, in the circumstances, I leave the parties to bear their own costs.

Appeal dismissed.

AIR 1970 DELHI 116 (V 57 C 27)

(HIMACHAL BENCH)

I. D. DUA, C. J.

Brij Lal, Appellant v. Tulsi and others, Respondents.

Second Appeal No. 45 of 1966, D/- 9-6-1969.

(A) Custom (Punjab) — Adoption — Kangra district — Customary adoption does not exclude from its fold the adoption of a married man, particularly amongst Dehra tribes. 1909 Pun Re 43, Rel. on. (Para 5)

(B) Custom (Punjab) — Ancestral property — Alienation — Right to challenge — Gift in favour of adopted sons, the next male descendants, and others with their consent — Collaterals of the adop-

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ters in the fourth degree cannot challenge its validity.

Where the gifts of ancestral property are made in favour of the adopted sons, who are the next male descendants, and to the others with their consent, then the collaterals of the adopters in the fourth degree cannot challenge its validity.

(Para 7)

No doubt the proper person to object to an alienation is the nearest reversionary heir, and when he happens to be a minor or is shown that he is in collusion with the alienor, or that he has refused without sufficient cause to institute proceedings, or has precluded himself by his own act or conduct from suing, or has concurred in the alienation or the act alleged to be wrongful, the next reversioner is entitled to maintain the action. But it is only an alienation which has not become indefeasible or unassailable which can be challenged by the nearest reversionary heir, and the alienation of ancestral immovable property becomes unassailable if, inter alia, the next male descendants consent to it. AIR 1927 Lah 521 & AIR 1947 Lah 185 & 66 Pun LR 865, Rel. on.

(Para 7)

Cases Referred: Chronological Paras

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| (1964) 66 Pun LR 865, Maghar Singh v. Gujjar Singh | 2, 7 |
| (1960) 62 Pun LR 425, Ganga Singh v. Basant | 2 |
| (1954) AIR 1954 SC 581 (V 41)= 1955-1 SCR 44, Hem Singh v. Har-nam Singh | 6 |
| (1951) AIR 1951 Simla 168 (V 38)= ILR (1951) Punj 144, Kirlu v. Kishan Dei | 2 |
| (1947) AIR 1947 Lah 185 (V 34)= 48 Pun LR 406, Faqir Chand v. Bishan Devi | 7 |
| (1927) AIR 1927 Lah 521 (V 14)= 28 Pun LR 378, Khuda Yar v. Imam Din | 7 |
| (1913) 1913 Pun Re 24=1913 Pun LR 143, Jiwan Singh v. Pal Singh | 6 |
| (1909) 1909 Pun Re 49=1909 Pun LR 68, Chanda v. Akbar | 6 |
| (1905) 1905 Pun Re 40=1905 Pun LR 18, Budh Singh v. Mula Singh | 6 |

Chhabil Das, for Appellant; Sushil Malhotra and D. P. Sud, for Respondents.

I. D. DUA, C. J.—Two gift-deeds dated 20-7-1962 and 4-2-1963 respectively were executed by Bhuroo and Kanhiya (defendants Nos. 5 and 6) in favour of defendants Nos. 1 to 4. The plaintiffs instituted a suit on the allegation that the land and the house, which are the subject-matter of the two gift-deeds, are their ancestral property and, therefore, could not be validly gifted away. Of the donees, two of them are the adopted sons of the adoptors. In the suit, the plaintiffs have claimed a declaration that these gifts would not affect their reversionary rights

after the death of defendants Nos. 5 and 6. The donees resisted the suit. The plaintiffs' relationship was denied and so was ancestral character of the property. It was further pleaded that the gifts had been made in their favour in lieu of services, with the result that even if the property were proved to be ancestral, the gifts were valid. The two donees who claim to have been adopted as sons are Bengali and Aflatu. It was pleaded that as these two persons had been appointed as heirs of the adoptors, the plaintiffs had no locus standi to bring the present suit which was, in the circumstances, purely speculative.

2. The trial Court framed a number of issues on the pleadings of the parties. After observing that the objection regarding the valuation of the house in dispute was not pressed, it held the plaintiffs to be collaterals of defendants Nos. 5 and 6 in the fourth degree, and indeed this was conceded by the defendants. The property was held not to have been proved to be ancestral. Following a decision of the Punjab High Court in Kirlu v. Kishan Dei, AIR 1951 Simla 168, according to which a gift of a reasonable and moderate portion of the ancestral land can be made in lieu of services and observing that such a custom was admitted by the learned counsel for the parties, the trial Court expressed its opinion that there was no obstruction in making a gift of non-ancestral property by any proprietor. The property having not been shown to be ancestral, the validity of the gifts was upheld. The trial Court, however, added that in case the suit property was proved to be ancestral, these gifts would be clearly invalid because under custom, a gift of ancestral property could not be made except to the extent of a moderate portion in lieu of services. The Court did not find any evidence on the record showing services to have been rendered by defendants Nos. 1 to 4 to the donors. The adoption of Bengali and Aflatu by Bhuroo and Kanhiya respectively was also upheld. These adoptions were by means of registered documents. The necessary ceremony of adoption was also proved to have been performed. The argument that Bengali was more than 15 years old and was a married man before his adoption and, therefore, his adoption was invalid, was negated on the basis of question and answer 74 of the Customary Law of the Kangra District compiled in the Revised Settlement of 1914-1918 by Mr. Middleton. Under this rule of customary law, according to the trial Court, adoption of persons like Bengali, who was stated to be 25 years old, was permissible. Even otherwise, such an adoption was held to be valid as held in Ganga Singh v. Basant, (1960) 62 Pun LR 425. In the presence of Bengali

and Aflatu, the plaintiffs had, in the opinion of the trial Court, no locus standi to contest the gifts. Reliance for this view was placed on a Bench decision of the Punjab High Court in Maghar Singh v. Guljar Singh, (1964) 66 Pun LR 865.

3. An appeal having been taken to the Court of the learned Additional District Judge, that Court reversed the conclusion of the learned Senior Subordinate Judge on the question of the non-ancestral nature of the property. The gifted property was accordingly held to be ancestral. The adoptions were also held to have been proved beyond all doubt and Bengali and Aflatu being adopted sons of Bhuroo and Kaniya respectively, were held entitled to succeed to them even if the gifts in their favour were not valid. On this view, the plaintiffs were held disentitled to a declaratory decree because they would not be the heirs of the property in dispute at the time the succession opens. The appeal was on this view dismissed.

4. On second appeal in this Court, Shri Chhabli Das, the learned counsel for the appellants, has contended that merely because two of the donees are the adopted sons, the plaintiffs cannot be deprived of their right as collaterals to challenge the gifts if they are invalid because the declaratory decree would enure for the benefit of all those collaterals who, at the time the succession opens, are found entitled to succeed, unless they have lost their right in some other way. He has also relied on Section 10 of the Hindu Adoptions and Maintenance Act of 1956, which lays down that no person shall be capable of being taken in adoption unless, inter alia, he or she had not been married and he or she has not completed the age of 15 years. These two conditions, however, are subject to a custom or usage applicable to the parties which permits adoption of married persons and of persons who have completed the age of 15 years. According to the learned counsel, in the case in hand, there is no custom permitting the adoption of married people and of people above 15 years of age. Question 74 on which reliance has been placed by the Courts below, according to Shri Chhabli Dass, does not establish a custom as contemplated by Section 10 of the Adoptions Act. The parties in the present case are tribes of Dehra.

5. It is desirable at this stage to reproduce question and answer 74 of the Customary Law of the Kangra District:

"Question 74. Is it necessary that the adopted son should be under a certain age? If so, up to what age is adoption allowable?"

Answer.—The Dehra tribes say he should be under 20, and that of Hamirpur say he should be under 25. The Nurpur

tribes say he can be adopted only if 6 or below 6.

The Rajputs, Rathis, Jats of Kangra, the Rajputs, Rathis, Gaddis and Kanets of Palampur fix no age. The Brahmans of Kangra and Palampur, Mahajans, Suds, Khatris, Jats and Sainis of Palampur say he should be below 12, and the person adopting should perform the Yagyopvid ceremony in his own house.

The Khatris, Mahajans, Suds and Sainis of Kangra Tahsil say the person adopted should be below 20 at the utmost.

The Ghriths of Palampur say he should be below 10, and the Gaddis of Kangra say there is no limit of age if the person adopted is of one's own family, but if he is not he should be of age."

6. After giving some illustrations, the compilation gives some exceptions from Tahsil Hamirpur and there are instances of adoptions of persons of 25, 30 and 40 years of age. The answers given by the various tribesmen to this question clearly suggest that the provision in regard to the question of age cannot be considered to be mandatory in the sense that the adoption of a person who is a little older than the age as suggested by the answer, must necessarily for this reason alone, be held invalid. The law reports abound with decisions dealing with similar provision in other compilations of customary law of the Punjab which support the directory nature of such a provision. The fact that a person as old as 20, and as suggested by the Exceptions, a person as old as 40, is permitted to be adopted, has inherent in it the permissibility of the adoption of a married man. Keeping in view the general tendency in Kangra, I would be disinclined to hold that the customary adoption excludes from its fold the adoption of a married man, particularly amongst Dehra tribes. In this connection, it would not be out of place to refer to the decision of the Supreme Court in Hem Singh v. Harnam Singh, AIR 1954 SC 581, to which reference has also been made in the judgment of the trial Court. It has been observed in that judgment:—

"Whether a particular rule recorded in the 'Riwaj-i-am' is mandatory or directory must depend on what is the essential characteristic of the custom. Under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adoptor and some of the rules have, therefore, been held to be mandatory and compliance with them regarded as a condition of the validity of the adoption. On the other hand, under the Customary Law in the Punjab, adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies and to preferences in selection have to be held to be directory and adop-

tions made in disregard of them are not invalid."

In *Jiwan Singh v. Pal Singh*, 1913 Pun Re 24, a Bench of the Punjab Chief Court, while dealing with the *Riwaj-i-am* of the Amritsar District, observed that the provision in regard to the age of the adopted son is of a recommendatory and not of a mandatory character. Reliance for this view was placed in the reported case on an earlier decision of the same Court in *Budh Singh v. Mula Singh*, 1905 Pun Re 40. Rattigan's Digest of Customary Law, which gives the general trend of customary rules prevailing in Punjab, states in paragraph 36 that there are no restrictions as regards the age or the degree of relationship of the person to be appointed. Amongst the authorities noted in the foot-note, *Chanda v. Akbar*, 1909 Pun Re 49, is a case of Lohar of Anritsar Tahsil, upholding the adoption of a married man, with children, of 26 years of age. The impugned adoptions, therefore, cannot be held to be invalid.

7. Turning now to the question of competency of the present suit, it is undoubtedly true that the proper person to object to an alienation is the nearest reversionary heir, but when he happens to be a minor or is shown that he is in collusion with the alienor, or that he has refused without sufficient cause to institute proceedings, or has precluded himself by his own act or conduct from suing, or has concurred in the alienation or the act alleged to be wrongful, the next reversioner is entitled to maintain the action. This broad rule is contained in paragraph 67 of Rattigan's Digest of Customary Law. But the occasion to refer to this broad rule contained in paragraph 67 arises only when the concurrence of the next reversioner in the alienation has not the effect of rendering such alienation absolutely unassailable. Where such an alienation has become unassailable or indefeasible, paragraph 67 cannot be taken to confer any right on the remoter reversioner to challenge that alienation. The alienation of ancestral immovable property becomes unassailable if, inter alia, the next male descendants consent to it; see paragraph 59 of Rattigan's Digest of Customary Law. This proposition seems to be deducible from the decision in *Khuda Yar v. Imam Din*, AIR 1927 Lah 521 which was approved by a Bench of the Lahore High Court in *Faqir Chand v. Bishan Devi*, AIR 1947 Lah 185. The decision in *Maghar Singh's case*, (1964) 66 Pun LR 865 to which reference has been made by the trial Court in its judgment, also points out that it is only an alienation which has not become indefeasible which can be challenged by the nearest reversionary heir. In the case in hand, in my view, as soon as the gifts are made in favour of the adopted sons, who are

the next male descendants and to the others with their consent which must be assumed in his case, the suit by the present plaintiffs must be held to be incompetent because of the principle enunciated above. This appeal, in the circumstances, fails and is dismissed, but with no order as to costs.

Appeal dismissed.

AIR 1970 DELHI 119 (V 57 C 28)
(HIMACHAL BENCH AT SIMLA)
P. N. KHANNA, J.

Paras Ram, Appellant v. Union of India and others, Respondents.

C. W. P. 95 of 1967, D/- 21-5-1969.

Co-operative Societies — Himachal Pradesh Co-operative Societies Act (13 of 1956), S. 101 and Schedule 1, Entry 3 of the Act— Himachal Pradesh Co-operative Societies Rules (1960), Rule 92 — Provisions are discriminatory and violate provisions of Art. 14 of the Constitution — (Constitution of India, Art. 14).

Section 101 of the Act read with entry No. 3 of Schedule 1 and also R. 92 of the Rules confer upon Co-operative Societies unrestricted power and unguided arbitrary discretion to resort to one or the other method of recovery against the defaulter and thereby to pick and choose some of them for the application of more drastic procedure under the Revenue Act. The said provisions, therefore, do provide differential treatment for persons similarly situated and thus being discriminatory in character violate the right of equality guaranteed by Art. 14 of the Constitution. AIR 1954 SC 545 & AIR 1961 SC 1715 & AIR 1967 SC 1581, Rel. on. (Para 12)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1581 (V 54) =
1967-3 SCR 399, Northern India
Caterers (P) Ltd. v. State of Punjab 9, 10
(1961) AIR 1961 SC 1715 (V 48),
State of Orissa v. Dhirendranath Das 9
(1954) AIR 1954 SC 545 (V 41) =
1955-1 SCR 448, Suraj Mall Mohata
and Co. v. A. V. Viswanatha Sastri 9

S. Malhotra and Romeshchandra, for Appellant; A. S. Sood, for Respondents.

ORDER:— This petition under Arts. 226 and 227 of the Constitution of India has been filed by Shri Paras Ram, a former Secretary, Indira Gram Sewa Co-operative Society, Village Kuthera, Tehsil Ghumarwin, District Bilaspur, Himachal Pradesh for the issue of appropriate writ, order or direction, quashing the recovery proceedings commenced against him for the recovery of a sum of Rs. 10,509.06

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with costs (Rs. 13,192.31 in all) being the amount of an award dated 26th June, 1966 made against him, by the District Co-operative and Supplies Officer under the provisions of the Himachal Pradesh Co-operative Societies Act, 1956, (Act 13 of 1956), hereinafter referred to as the 'Act'.

2. According to his allegations, the petitioner while working as the Secretary of the Indira Gram Co-operative Society Limited, respondent No. 6, incurred the displeasure of the Co-operative Inspector as a result of which he was involved in a charge of embezzlement of the funds of the society. These charges were not admitted, as according to him, nothing was due from him. The dispute, as to the petitioner's liability towards the society was referred to the Registrar, Co-operative Society, Himachal Pradesh, Simla, respondent No. 2, under Section 87 of the said Act, who in turn appointed the District Co-operative and Supplies Officer, Bilaspur, respondent No. 3, to act as the Arbitrator, under Section 88 (b) of the Act. On 26th June, 1966, respondent No. 3 gave his award by which he directed the petitioner to pay a sum of Rs. 10,509.06 with costs (a total of Rs. 13,192.31) to the Indira Gram Co-operative Society Limited, respondent No. 6. The petitioner filed an appeal under Section 113 of the Act but the same was rejected. A revision under Section 114 of the Act filed by the petitioner was likewise rejected on February 8, 1967, by the Lieutenant Governor, Himachal Pradesh. In April 1967, the District Co-operative and Supplies Officer, Bilaspur, on further representation made by the petitioner is alleged to have assured him that the matter would be again looked into provided he paid a sum of Rs. 2,000 provisionally. This sum of Rs. 2,000 was paid by the petitioner, but nothing substantial seems to have been done thereafter.

3. The Collector, Bilaspur, respondent No. 4, has now started proceedings for recovery of the award amount under Sections 100 and 101 of the Act, read with Rule 92 of the Himachal Pradesh Co-operative Societies Rules, hereinafter referred to as the 'Rules'. The papers have been transmitted to Tehsildar, Tehsil Ghumarwin, District Bilaspur, for effecting the recovery of amount detailed in the award as arrears of land revenue, who, according to the petitioner, is about to realise the amount by coercive process.

4. The petitioner has by this petition challenged the constitutional validity of the provisions of the Act and the Rules, prescribing the method and mode of recovering the amount of the award. The award of the arbitrator made under the

Act, if not carried out, in a certificate signed by the Registrar, is deemed under Section 100 of the Act, to be a decree of the Civil Court and has to be executed in the manner as provided in Section 101, according to which, the recovery is to be made in the manner provided in the First Schedule to the Act.

5. The relevant provisions prescribing the method of recovery are contained in the entry at serial No. 3 of the First Schedule to the Act, which read as follows:—

"By the Collector as arrears of Land Revenue upon requisition by the Society or

By any Civil Court having local jurisdiction, in the same manner as a decree of such Court, upon application by the Society."

The method of recovery by the Collector as arrears of land revenue is given in Section 74 and other relevant sections of the Himachal Pradesh Land Revenue Act, 1953, hereinafter referred to as the 'Revenue Act'.

6. According to the learned counsel for the petitioner the two alternative modes of recovery provided by the Act and the Rules, one being under Procedure Code, invest the authorities with arbitrary powers to select one or the other mode of recovery. No guiding principles have been prescribed for making the choice. The provisions of the Act and the Rules regarding recovery are therefore illegal, ultra vires, and unconstitutional. Sec. 101 of the Act read with entries at serial No. 3 of Schedule I of the Act and also Rule 92 of the Rules, according to the learned counsel, suffer from the infirmity of excessive delegation of power.

7. According to the learned counsel the mode of recovery under the Act is very harsh as compared to the recovery through the civil Court under the Civil Procedure Code. In proceedings under the Civil Procedure Code, the judgment-debtor can raise objections regarding execution, discharge or satisfaction of the decree under Section 47, Civil Procedure Code; and is entitled if the execution application is made more than one year after the date of decree to a notice providing him with a chance to raise objections if any, under Rule 22 read with Rule 23(2) of Order 21, Civil Procedure Code, and can also take advantage of the law of limitation which prescribes the period of limitation of twelve years for executing a decree. No such facilities are available to him when recovery is made under the Revenue Act. The aggrieved defaulter is also deprived of the benefit of trial by ordinary Courts administering ordinary law, and would be subjected to the jurisdiction of the Re-

nue Courts instead. The learned counsel for the respondent submits that under Section 84 of the Revenue Act, the defaulter, if he denied his liability and pays the amount demanded under protest made in writing at the time of payment, also has the right to institute a suit in a civil Court for the recovery of the amount so paid. But the right so given is clearly illusory, and disadvantageous to the defaulter concerned, when it is borne in mind that he is required to pay the full amount before he can file the suit, where recovery can be claimed by him only after paying heavy court-fees. According to the learned counsel for the petitioner, the recovery provisions, therefore, infringe Article 14 of the Constitution of India inasmuch as a person like the petitioner proceeded against in the manner of the recovery of arrears of land revenue may be discriminated against as compared to another person against whom proceedings may be taken under the alternate provisions of the Civil Procedure Code. It is in these circumstances that the learned counsel urges that the recovery proceedings stated against the petitioner should be ordered to be quashed.

8. The language of entries against serial No. 3 in the First Schedule to the Act do vest the Co-operative Society with the unrestricted discretion to apply either to the Collector for effecting recovery as arrears of land revenue or to apply to the civil Court having local jurisdiction in the matter to recover the amount in the same manner as a decree of such court. The Act gives no guidance in the matter of treating any given case in one manner or the other. It has been left completely to the uncontrolled arbitrary choice of the society concerned.

9. It has been repeatedly held that all persons who are similarly situated are entitled to avail themselves of the same rights for relief or for defence and to enjoy like protection without discrimination. Even a rule of procedure comes as much within the purview of Article 14 of the Constitution, as the rules of substantive law. The learned counsel has referred to *Suraj Mall Mohita and Co. v. A. V. Viswanatha Sastri*, AIR 1954 SC 545, *State of Orissa v. Dhirendranath Das*, AIR 1961 SC 1715 and *Northern India Caterers (Pvt.) Ltd. v. State of Punjab*, AIR 1967 SC 1581, in support of his contention that if a law provides differential treatment amongst persons similarly situated, it violates the equality clause of Article 14 of the Constitution of India. The case of *Northern India Caterers*, AIR 1967 SC 1581, dealt with the provision of Punjab Public Premises and Land (Eviction and Rent Recovery) Act (31 of 1959). The legislature, by the said enactment provided an additional

remedy to the Government which was thought to be speedier than the one by way of a suit under the ordinary law, for the purpose of ejecting unauthorised occupants of Government premises. It was argued that persons occupying Government premises form a class by themselves as against those who occupy private owned properties. Such classification was sought to be justified on the ground that a differential treatment was required in this case in public interest. But it was urged that all those who fell under one classification were entitled to equal treatment among themselves; and as the impugned act provided an additional remedy to the Government and no guiding principles were laid to select one procedure or the other the act was declared to be bad. Shelat, J. speaking for the majority observed:—

"Assuming that persons in occupation of Government properties and premises form a class by themselves as against tenants and occupiers of private owned properties and that such classification is justified on the ground that they require a differential treatment in public interest, those who fall under the classification are entitled to equal treatment among themselves. If the ordinary law of the land and the special law provide two different and alternative procedures, one more prejudicial than the other, discrimination must result if it is left to the will of the authority to exercise the more prejudicial against some and not against the rest. A person who is proceeded against under the more drastic procedure is bound to complain as to why the drastic procedure is exercised against him and not against the others, even though those others are similarly circumstanced. The procedure under S. 5 is obviously more drastic and prejudicial than the one under the Civil Procedure Code where the litigant can get the benefit of a trial by an ordinary Court dealing with the ordinary law of the land with the right of appeal, revision, etc., as against the person who is proceeded against under Section 5 of the Act as his case would be disposed of by an executive officer of the Government, whose decision rests on his mere satisfaction, subject no doubt to an appeal but before another executive officer, viz., the Commissioner. There can be no doubt that S. 5 confers an additional remedy over and above the remedy by way of suit and that by providing two alternative remedies to the Government and in leaving it to the unguided discretion of the Collector to resort to one or the other and to pick and choose some of those in occupation of public properties and premises for the application of the more drastic procedure under S. 5 that section has let itself open to the charge of discrimination and as being violative

of Article 14. In this view S. 5 must be declared to be void."

10. The learned counsel for the respondent submitted that equal protection of the laws cannot be said to have been denied merely because the Co-operative Society has been given the option of proceedings against the defaulter either by an application to the Collector or by applying to the civil Court. The defaulter cannot be given a position to dictate that the society should have no choice of the proceedings. As the procedure for the recovery of the arrears of the land revenue was speedier than the resort to the civil Court, there was no likelihood of the Co-operative Society ever going to the civil Court. The discrimination alleged was, therefore, unreal and fanciful. In fact the learned counsel adopted the arguments which had appealed to Bachawat, J. who wrote the minority judgment in the Northern India Caterers's case, AIR 1967 SC 1581.

11. But in the light of the views expressed by the majority of the Judges of the Supreme Court as contained in the observations of their Lordships cited above, the contention of the learned counsel for the respondent cannot be accepted.

12. It is thus clear that Section 101 of the Act read with entry at serial No. 3 of Schedule I of the Act as also Rule 92 of the Rules confer upon the Co-operative Societies unrestricted and unguided arbitrary discretion to resort to one or the other method of recovery against the defaulter and thereby to pick and choose some of them for the application of the more drastic procedure under the Revenue Act. The said provisions, therefore, do provide differential treatment for persons similarly situated and thus being discriminatory in character violate the right of equality guaranteed by Article 14 of the Constitution. The said provisions must, therefore, be declared to be void.

13. In the result the recovery proceedings started against the petitioner by the respondent under the aforesaid provisions is quashed. There shall, however, be no order as to costs.

Petition allowed.

AIR 1970 DELHI 122 (V 57 C 29)

FULL BENCH

I. D. DUA, C. J., S. K. KAPUR AND
S. N. SHANKAR, JJ.

The Ishwari Khetan Sugar Mills Pvt. Ltd., Lakshmiganj, U. P., Petitioner v. Union of India and others, Respondents.
Civil Writ Petn. No. 696 of 1968, D/- 6-3-1969.

CN/CN/A869/70/VBB/A

Essential Commodities Act (1955) (as amended in 1967), Ss. 2(3), 3(3-C)— Sugar produced in 1966-67 damaged by fire and reprocessed in 1967-68 — Reprocessed sugar does not become fresh sugar produced in 1967-68 — S. 3(3) does not apply — Portion of damaged unprocessed sugar containing more than 90% sucrose — No power in Central Government to give directions for its reprocess — It is imperative on Central Government to fix price for its release.

The petitioners, carrying on sugar manufacturing and selling business, produced sugar of D. 29 grade conforming to ISS standard in 1966-67. As a result of fire in the petitioners' godown before the stocks could be released for sale, portion of that sugar was damaged and was, therefore, reprocessed in 1967-68 to restore it to its original condition. About 3000 bags of damaged sugar could not be reprocessed and lay with the Petitioners, who claimed a right in law to sell it in the market without being reprocessed. The stock of the sugar which was reprocessed had already been included in the figures of production of 1966-67. The question was whether the Central Government could issue direction to release the reprocessed sugar as sugar produced in 1966-67 and at the prices fixed for that year.

Held, in the circumstances of the case, (i) that the reprocessed sugar must be considered to be the stock produced in 1966-67 to justify its release as the sugar produced in that year at the rates fixed for that year. It would not be proper to say that it was a fresh production. The intervening fire was simply a hazard of the trade and not a part of the normal process for manufacture of sugar.

(Paras 11, 13)

Sub-s. (3) of S. 3, which contemplates the fixation of different prices for different kinds of sugar, does not apply to a case like this. Read in the context of the purpose for which Section 3 of the Essential Commodities Act has been enacted, namely, for the purpose of regulating production and supply of an essential commodity for the purpose of securing its equitable distribution and availability at fair price, this provision cannot be construed to mean that the Central Government will be authorised to fix different prices for different factories only for the purpose of securing a reasonable return to an individual manufacturer, who was obliged to incur some unforeseen expenses due to an accident or some such other case. Such an interpretation would be repugnant to the very purpose of the Act. The facts, therefore, that the petitioners had to incur expenses due to the accident, is not at all relevant and does not entitle them to have a fresh price determined for the reprocessed

sugar. Besides, in any case, the product, when first manufactured, remained sugar till after reprocessing and, therefore, no manufacture was involved in the reprocessing, particularly when judged in the background of the legislative provisions and the policy. AIR 1963 SC 791, Disting. (Para 13)

(ii) The Central Government had no power in law to compel the petitioners to reprocess the 3,000 bags of damaged unprocessed sugar still lying with them. If the damaged sugar contained more than 90 per cent of sucrose, it would prima facie be sugar subject to the control of the Central Government under the Essential Commodities Act and the Sugar Control Order and as such, the petitioners could not dispose of it without the necessary permission of the Central Government. It is imperative for the Central Government, therefore, to determine its price and to direct its release and to deal with it in all respects in accordance with the provisions of the Essential Commodities or the Sugar Control Order or other relevant provisions. A different price could also be fixed with respect to it. (Paras 20, 21)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 791 (V 50) = (1963) Supp. 1 SCR 586, Union of India v. Delhi Cloth and General Mills Co., Ltd.

S. C. Aggarwal with Revinder Narain, J. Aggarwal, Miss Uma Mehta and K. Dayal, for Petitioners; Devinder K. Kapur with A. D. Chaudhry, for Respondents.

ORDER:— The petitioners in this case, the Ishwari Khetan Sugar Mills, Private Limited, carry on the business of manufacture and sale of sugar. They have applied under Article 226 of the Constitution for a writ or order for quashing the directions issued by the Directorate of Sugar, Ministry of Food, Government of India, requiring them to deliver their stocks of reprocessed sugar in the year 1967-68 at the rates fixed by the Central Government for delivery of sugar produced in the season 1966-67 and for prohibiting the respondents from compelling them to reprocess the 3,000 bags of damaged sugar lying with them and to permit the same being sold in free market. The petition was admitted to be heard by a Division Bench but in view of the important question involved, it was referred to a Full Bench for decision and that is how the case is now before us.

2. The occasion for filing this petition arose because of an accidental fire that took place on May 30, 1967, during the sugar season of the year 1966-67 in the petitioner's godown No. 3 involving 14,659 bags of manufactured sugar, out of which 1,144 bags were completely lost and the remaining 13,515 were damaged

either by fire or fire-fighting operations. As sugar at that time was a controlled commodity and could not be sold without permit, the petitioners approached the appropriate authorities in the Sugar Directorate with a request to issue permits to release the damaged stocks for sale in the market. This request was, however, refused by the Directorate because the damaged sugar did not conform to the prescribed Indian Sugar Standard (ISS) of D-29 Grade of Sugar, which alone could be released for human consumption. They advised the petitioners to reprocess it and to intimate the quantity of white sugar obtained after reprocessing, duly certified by Central Excise Inspector of their factory, to enable the Directorate to consider its release. The petitioners, in consequence, started reprocessing but by the end of 1966-67 season, out of the damaged 13,515 bags, they could with difficulty and after incurring heavy costs reprocess 10,515 bags only. 3,000 bags still remained with them in the unprocessed form.

3. In January, 1968, the Government by letter No. 4-2-(13)/66-SCII January 20, 1968 (Annexure B) informed the petitioners that the reprocessed sugar would be treated as 'levy sugar' and reiterated that it was not possible to release the damaged sugar for sale in free market. The words 'Levy sugar' represented the 60 per cent of total production of sugar of the year 1967-68, which, under a revised policy for this season, the Government had decided to take over to be released under permits issued by them at controlled prices. By another letter dated January 30, 1968 (Annexure C) the petitioners were further informed that the reprocessed sugar had to be delivered by them at rates applicable for deliveries of sugar produced in 1966-67, as fixed by the Central Government by order dated November 16, 1967, issued by them in exercise of powers conferred by subsec. (3-C) of Sec. 3 of the Essential Commodities Act, 1955. This order fixed the ex-factory price of sugar at Rs. 139.07 p. per quintal for the sugar produced in 1966-67.

4. Before the letter dated January 30, 1968 (Annexure C) was issued, the Government had already fixed the price at which sugar produced in 1967-68 was to be released at Rs. 158.00 per quintal by Notification dated December 8, 1967 (Annexure M). By letter dated February 20, 1968 (Annexure E), the petitioners were directed to deliver 9 quintals out of the reprocessed sugar against gate sale release orders issued by the directorate at the price fixed for the sugar produced in 1966-67. The petitioners protested that this direction was wholly unjust and illegal. They maintained that having regard to the heavy costs incurred by them

In the reprocessing of this sugar and the fact that the sugar was actually reprocessed and so produced in the year 1967-68, it was neither just nor legal to ask them to deliver it at the price fixed for the sugar produced in 1966-67, or to treat it as the production of that year. The Managing Director of the petitioner-company also met the Joint Secretary, Ministry of Food, personally who the petitioners say, gave them an impression that Government would determine a different price for this reprocessed sugar after taking into account all the relevant factors including the cost of reprocessing and the cost of sugar lost in this reprocessing.

Later, by their letter dated March 13, 1968 (Annexure E-2) the Directorate amended their letter of February 20, 1968 (Annexure E) to the extent that the nine quintals of sugar, referred therein, were allowed to be delivered from the fresh stocks of sugar produced in 1967-68 and also at the prices fixed for this year as against the previous directions to deliver it out of the reprocessed sugar and at the price fixed for 1966-67 and then by their letter dated April 19, 1968, also asked the petitioners to furnish them all details regarding the reprocessing including information as to the extra material, fuel, etc., used in the reprocessing, but did not thereafter determine any fresh rates at which this sugar was to be released. On the contrary, in exercise of powers conferred by clause (5) of Sugar (Control) Order, 1966, read with its clause 17(2), the Central Government amended a previous notification dated March 19, 1968, to specially meet the petitioners' objections, and by order dated May 20, 1961, added an explanation to sub-clause (iv) to clause (c) of that Notification that the damaged or defective sugar or Rori brown sugar of any previous season shall be marked as the production of the season in which it was originally produced. This necessarily meant that the reprocessed sugar in this case had to be treated as the sugar produced in 1966-67.

Thus, in spite of representations and requests, the petitioners maintain that the respondents have acted wrongfully and illegally in insisting to treat the reprocessed sugar as the sugar produced in 1966-67 and in refusing to determine the price at which it should be released for sale. In regard to sugar of the 3,000 bags, still lying with them in the unprocessed form, they contend that the respondents have no power in law to compel them to reprocess it and they are entitled to sell the same in the free market.

5. In the affidavit, filed in opposition, the respondents have denied all the allegations of the petitioners. They main-

tain that the reprocessed sugar was, in fact, the production of 1966-67 and could not be treated as that of 1967-68 to be released at the rates for this year, nor could any special price be determined for this sugar. They further maintain that sugar to be released for human consumption had to conform to specific Indian Sugar Standards and the damaged sugar which was below this standard was not eligible for release.

6. In the rejoinder the contentions raised in the petition are reiterated and the plea that the petitioners are entitled in law to sell the 3,000 bags of unprocessed sugar in the market, without being reprocessed, is reaffirmed. It is also urged that the respondents have, in similar circumstances, been permitting release of damaged sugar. The case of Shankar Sugar Mills, Limited, where a similar fire had taken place, is cited as an instance. There, it is stated, the respondents released the damaged sugar for sale in the market.

7. The respondents filed a reply to the rejoinder reaffirming the position taken in the counter-affidavit. In regard to release of damaged sugar, in the case of Shankar Sugar Mills, it was stated that this was a very old case relating to the season 1952-53, that the relevant papers relating to this case were not traceable and the respondents were, therefore, unable to say if the damaged sugar was released in that case and, if so, under what circumstances.

8. The matter has been argued at length before us. The contentions raised by the learned counsel for the petitioners are—

(1) That the reprocessed sugar should be considered by the respondents to be the sugar produced in 1967-68, and they were not justified in asking the petitioners to sell it at the price determined for the release of sugar produced in 1966-67.

(2) That, in the alternative, the Central Government, in the circumstances of this case, should determine afresh the price at which the reprocessed sugar should be released.

(3) That the respondents have no power in law to compel the petitioners to reprocess the 3,000 bags of the damaged unprocessed sugar still lying with them which they are entitled to sell in the free market.

9. The argument of the petitioners is that the reprocessing of the sugar was not a mere sifting or separating of good sugar from bad, but it was a process of manufacture itself. The damaged sugar was melted, fresh syrup from newly crushed sugar-cane was added to it and the mixture so produced was then refined by almost the same process that was used for the manufacture of fresh sugar.

and the resultant reprocessed sugar, so obtained which conformed to the prescribed Indian Sugar Standard D-29 grade, fit for human consumption, was wholly different from the unprocessed damaged sugar, which served only as a raw material for its manufacture. In this process, they further contend that 5,031.7 quintals of the damaged sugar were completely lost, and out of the total quantity contained in 10,515 bags, only 5483.3 quintals of sugar could be recovered and that this whole thing resulted in a net loss of Rs. 15,65,486/-, out of which the insurance company paid Rs. 3,55,422/- only and adding to this amount a sum of Rs. 12029/- on account of interest on the compensation received from the insurance company they still suffered a net loss of Rs. 11,97,135.33 p. They, therefore, contend that the reprocessed sugar should have been considered to be a fresh production or manufacture and the respondents should not have treated it to be the sugar produced or manufactured in the year 1966-67 and should have allowed it to be sold at the rates determined for the sugar produced in the year 1967-68 and that, in any case, the Central Government should have determined afresh the price at which it was to be released under sub-section (3C) of the Essential Commodities Act, 1955, as amended by Parliament by Act 36 of 1967.

10. The pleas, *prima facie*, appear to be plausible, but it is difficult to sustain the arguments raised when examined in the background of the relevant statutory provisions and the powers conferred by Section 3 of the Essential Commodities Act on the Central Government to regulate the production and supply of sugar for the purpose of securing its equitable distribution and availability at fair price. The purpose of this provision is to maintain the supplies of essential commodities and regulate their distribution in public interest and the object of fixation of price is to make available these supplies at fair price to the general public. It is admitted by the petitioners that sugar is an essential commodity. As such, its production and distribution can validly be regulated by the Central Government in exercise of these powers. The industry producing sugar is essentially a seasonal industry and almost the entire marketable sugar is produced by the factories manufacturing it during a particular part of the year and for the remainder of the year they remain closed. The supplies in public interest, however, have to be maintained throughout the year at fair price.

To achieve this purpose, the method adopted by the Central Government is to assess the total production of the year by all the factories and to fix a fair price after taking into account all the relevant factors, as provided by law, at which this

production should be released to the trade. The stocks are then released from time to time by periodical orders to obtain equitable distribution and to avoid artificial shortages that may otherwise be created by vested interests. The release of the stocks as well as fixation of its prices are both made with reference to the seasonal cost of the production of the year. This method for achieving the purpose of the Act is perfectly legal and strictly within the powers conferred by Section 3 of the Essential Commodities Act on the Central Government. No challenge has, in fact, been laid by the petitioner in this regard. That being the position, the impugned directions requiring the petitioners to release the reprocessed sugar as the sugar produced in 1966-67 at the rates fixed for this year are perfectly legal and justified and no fault can be found with them.

11. The question, however, that calls for determination is whether, in the circumstances of this case, this reprocessed sugar can be considered to be the stocks produced in 1966-67 to justify its release as the sugar produced in that year at the rates fixed for that year. It is conceded by the petitioners that they had produced the sugar that got damaged as a result of fire in the year 1966-67. It is further in the affidavit of the respondents and not denied by the petitioners that they had also included this stock in the figures of production of that year in the statement submitted by them to the Central Government. Under these circumstances, if as a result of the accident in the petitioners' own godown, before the stock could be released for sale, it became substandard and not marketable, and had, therefore, to be reprocessed and was reprocessed to restore it to its original condition and to make it again the D-29 grade sugar, fit for human consumption, as it was when produced, it would hardly be proper to say that it is a fresh production. The intervening fire was simply a hazard of the trade and not a part of the normal process for manufacture of sugar. The reprocessing had to be resorted to only to remove the defects that were caused by the accident and not to manufacture the sugar that was being refined to remove the impurities. The stocks remained to be the stocks produced in 1966-67 and declared to be so by the petitioners themselves.

12. Relying on the observations of Das Gupta, J. speaking for the Court in *Union of India v. Delhi Cloth and General Mills Co., Ltd.*, AIR 1963 SC 791, the learned counsel contended that the reprocessing of sugar by the petitioners was in fact a fresh manufacture as held in this case, because by this reprocessing they had brought into existence a new substance. The observations in para 14

of this judgment, on which reliance is placed, were made in a wholly different background. The question before the Court in that case was as to the legality of imposition of excise duty to what the taxing authorities called the manufacture of refined oil from raw oil. This will have no application in the facts of the present case. Here what we have to see is whether in the scheme adopted by the respondents to work Section 3 of the Essential Commodities Act, the reprocessed sugar for the purposes of distribution could be called to be the sugar produced in 1966-67. This, obviously, cannot be done in this case for the reasons, which have already been set out.

13. Placing reliance on sub-sec. (3-C) added by the Parliament Act 36 of 1967, the learned counsel urged that the Central Government should have determined afresh the price of this reprocessed sugar. After sub-section (3B) of Section 3 of the Principal Act, this sub-section was added by the amending Act in the following terms:—

"(3-C). Where any producer is required by an order made with reference to clause (f) of sub-section (2) to sell any kind of sugar (whether to the Central Government or a State Government or to an officer or agent of such Government or to any other person or class of persons) and either no notification in respect of such sugar has been issued under sub-section (3-A) or any such notification, having been issued, has ceased to remain in force by efflux of time, then, notwithstanding anything contained in sub-section (3), there shall be paid to that producer an amount therefor which shall be calculated with reference to such price of sugar as the Central Government may, by order, determine, having regard to—

(a) the minimum price, if any, fixed for sugar-cane or by the Central Government under this section;

(b) the manufacturing cost of sugar,

(c) the duty or tax, if any, paid or payable thereon, and

(d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar,

and different prices may be determined from time to time for different areas or for different factories or for different kinds of sugar.

Explanation:— For the purposes of this sub-section, "producer" means a person carrying on the business of manufacturing sugar."

The argument is that the reprocessed sugar is quite clearly not the same kind of sugar as the damaged sugar, which was used only as a raw material for its manufacture, and as the amended section contemplates the fixation of different prices for different kinds of sugar after

taking into account the cost of its manufacture, the Central Government should have fixed a different price for this sugar. It is not possible to accept this submission. Sub-section (3-C) does not at all apply to a case like this. It talks of a different kind of sugar and envisages the determination of its price for the purpose of securing a reasonable return on the capital employed, not in the manufacture or production of a particular lot but in the business of manufacturing sugar vide clause (d) of the sub-section. The approach is, not from the point of view of any individual consignment of sugar, but from the point of view of the industry as a whole for determining a fair price for its production of the year for purposes of the trade. It is true that this provision authorises different prices being determined from time to time and also for different areas and even for different factories, but that is intended for wholly different situations; as, for example, when there are variations in prices of sugar-cane from area to area or the manufacturing cost of different factories, situated in different zones, is different or there are such like other causes relating to the business of manufacture of sugar as a whole beyond the control of the manufacturers.

Read in the context of the purpose for which Section 3 of the Essential Commodities Act has been enacted, namely, for the purpose of regulating production and supply of an essential commodity for the purpose of securing its equitable distribution and availability at fair price, this provision cannot be construed to mean that the Central Government will be authorised to fix different prices for different factories only for the purpose of securing a reasonable return to an individual manufacturer, who was obliged to incur some unforeseen expenses due to an accident or some such other cause. Such an interpretation would be repugnant to the very purpose of the Act. The fact, therefore, that the petitioners had to incur expenses due to the accident, is not at all relevant and does not entitle them to have a fresh price determined for the reprocessed sugar. Besides, in any case, the product, when first manufactured, remained sugar till after reprocessing and, therefore, no manufacture was involved in the reprocessing, particularly when judged in the background of the legislative provisions and the policy. Nothing has been shown to the contrary suggesting that sugar was remanufactured in 1967-68.

14. The word "kind", used in this sub-section, further has reference to the various kinds of sugar mentioned in the Act itself. Clause (e) of Section 2 of Act 26 of 1967 also amended the definition of "sugar" and defined it to mean not only sugar containing more than 90 per cent

of sucrose, including sugar candy, but also khandsari sugar or bura sugar crushed sugar or any sugar in crystalline or powdered form and included in this term even the sugar in process in vacuum pan sugar factory or raw sugar produced therein. It is for these different kinds of sugar that the sub-section empowers the Central Government to fix different prices. The reprocessed sugar in this case is not a sugar of a different kind. As stated earlier, it is the same kind of D-29 grade sugar conforming to ISS standard, the price of which had already been fixed. The Central Government therefore, were under no obligation to fix a different price for the reprocessed sugar of the petitioners in this case.

15. The learned counsel for the petitioners then argued that his clients were forced to reprocess this sugar and this fact has a material bearing on the question in issue. This does not appear to be so for purposes of the decision of this petition, because the only reliefs claimed by the petitioners in respect of the reprocessed sugar are that the directions of the respondents to release it as the sugar produced in 1966-67 and at the prices fixed for that year be quashed and that the same may be held to be the production of 1967-68 and the Government, in the alternative, be directed to fix a different price for its release having regard to the expenses incurred in its reprocessing. No claim has been made on the basis of the alleged compulsion. The question, therefore, whether the petitioners were compelled to reprocess the damaged sugar or they were simply advised to do so and they accepted this advice and reprocessed the damaged stocks, is not relevant for the decision of the points involved for granting or refusing these reliefs.

16. The learned counsel for the petitioners then relied on the letter dated April 19, 1968 (Annexure U) from the Chief Director, Ministry of Food, Directorate of Sugar, requesting the petitioners to furnish information in regard to the damaged sugar along with the copies of the correspondence that the petitioners had with the Insurance Company in regard to their claim for compensation for the fire and maintained that the respondents themselves had in a way conceded the demand of the petitioners to determine fresh price of the reprocessed sugar and this information was called only for that purpose. Referring to the petitioners' letter dated May 20, 1968 (Annexure V) and the subsequent correspondence on the subject, the learned counsel complained that in spite of the required information having been supplied, the respondents failed to fix the price and on the contrary wrongfully persisted by letter dated August 9, 1968 (Annexure W) that the reprocessed sugar could only be

treated as the production of 1966-67 and should be released by the petitioners at the prices fixed for that year.

In the affidavit filed in reply the respondents maintained that at no stage any assurance was given to the petitioners that the price of the reprocessed sugar would be fixed. They did not deny the correspondence relied upon by the petitioners, but maintained that the data was asked for simply to enable the Government to carefully examine the matter before giving a final reply and that after receipt of the full details, it was considered that there was no case for determination of any fresh price and that the reprocessed sugar could not but be treated as the sugar produced in the year 1966-67. In view of what has been said above, the Government were under no obligation to determine the price of the reprocessed sugar and the mere asking of the data in regard to the damaged sugar cannot be taken to have conferred any right on the petitioners to have the price of the reprocessed sugar determined by the Central Government. The suggestion, therefore, that this correspondence indicates that the respondents had conceded the right of the petitioners to have the price of the reprocessed sugar determined, is not correct.

17. The learned counsel for the petitioners then referred to the notification dated May 20, 1961, issued by the Central Government in exercise of their powers conferred by clause (7) of the Sugar (Control) Order, 1955 (Annexure Q) providing, amongst others, that all sugar manufactured by vacuum pan process shall be sold by the producer packed in new Twill jute bags of the dimensions given therein and that each bag shall bear on it, amongst others, the marking of the season of production of the sugar, contained in it. Referring to the subsequent Notification dated July 31, 1962 (Annexure R) amending the previous notification dated May 20, 1961, the learned counsel pointed out that sub-clause (iv) of clause (c) of the previous notification, which provided that the season of production of the sugar shall be mentioned on the bag, was amended in the latter notification to provide that the bag shall contain the year in which the sugar was packed. He, therefore, maintained that what was necessary and relevant for the purpose of sale of sugar, according to the relevant statutory orders in force at the time, was not the year of its production but the year of its packing.

By later notification dated March 19, 1968 (Annexure F), the Central Government, however, in exercise of powers conferred by clause (5) of the Sugar (Control) Order read with clause (17), sub-clause (2) of that Order, added an explanation

after sub-clause (iv) to clause (c) to the notification dated May 20, 1961, which provided that sugar obtained from the reprocessing of damaged sugar or defective sugar or rori or brown sugar of any previous season, was to be marked as produced. The learned counsel contended that this was wholly illegal and unwarranted and that no such deeming provision could be statutorily introduced having regard to the fact that the criterion for determining the year or season of production had already been directed by notification dated July 31, 1962 (Annexure R) to be the year in which sugar was packed and this notification therefore, could not apply to the reprocessed sugar.

It was further maintained that the sugar in question had been reprocessed before March 17, 1968 while this notification was issued thereafter and was not retrospective and, therefore, had no application to the present case.

18. The notifications dated July 31, 1962 (Annexure R) as well as notification dated March 19, 1968 (Annexure F) referred only to the labelling of the bags and it is not quite correct to say that they would have any bearing on the year of production for purposes of determination of its price. It is, however, not necessary to deal with that argument further in view of what has already been said in regard to the nature of the sugar reprocessed in this case. Independently of the notification dated March 19, 1968, this sugar cannot be considered to be a different kind of sugar and is essentially and basically the production of 1966-67, the price for which had already been determined.

19. Now taking up the third contention, it is clear that the case of the petitioners in regard to 3,000 bags of the damaged sugar stands on a different footing. By letter, dated June 11, 1963 (Annexure V2) they wrote to the Chief Director, Directorate of Sugar and Vanaspati, that in spite of efforts they have not been able to reprocess these remaining 3,000 bags and that they may be allowed to be disposed of in whatever way the Directorate may deem proper and a reasonable price may be fixed for the same; pointing out specifically that it was not advisable or proper to keep this sugar for the next season for purposes of being reprocessed and that it was likely to deteriorate still further during the rainy season. To this the respondents sent a reply by letter dated August 9, 1968 (Annexure W) simply advising them to reprocess this sugar in the next season 1968 and 69 and intimate the white sugar recovered from it to enable the Directorate to consider its release.

20. This damaged sugar according to the averment made in para 5 of the re-

joinder and the particulars of the reprocessed sugar sent to the respondent vide Annexure V, dated May 20, 1968, contained 97.8 per cent sucrose. Sugar as defined by Section 2 (3) of Act No. 36 of 1967 means any form of sugar containing more than 90 per cent sucrose and includes even sugar in process in vacuum pan sugar factory or raw sugar produced. According to this definition, if the damaged sugar contained 97.8 per cent of sucrose, it would prima facie be sugar subject to the control of the Central Government under the Essential Commodities Act and the Sugar Control Order and as such, the petitioners could not dispose of it without the necessary permission. The defence of the respondents, however, for their insisting on the petitioners to reprocess this sugar, as pleaded in para 6 of the reply to the rejoinder, is that under conditions that prevailed in 1966-67 when there was a complete control on distribution of sugar, all sugar produced in that year had to be allotted to the State Governments or their nominees at notified prices and these prices were fixed in respect of sugar conforming to Indian Sugar Standard grades only, and as the damaged sugar was below the ISS grade, for which no price was or could be fixed, this sugar could not be allotted to the State Governments for distribution for domestic consumption and hence was not released.

21. No provision of the Essential Commodities Act or the Sugar Control Order or any other law empowering the respondents to compel the petitioners to reprocess the sugar below the ISS standard has been brought to our notice. If the sugar produced is sugar within the meaning of Essential Commodities Act, it is open to the Central Government to determine its price and to direct its release and to deal with it in all respects in accordance with the provisions of this Act. A different price can also be fixed with respect to it. In fact the respondents themselves have produced (Annexure RRI), copy of a notification dated December 8, 1967 where the Central Government fixed prices of various grades of sugar higher or lower than ISS D-29 grade. If the remaining 3,000 bags, therefore, contain sugar within the meaning of the Essential Commodities Act, it is imperative for the respondents to deal with it in accordance with this Act and the Sugar Control Order or other relevant provisions.

22. In this view of the matter, we direct that the sugar in the damaged 3,000 bags may be got tested and examined by the respondents to ascertain the exact position and its sucrose contents. If it is found to be sugar subject to the control and distribution in accordance with the provisions of this Act, the respondents should issue suitable orders in accordance

done by a person prior to the coming into force of that clause.

We shall proceed to consider these grounds in the order in which they were pressed before us.

5. RE: GROUND (A).— This ground is based on the premise that unless gold is validly seized under Rule 126-L, it cannot be confiscated under Rule 126-M. It is, therefore, necessary to determine what, on a true construction of R. 126-M, is the condition for confiscation under that Rule. Is it necessary that gold must be validly seized under Rule 126-L before it can be confiscated under R. 126-M? Rule 126-M says that any gold seized under Rule 126-L shall be liable to confiscation. It is not any gold which is declared to be liable to confiscation: it is only gold seized under Rule 126-L which is subjected to the liability to confiscation. Seizure of gold must, therefore, clearly precede its confiscation. Having regard to the clear and explicit language of the rule, Mr. Khambhatta on behalf of the respondents could not resist the conclusion that unless gold is seized it cannot be confiscated but his argument was that though seizure may be a necessary condition of liability to confiscation, it was not necessary that the seizure must be a valid seizure under Rule 126-L. What is required to satisfy the condition of that rule is, he argued, the physical act of seizure and whether it is done in accordance with Rule 126-L or otherwise is entirely immaterial for that relates only to the mechanics of seizure. He contended that it was therefore entirely irrelevant to consider whether or not the undeclared gold was validly seized under Rule 126-L. This contention is, in our opinion, not well founded for it ignores the key words "any gold seized under Rule 126-L". Rule 126-M does not say "any gold seized" shall be liable to confiscation but it says "gold seized under Rule 126-L" shall be liable to confiscation and effect must be given to the words "seized under Rule 126-L". The seizure contemplated by Rule 126-M is a seizure under Rule 126-L and, therefore, it must be in accordance with Rule 126-L. Moreover the suggested construction would make a mockery of the safeguard provided by Rule 126-L in regard to search and seizure of gold. Mr. Khambhatta on behalf of the respondents relied on the decision of the Supreme Court in *Radha Kishan v. State of Uttar Pradesh*, AIR 1963 SC 822 but that decision deals with a totally different question and cannot help in the construction of Rule 126-M. The point at issue in that case was whether seizure of certain articles as a result of search carried on in contravention of the provisions of Sections 103 and 165 of the Code of Criminal Procedure was

vitiated so that the fact of seizure could not be proved by the evidence regarding seizure. The Supreme Court held that it was undoubtedly true that because of the illegality of the search the Court might be inclined to examine carefully the evidence regarding seizure but the seizure was not vitiated and if the evidence with regard to the fact of seizure was otherwise satisfactory, the seizure could be established. We are not concerned here with any question of proving the fact of seizure. The question before us is as to what is the true interpretation of the words "any gold seized under Rule 126-L" and these words, clearly posit gold seized in accordance with Rule 126-L.

6. It therefore becomes necessary to consider whether the undeclared gold which was seized by R. M. Shelat was validly seized under Rule 126-L. Rule 126-L (2) says that any person authorised by the Central Government by writing in this behalf may enter and search any premises and seize any gold in respect of which he suspects that any provision of Part XII-A has been or is being or is about to be contravened. The contention of the petitioner was that R. M. Shelat was not authorised by the Central Government by writing to enter and search the premises of the petitioner and seize the undeclared gold. The respondents, however, urged that R. M. Shelat had the necessary authority from the Central Government by reason of the Notification dated 10th January 1963 issued by the Central Government as amended by the subsequent Notification dated 5th November 1963 read with the permission dated 17th December 1964 given by the Superintendent of Central Excise. Since the Notification of the Central Government dated 10th January 1963 as amended by the subsequent Notification dated 5th November 1963 was relied upon as the source of authority of R. M. Shelat to exercise the function under Rule 126-L(2), it would be desirable to examine the terms of the said Notification. Considerable argument turned upon the language of the said Notification and we would, therefore, reproduce it in full in so far as it is material for the present purpose:

"S.O. 130:— In exercise of the powers conferred by Rule 126-X read with sub-rule (4) of Rule 126-J of the Defence of India Rules, 1962, the Central Government hereby authorises officers of the Central Excise Department not inferior in rank to officers specified in column 2 of the table below as the persons who shall exercise any or all the powers of the Gold Board in relation to the matters specified in the corresponding entries in column 3 and column 4 of the said table.

TABLE

Sr. No.	Officers of the Central Excise Department authorised to exercise the powers and functions.	Rule of the Defence of India Rules, 1962 to which the powers and functions have reference.	Nature of the powers and functions.
1	2	3	4
1	Superintendent.	126 E	Issue, renewal, refusal or cancellation of licences of the dealers and acceptance and disposal of gold deposited by persons whose applications for licences have been refused or whose licences have been cancelled.
2	Superintendent.	126 F	Acceptance and authentication of returns, affixing of signatures thereon and return of authenticated and signed copies of returns to licensed dealers and refiners.
3	Inspector.	126 G	Calling for and inspection of accounts, registers and documents from licensed dealers and refiners.
4	Inspector.	126 I	Acceptance and authentication of declarations by persons other than licensed dealers or refiners and affixing of signatures on declarations and return of authenticated copies to the declarants.
5	Sub-Inspector.	126 L (1)	Entry into and search of any establishment of any licensed dealer or refiner and seizure of gold or packages, coverings and receptacles containing gold, in the event of suspected contravention of the rules.
6	Sub-Inspector with the written permission of Superintendent.	126 L (2)	Entry into and search of premises not being refinery or establishment of a licensed dealer and seizure of any gold or packages, coverings or receptacles containing gold which may be found therein.
7	Inspector	126 L (6)	Power to take and dispose of samples.
8	Superintendent	126 L (4)	Power to hold enquiry for the purpose of ascertaining whether there has been any contravention of the provisions of Part XII-A of the Defence of India Rules, 1962 and to summon persons and documents.

1	2	3	4
9	Collector of Central Excise.	126 M (1) & (2)	Confiscation of gold found and seized under rule 126 L (1) or rule 126 L (2): (a) where the value exceeds two thousand rupees; (b) where the value does not exceed two thousand rupees.
	Assistant Collector of Central Excise		
10	Assistant Collector of Central Excise.	126 Q	According of sanction for the prosecution of offences.
	Dept. of E. A. Notin. (No. F. 7 (26)/67-SB) Dt. 9-1-1963.		

This Notification was amended by the subsequent notification dated 5th November 1963 which was inter alia in the following terms:

"NOTIFICATION.

Whereas the Central Government is of the opinion that it is necessary in the public interest to do so:

Now, therefore, in exercise of the powers conferred by sub-rule (4) of Rule 126-J read with Rule 126-X, of the

Defence of India Rules, 1962 the Central Government hereby makes the following amendments in the notification of the Government of India in the Ministry of Finance, Department of Economic Affairs No. S.O. 130, dated the 10th January 1963, namely:—

In the said notification:—

- (1)
(2) for the Table, the following Table shall be substituted, namely:—

TABLE

Sr. No.	Officers authorised to exercise the powers and functions.	Rule of the Defence of India Rules 1962 to which the powers and functions have reference.	Nature of the powers and functions.
---------	---	---	-------------------------------------

1	2	3	4
1
2
3
4
5
6	Sub-Inspector of the Central Excise Department with the written permission of Superintendent, Preventive Officer of the Customs Department for the time being employed for the prevention of smuggling, with the written permission of a Gazetted Officer of the Collectorate of Customs, any officer of the Directorate of Revenue Intelligence, other than (i) the Administrative Officer, (ii) Hindi Officer, and (iii) Ministerial Officer, with the written permission of a Gazetted Officer of the Directorate of Revenue Intelligence.	126 L (2)	Entry into and search of premises not being refinery or establishment of a licensed dealer and seizure of any gold or packages, coverings or receptacles containing gold which may be found therein.
...

13th March 1968.

On 17th December 1964, the Superintendent of Central Excise granted written permission to R. M. Shelat and other Inspectors and Sub-Inspectors of Central Excise to enter into and to search the premises of the petitioner and to seize any gold in respect of which any provision of the Gold Control Rules, 1963 had been or was being or was about to be contravened. The question is whether by reason of the Notification dated 10th January 1963 as amended by the subsequent Notification dated 5th November 1963 read with the permission dated 17th December 1964 R. M. Shelat was validly authorised by the Central Government under R. 126-L (2).

7. The first contention of the petitioner on this point was that the recital as to the source of power contained in the Notifications dated 10th January 1963 and 5th November 1963 as also the words "any or all the powers of the Gold Board" used in the opening part of the Notification dated 10th January 1963 showed that the powers which the officers specified in column 2 of the Table were authorised by the Central Government to exercise were the powers of the Gold Board in relation to the matters specified in the corresponding entries in columns 3 and 4 of the Table and since the power contemplated in Rule 126-L (2) was not a power of the Gold Board, the Notification dated 10th January 1963 as amended by the subsequent Notification dated 5th November 1963 was ineffective to authorise any officer to exercise the power under R. 126-L (2). Now it is no doubt true that in the opening part of the Notifications dated 10th January 1963 and 5th November 1963 it is said that the authorisation is granted by the Central Government in exercise of the powers conferred by Rule 126-J (4) read with Rule 126-X which permit authorisation only in respect of the powers of the Gold Board but that is not determinative of the question, for, if the Central Government had the power to authorise exercise of power under Rule 126-L (2) under any other provision of law, the authority granted under the Notifications dated 10th January 1963 and 5th November 1963 could be justified under that power in spite of reference to the wrong power in the opening part of the said Notifications. It is well settled that a wrong reference to the power under which certain action is taken by the Central Government would not per se vitiate the action taken if it can be justified under some other power under which the Central Government could lawfully take such action. The wrong label given by the Central Government cannot affect the validity of the action if it is otherwise within the scope of the power

of the Central Government. The recital as to the source of the power contained in the opening part of the Notifications dated 10th January 1963 and 5th November 1963 cannot, therefore, be of any help in determining the true meaning and effect of the Notification dated 10th January 1963 as amended by the subsequent Notification dated 5th November 1963.

8. Turning to the words "the powers of the Gold Board" it is true that, standing by themselves, they seem to support the argument of the petitioner but if we read the Notification dated 10th January 1963 as a whole and try to collect the intention of the Central Government from every part of it, these words do not present any difficulty in the way of a proper construction of the Notification. The intention of the Central Government as manifested in the Notification is clear beyond question. The Notification says in so many terms that the Central Government authorises the specified officers to exercise any or all the "powers of the Gold Board in relation to the matter specified in the corresponding entries in column 3 and column 4 of the said Table" and one of the matters specified in the Table is the power of entry into and search of premises not being refinery or establishment of a licensed dealer and seizure of any gold which may be found therein under Rule 126-L (2). It is clear from the Notification that the Central Government intended to authorise the specified officers to exercise the power of entry into and search of premises not being refinery or establishment of a licensed dealer and seizure of gold found therein under Rule 126-L (2) and that is why it included Item No. (6) in the Table of the Notification. The question is whether the words "the powers of the Gold Board" in the opening part of the Notification should be allowed to defeat the manifest intent of the Central Government. These words undoubtedly can have no application in a case of exercise of power under Rule 126-L (2), for the power under Rule 126-L (2) is not a power of the Gold Board. But it must be remembered that the Central Government was providing for conferment of authority in respect of several matters and some matters such as Rules 126-E, 126-F, 126-G, 126-I and 126-L (6) did refer to the powers of the Gold Board. It is, therefore, quite possible that the Central Government may have used the words "the powers of the Gold Board" though they were inappropriate in relation to the remaining matters, namely, Rules 126-L(1), 126-L(2), 126-L(4) and 126-M(2). Mere technical inappropriateness of language should not be allowed to defeat the intention of the Central Government. Lord Hobhouse speaking on behalf of the

Judicial Committee of the Privy Council in *Salmon v. Duncombe*, (1886) 11 AC 627 observed:

"It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law".

The same principle was reiterated by Lord Justice Mackinnon in *Sutherland Publishing Co. v. Caxton Publishing Co.*, (1937) Ch. 210, when he said:

"When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used, and of which the plain meaning would defeat the obvious intention of the Legislature."

If the intention of the Central Government is expressed with sufficient clarity and there is no doubt here as to what the Central Government intended to accomplish, it would not be right on our part to defeat the intention of the Central Government merely because of technical inappropriateness of the language used by the Central Government. Moreover to read the words "the powers of the Gold Board" as overriding the other parts of the Notification would be to sin against the fundamental rule of construction which requires that all parts of a statutory instrument must be read harmoniously so as to give effect to each and every part and not to result in rejection of any part as ineffective or futile. The effect of the suggested construction would be to render entries at serial Nos. (5), (6), (8) and (10) ineffective and meaningless and to mutilate the Notification by excising an important part of it. That would be contrary to all recognized canons of construction and would fail to achieve the intention of the Central Government. We are, therefore, of the view that on a plain natural construction of the words used in the Notification as amended, the Central Government authorised the officers of the Central Excise Department not inferior in rank to the Sub-Inspector of Central Excise with the written permission of the Superintendent of Central Excise to exercise the power under Rule 126-L (2).

9. It was then contended on behalf of the petitioner that in any event, the authority conferred under the Notification was ineffective for the purpose of Rule 126-L (2) since the authority was conferred on the specified officers by designation of office held by them and not by name. The petitioner urged that the words used by the rule-making authority in Rule 126-L(2) were "any person" and these words indicated that a person to be entitled to exercise the power under Rule 126-L(2) must be authorised by

name and not by description of office held by him. This argument is plainly incorrect; it seeks to read much more in Rule 126-L(2) than what it contains. The words "any person" are used in R. 126-L (2) to denote a wider category of persons which would include any and every person who may be authorised by the Central Government but they do not require that such person must be authorised by name and not by description of his office. There is no limitation as to the mode of conferment of authority in Rule 126-L(2) and we cannot import any restriction that the authority must be conferred by name and not by designation of office. Though the General Clauses Act, 1897 is not strictly applicable in the construction of the Gold Control Rules, the principle embodied in Section 15 of that Act can certainly be relied upon and it would be legitimate to hold that where a power to appoint any person to execute any function is conferred, such appointment may be made either by name or by virtue of office.

10. The next contention of the petitioner was that in any event the authorisation conferred under the Notification was not a valid authorisation in so far as the officers not inferior in rank to the Sub-Inspector of Central Excise were concerned, since there was no direct authorisation in their favour but they were authorised to exercise the power under R. 126-L(2) with the written permission of the Superintendent of Central Excise. The petitioner contended that the authorisation of the Central Government under Rule 126-L(2) must be directly in favour of the person concerned and it cannot be made conditional upon a permission to be granted by another officer of the Government. It is difficult to appreciate this argument. Rule 126-L(2) confers power on the Central Government to authorise any person which would include an officer of the Government and it is implicit in the conferment of the power that the Central Government may, while authorising such officer, impose a condition that he shall exercise the power under Rule 126-L(2) after obtaining the written permission of his superior. If such a condition is imposed on the exercise of the power, the person exercising the power would have to obtain the written permission of his superior as required by the condition before he can exercise the power but when he exercises the power he would do so by virtue of the authority conferred upon him by the Central Government. The authorisation may be unconditional or it may be subject to the fulfilment of a condition.

11. It is, therefore, clear that by the Notification dated 10th January 1963 as amended by the subsequent Notification dated 5th November 1963 the Central

Government authorised the officers of the Central Excise Department not inferior in rank to Sub-Inspector of Central Excise to exercise the power under R. 126-L (2) with the written permission of the Superintendent of Central Excise. R. M. Shelat was a Deputy Superintendent of Central Excise and was as such an officer of the Central Excise Department superior in rank to the Sub-Inspector of Central Excise and before effecting search and seizure, he obtained the permission dated 17th December 1964 from the Superintendent of Central Excise. He must, therefore, be held to be a person duly authorised by the Central Government by writing in that behalf to exercise the power under Rule 126-L(2) and ground (A) must be held to be unsustainable and must be rejected.

12. RE: GROUND (B): The challenge under this ground was that Rules 126-L, 126-M and 126-P suffered from the vice of excessive delegation of legislative power and were therefore invalid. But this challenge stands negated by the decision of the Supreme Court in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381. The petitioner in that case challenged the validity of Rule 30(1)(b) which was made by the Central Government under Section 3, sub-section (1) and sub-section (2), clause 15(i) of the Defence of India Act and the contention was that in conferring power on the Central Government to make rules, the Legislature had abdicated its essential legislative function in favour of the Central Government and therefore Rule 30(1)(b) was invalid. Gajendragadkar, J. speaking on behalf of the Supreme Court repelled this contention observing:

"In the present cases, one has merely to read Section 3(1) and the detailed provisions contained in the several clauses of Section 3(2) to be satisfied that the attack against the validity of the said section on the ground of excessive delegation is patently unsustainable. Not only is the legislative policy broadly indicated in the preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making authority that it would be idle to contend that the Act has delegated essentially legislative function to the rule-making authority. In our opinion, therefore, the contention that S. 3(2) (15) (i) of the Act suffers from the vice of excessive delegation must be rejected ... If the impugned sections of the Act are valid, it follows that Rule 30(1)(b) ... must be held to be valid since it is consistent with the operative provisions of the Act and in making it, the Central Government has acted within its delegated authority." This ground also, therefore, fails and must be rejected.

13. RE: GROUND (C): This ground raises the question whether Rules 126-L, 126-M and 126-P are outside the ambit of the power conferred under Section 3. The contention of the petitioner was that rules could be made under Section 3 only for the purpose of carrying out one or more of the purposes set out in Sec. 3, sub-section (1) and since Rules 126-L, 126-M and 126-P did not subserve any one or more of the purposes set out in Section 3, sub-section (1), they were ultra vires Section 3. Now, for the purpose of deciding this contention, it is immaterial whether the Gold Control Rules were made under Section 3, sub-section (1) or Section 3, sub-section (2), clause (33). Some argument was addressed before us on behalf of the petitioner as to whether all that was comprised within the definition of "Gold" in Rule 126-A, Explanation clause (d) could be said to be "Bullion" within the meaning of that term as used in Section 3, sub-section (2), clause (33) but it is not necessary to examine this question, for even if the view be taken that the word "Bullion" is not sufficiently wide to comprehend within its scope and ambit of all that is included in the definition of "Gold" in Rule 126-A, Explanation clause (d) and Gold Control Rules cannot be justified under Section 3, sub-section (2) clause (33), they can in any event trace the source of their authority in Sec. 3, sub-section (1). Section 3, sub-section (1) confers rule-making power on the Central Government which can be exercised for carrying out any one or more of the purposes set out in that sub-section and sub-section (2) of Section 3 then proceeds to set out illustratively certain matters for which the rules made under Sec. 3, sub-section (1) may provide. The matters set out in Section 3, sub-section (2) are not restrictive of the generality of the rule-making power conferred under Section 3, sub-section (1); the function of Section 3, sub-section (2) is merely an illustrative one. It is, therefore, unnecessary to inquire whether the Gold Control Rules, were made under Section 3, sub-section (1) or Section 3, sub-section (2), clause (33). But in either case, they could be validly made only for securing one or more of the purposes mentioned in Section 3, sub-section (1). There must be a relation between the provisions of the Rules and one or more of the purposes specified in Section 3, sub-section (1). The test provided by the guiding principle set out in Section 3, sub-section (1) is an objective test and whether or not in making the Rules the guiding principle was followed by the Central Government and the Rules subserve any of the purposes set out in Section 3, sub-section (1) is a justiciable question. Vide clause (v) of classification of statutes made in *Ram Krishna Dalmia v. S. R.*

Tendolker, AIR 1958 SC 538, the observations of the Supreme Court in *Jyoti Pershad v. Union Territory of Delhi*, AIR 1961 SC 1602 and the unreported decision of this Court in *Premchand Jechand v. K. G. Sanghrani*, Special Civil Appln. No. 434 of 1967 (Guj.). If it can be shown from the intrinsic evidence in the Rules or from the affidavits that the Rules do not subserve any of the purposes set out in Section 3, sub-section (1), the Rules would be outside the ambit of Section 3.

14. Now the case of the respondents was that the Gold Control Rules subverted the purpose of securing the defence of India and maintaining supplies and services essential to the life of the community and the argument of the petitioner was, therefore, directed towards showing that the Rules did not subserve either of the said two purposes. The petitioner urged that for the purpose of establishing that the Rules subverted the purpose of securing the defence of India and maintenance of supplies and services essential to the life of the community, it was not enough to show that there was some connection between the provisions of the Rules and the said two purposes but it was necessary to show that such connection was real and proximate so that the provisions of the Rules, if implemented, would result in the securing of the said two purposes. The argument of the petitioner was that if this was the test to be applied for the purpose of determining whether the Rules subverted the said two purposes, it was apparent that the Rules did not subserve either of the said two purposes for there was no real and proximate connection between the provisions of the Rules and the said two purposes and the provisions of the Rules, if implemented, did not directly and immediately result in the fulfilment of the said two purposes. Before we proceed to consider this argument of the petitioner, it is necessary to point out that while considering the question whether the Rules subserve the purposes for which they are claimed to have been made, it must be borne in mind that the Court is not to act as a Court of appeal and examine whether the view taken by the Central Government that the Rules subserve the stated purposes is right or wrong. The Court cannot substitute its own opinion for that of the Central Government; as a matter of fact, the Court would not have sufficient means to form an opinion as to whether the Rules subserve the stated purposes or not. Having regard to the nature of the problem to be tackled by the Central Government, the diversity of factors liable to be taken into consideration and the possibility of divergence of views in the assessment of the relative value and effect of varying social, political and economic factors and their inter-

connection with one another, a certain amount of latitude and free-play must be allowed to the Central Government and the rules made by the Central Government cannot be struck down unless it appears clearly that the rules cannot, on a reasonable view of the matter, subserve the stated purposes. Such would be the case where the provisions of the rules are totally unrelated to the stated purposes or they are not reasonably capable of being related to the stated purposes. The test must be whether the means adopted by the Central Government are reasonably related to the end in view, namely, the achievement of the stated purposes. We cannot accept the contention of the petitioner that the connection between the means and the end must be such that the implementation of the means must directly result in the achievement of the end without any intervening steps in the chain of causation. In a complex society which is guided by many variable social, economic and political factors, it would be impossible to predicate in most cases that the means adopted would directly lead to the desired end without the intervention of any intermediate factors. To read the section as authorising the Central Government to make rules only where the direct effect of the rules is to secure any one or more of the purposes set out in the section would be to deprive the section of much of its utility and value. It is immaterial as to how many links are there in the chain between the provisions of the rules and the stated purposes for effectuating which the rules are made. There can be no hard and fast rule or strait-jacket formula in this respect. The question must always be, whether the provisions of the rules can, on a reasonable view of the matter, be said to be related to the stated purpose and if they are, they must be held to be within the scope and ambit of Section 3.

15. This view which we are taking finds support from the decision of the English Court in *Chester v. Bateson*, (1920) 1 KB 829. There the question was whether a certain Regulation was ultra vires the regulation-making power conferred on His Majesty in Council by Section 1, sub-section (1) of the Defence of Realm Consolidation Act, 1914 and dealing with this question, Darling, J. stated the following test:

"..... and I ask myself whether it is a necessary, or even reasonable, way to aid in securing the public safety and the defence of the realm to give power to a Minister to forbid any person to institute any proceedings to recover possession of a house so long as a war worker is living in it."

The same test was also applied by the Judicial Committee of the Privy Council

In Attorney General for Canada v. Hallet & Carey Ltd., 1952 AC 427. That was an appeal from Canada and the statute which came up for consideration was the National Emergency Transitional Powers Act, 1945. Section 2, sub-section (1) conferred power on the Governor-in-Council to do and authorise such acts and things and make from time to time such orders and regulations as he may deem necessary or advisable for the purpose of maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace. In exercise of this power, an Order in Council was made by the Governor in Council and the question was whether this Order in Council was ultra vires Section 2(1) of the Act. Explaining the scope and ambit of the power of the Governor in Council under Section 2(1), the Judicial Committee of the Privy Council said:

"..... That does not allow him (Governor in Council) to do whatever he might feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the Court is entitled to read the Act in this way." The Bombay High Court has also adopted the same test in *Amichand v. G. B. Kotak*, 67 Bom LR 234 = (AIR 1966 Bom 70).

14th March 1963.

16. If this test is applied, the challenge to the validity of Rules 126-L, 126-M and 126-P on this ground must fail. The Gold Control Rules are reasonably related to the purpose of securing the defence of India and maintenance of supplies and services essential to the life of the community. We may in this connection refer to paragraph 6 of the affidavit of Chumilal Gopichand Soni sworn on 1st April 1967 where it is stated:

"..... I say that the said Rules have been framed by the Central Government in exercise of its powers conferred by the Section 3, sub-section (1) of the Defence of India Act, 1962 and not merely under Section 3, sub-section (2), clause (33), as suggested. I say that the Rules were framed inter alia with a view to put restrictions on the smuggling of gold and on the use of gold already smuggled into India. I say that smuggling of gold was causing a drain on the foreign exchange and that preventing smuggling of gold would result in increasing foreign exchange reserve of the Central Government which was very necessary for the purposes of the defence of India as well as the maintenance of the supplies and civil services essential to the life of the community. I say that the Gold Control Rules are inter alia intended to serve the purpose of conservation of foreign ex-

change as also for the other purposes mentioned in Section 3(1) of the said Act. In this connection, it is common knowledge that the prices of gold in India owing to the demand by the people for preparing ornaments and articles of gold has been very high and lucrative as compared to the price of gold in other countries and that is the inducement and incentive to the people to smuggle gold. The smuggling of gold adversely affects to a great extent India's foreign exchange reserve and therefore it was necessary to control internal market and business in gold for purposes of conservation of foreign exchange by restricting the use of such gold which is very essential in times of emergency for the defence of India as well as for maintenance of essential services and supply of essential commodities. I say that it was for these reasons and to achieve these objects that the Gold Control Rules were promulgated."

In view of the statements in this paragraph, it is impossible to say that the Gold Control Rules are totally unrelated to the purpose of securing the defence of India and maintenance of services and supplies essential to the life of the community or that they are not reasonably capable of being related to either of the said two purposes. We must, therefore, reject this ground of challenge against the validity of the Impugned Rules.

17. RE: GROUND (D): That takes us to the last ground of challenge against the validity of the Impugned show cause notice. This ground of challenge was a limited one and it was directed only against the penalty sought to be imposed on the petitioner under Rule 126-L (16). The argument of the petitioner was that the omission to declare the undeclared gold and retaining possession of it without declaring it which rendered it liable to confiscation had already taken place prior to 24th June 1963 when R. 126-L(16) was introduced in Part XII-A of the Gold Control Rules and Rule 126-L(16) was, therefore, not applicable and no penalty could be imposed on the petitioner under that Rule. This argument depends for its determination on a true interpretation of Rule 126-L(16) and it is, therefore, necessary to examine the language of that provision. Rule 126-L(16) says that any person who in relation to any gold does or omits to do any act which act or omission would render such gold liable to confiscation under Rule 126-M, or abets the doing or omission of such an act shall be liable, in addition to any liability for any punishment under Part XII-A to a penalty not exceeding five times the value of the gold or one thousand rupees, whichever is more. It is a provision imposing penalty and therefore it should

not be construed retrospectively so as to impose penalty for an act committed prior to its coming into force unless such effect cannot be avoided without doing violence to its language. Now, there is nothing in the language of this provision which compels us to give it a retrospective operation. On the contrary, the language clearly suggests a prospective operation. Rule 126-L(16) must, therefore, be construed as attracting penalty only in those cases where the act or omission which would render gold liable to confiscation is done after the coming into force of that provision. If there is any act or omission rendering gold liable to confiscation done by a person prior to the coming into force of Rule 126-L(16), such a case would not be covered by Rule 126-L(16) and the penalty under that provision would not be attracted. It therefore becomes necessary to inquire whether on the allegations contained in the show cause notice, any act or omission was done by the petitioner after the coming into force of Rule 126-L(16) which rendered the undeclared gold liable to confiscation. It is only if the respondents can show that such act or omission was done by the petitioner that the respondents can assume jurisdiction to impose penalty on the petitioner under Rule 126-L(16).

18. That raises the question as to when gold becomes liable to confiscation. Rule 126-M deals with confiscation of gold and says that any gold seized under Rule 126-L shall be liable to confiscation. Though the liability to confiscation is declared by Rule 126-M, it does not in so many terms state the grounds on which gold which is seized under Rule 126-L shall be liable to confiscation. But the grounds can be clearly gathered by implication from reference to Rule 126-L. The scheme of the rules seems to be that any person authorised by the Central Government may seize gold if he suspects that in respect of it any provision of Part XII-A has been or is being or is about to be contravened and after gold is seized, it may be confiscated after adjudication in the manner provided by law if it is adjudged that any provision of Part XII-A has been contravened in respect of such gold. Seizure of gold can be made on suspicion but after seizure, gold can be confiscated if what was suspicion at the stage of seizure is converted into determination as a result of adjudication. Gold can, therefore, be confiscated if it is established that in respect of it any provision of Part XII-A has been contravened. Contravention of any provision of Part XII-A in relation to any gold would render such gold liable to confiscation. The question which we must, therefore, ask ourselves is, whether any contravention of a provision of

Part XII-A rendering the undeclared gold liable to confiscation was committed by the petitioner after the coming into force of Rule 126-L(16).

19. It is clear from the allegations contained in the show cause notice that according to the respondents, the petitioner owned the undeclared gold since the commencement of Part XII-A but failed to declare it within the prescribed period in contravention of Rule 126-L(1) and retained possession of it without declaring it in contravention of R. 126-L(10). The omission of the petitioner to declare the undeclared gold within the prescribed period in contravention of Rule 126-L(1) and retaining possession of the undeclared gold in contravention of R. 126-L(10) rendered the undeclared gold liable to confiscation at the latest by 28th February 1963 and if it had been seized by any authorised person, it could have been confiscated under Rule 126-M at any time prior to 24th June 1963 when R. 126-L(16) was introduced. The undeclared gold had already become liable to confiscation prior to 24th June 1963 and no act or omission was required to be done after 24th June 1963 to render the undeclared gold liable to confiscation. It is no doubt, true that the petitioner continued in possession of the undeclared gold even after 24th June 1963 and was in possession of the same on 20th November 1964 when it was uncovered by the raiding officers but that was not an act or omission which rendered the undeclared gold liable to confiscation. The act or omission which rendered the undeclared gold liable to confiscation had already been committed prior to 24th June 1963 and the penalty provided in Rule 126-L(16) was therefore not attracted. It is significant to note that the event which attracts penalty is not a breach of any provision of Part XII-A simpliciter but it is the doing of an act or omission which would render gold liable to confiscation. Moreover, the offence contemplated by Rule 126-L(16) is not a continuing offence. What attracts penalty under R. 126-L(16) is the act or omission which renders gold liable to confiscation. In the present case, the undeclared gold had already become liable to confiscation by reason of an act or omission of the petitioner prior to 24th June 1963 and there was accordingly no question of the petitioner doing any act or omission after 24th June 1963 which would render the undeclared gold liable to confiscation. Rule 126-L(16) had therefore no application to the case of the petitioner and the impugned show cause notice issued by the Assistant Collector, Central Excise, was without jurisdiction in so far as it sought to impose penalty on the petitioner under Rule 126-L(16).

20. We, therefore, allow the petition and make the rule absolute to the limited

extent that a writ of mandamus shall issue quashing and setting aside the impugned show cause notice in so far as it calls upon the petitioner to show cause why penalty under Rule 126-L(16) should not be imposed upon him on the allegations contained in it. Since the petitioner has partly succeeded and partly failed, the proper order for costs would be that each party should bear and pay its own costs.

Petition partly allowed.

AIR 1970 GUJARAT 122 (V 57 C 18)

B. J. DIVAN AND V. R. SHAH, JJ.

Vora Mulla Taheralai Mulla Akbaralli, Appellant v. Manoranjan Barua, Respondent.

Second Appeals Nos. 424 and 539 of 1961, D/- 3-2-1969, from order of Asst. J. at Mehsana in Civil Appeal No. 227 of 1959 and from decision of Civil J. Junior Divn. at Siddhapur in Civil Suit No. 97 of 1957

Transfer of Property Act (1882), Section 53-A — Scope — Provisions do not confer any right on transferee to claim possession or any other right in property — Transferee has a right only to plead estoppel to protect his possession against transferor.

As regards the right of a transferee in possession under S. 53-A the following principles emerge from the Section: (1) Sec. 53-A only creates an estoppel against the transferor or persons claiming under him from enforcing any right in respect of the property against the transferee or persons claiming under him. (2) The transferee or persons claiming under him have a right to plead the bar of estoppel to protect their possession against the transferor or persons claiming under him. (3) The transferee does not get any right to claim possession or any other right in the property on the basis of an unregistered document. (4) The right to plead estoppel conferred by Section 53-A on a transferee is a right available to the transferee in order to defend his possession, and (5) Section 53-A confers no active title on the transferee. AIR 1968 SC 794 & AIR 1940 PC 1, Foll.; AIR 1952 Orissa 143 & AIR 1957 Andh Pra 854 & AIR 1953 Ajmer 47 & AIR 1953 Ajmer 19 & AIR 1939 All 611 & AIR 1944 Oudh 212 & AIR 1943 Mad 706 & AIR 1957 Andh Pra 61 (FB), Dist.; AIR 1967 SC 1390 & AIR 1963 Ker 236 & (1906) ILR 28 All 41 & AIR 1945 Pat 183 & AIR 1951 Nag 438, Referred.

(Paras 10 & 13)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 794 (V 55) =

(1968) 2 SCR 720, Delhi Motor

Co. v. U. A. Basurkar 12, 17

- (1968) AIR 1968 Andh Pra 113 (V 55) = (1968) 1 Andh LT 89, Manora Bai v. Sultan Bakath 28
(1967) AIR 1967 SC 1390 (V 54) = 1968 Cri LJ 1647, Mangru v. Tarakanthji 25
(1963) AIR 1963 Ker 236 (V 50) = ILR (1963) 2 Ker 167, Mathai v. Kunu[kochu] 26
(1957) AIR 1957 Andh Pra 61 (V 44) = 1956 Andh WR 1137 (FB), Chimpiramma v. Subramanyam 24
(1957) AIR 1957 Andh Pra 854 (V 44) = 1956 Andh WR 830, Achayya v. Venkata Subba Rao 16
(1953) AIR 1953 Ajmer 19 (V 40) = 1952 AMLJ 33, Fateh Mohd. v. Mst. Ghosia Bibi 17
(1953) AIR 1953 Ajmer 47 (V 40) = 1953 AMLJ 109, Gulab Chand v. Madholal 17
(1952) AIR 1952 Orissa 143 (V 39) = ILR (1949) 1 Cut 705, Padmalabha v. Appalanarasamma 14, 23
(1951) AIR 1951 Nag 438 (V 38) = ILR (1951) Nag 904, Moolchand v. Parmanand 27
(1945) AIR 1945 Pat 189 (V 32) = ILR 23 Pat 961, Ramchandar Singh v. Raghupati Sahal 27
(1944) AIR 1944 Oudh 212 (V 31) = 19 Luck 565, Ewaz Ali v. Mt. Firdous Jehan 19
(1943) AIR 1943 Mad 708 (V 30) = 1943-2 Mad LJ 300, Audinarayudu v. Mangamma 23
(1940) AIR 1940 PC 1 (V 27) = 66 Ind App 293, Probodh Kumar Das v. Dantnara Tea Co. Ltd. 21
(1939) AIR 1939 All 811 (V 26) = ILR (1939) All 809, Ram Chander v. Mahara! Kunwar 18
(1936) AIR 1936 Lah 519 (V 23) = 38 Pun LR 281, Balmokand v. Ram Saran Das 28
(1934) AIR 1934 PC 235 (V 21) = 61 Ind App 388, Pir Bakhsh v. Mahomed Tahar 8
(1934) AIR 1934 Cal 559 (V 21) = ILR 61 Cal 240, Gourgopal Dev v. Karmalkalika Datta 28
(1906) ILR 28 All 41 = 2 All LJ 491, Ghasiram v. Mangal Chand 27
S. N. Patel, for Appellant, in S. A. No. 424 of 1961 and for Respondent in S. A. No. 539 of 1961; S. K. Zaveri, for Respondent, in S. A. No. 424 of 1961 and for Appellant, in S. A. No. 539 of 1961.
SHAH, J.:— The appellant in Second Appeal No. 424 of 1961 is the plaintiff; while the appellant in Second Appeal No. 539 of 1961 is the defendant in Civil Suit No. 97 of 1957 filed in the Civil Court at Sidhpur. The circumstances under which these two Second Appeals arise may be briefly stated.

2. The subject-matter of this dispute is a house at Sidhpur, and it belonged to one Alihussain Mahmadalli Iqbal. On

6-11-1952, Alihussain entered into an agreement of sale (Exh. 120) of this house with the plaintiff and the sale price was fixed at Rs. 8,000, out of which an amount of Rs. 2,500 was paid to Alihussain by the plaintiff on 6-11-1952. The balance amount of the purchase price has been paid by the plaintiff by the end of 1954. With the execution of the agreement on 6-11-1952, Alihussain put the plaintiff in possession of the house. The present defendant obtained a money decree against Alihussain on 15-2-1955 in suit No. 873 of 1954 in the Calcutta High Court. The present defendant-judgment-creditor filed Execution Application No. 75 of 1955 in the Court of the Civil Judge (Junior Division) at Sidhpur and in execution of the decree he got the house attached on 27th June 1955. The plaintiff thereupon filed a claim petition No. 19 of 1956 under O. 21, R. 58 of the Civil Procedure Code to get the attachment raised on the ground that he was the exclusive owner of the property. This claim petition was dismissed by the Court on 26th July 1957. The plaintiff, thereupon filed Civil Suit No. 97 of 1957 on 2-9-1957 asserting that he is the exclusive owner of the property and asking for a declaration that the property is not liable to attachment and sale in execution of the decree of the defendant and for an injunction restraining the defendant from putting the property to sale in the Execution Application. In this suit the defendant contended that the sale agreement was not genuine and that it was executed to defeat the claim under the decree. He also raised two more contentions to the effect that the judgment-debtor that is, Alihussain was a necessary party to the suit and that the suit was not maintainable at the instance of the present plaintiff in view of the provisions of Section 53-A of the Transfer of Property Act.

3. The learned trial Judge accepted all the contentions raised by the defendant and consequently dismissed the suit of the plaintiff. The plaintiff filed Civil Appeal No. 227 of 1959 on 19-10-1959 to the District Court at Mehsana. The appeal was heard and decided by the learned Assistant Judge in that Court. The learned Assistant Judge held that the judgment-debtor was not a necessary party and that the provisions of Section 53-A of the Transfer of Property Act created no bar to the plaintiff's maintaining this suit. He also held that the agreement for sale was genuine and that possession was taken by the plaintiff under the agreement for sale on 6-11-1952 and that all moneys due under the agreement for sale had been paid to Alihussain by the plaintiff before the end of 1954. He also held that the agreement for sale was not made to defeat the creditors. He however, came to the con-

clusion that the intention of the parties, when the agreement of sale was executed by Alihussain, was to give the house as security for an amount of Rupees 8,000. He, therefore, reversed the decree of the trial Court and passed a decree declaring that the suit house should be sold in Darkhast No. 75 of 1955 subject to the plaintiff's charge over it for Rupees 8,000. It is against this decree passed by the first appellate Court that the plaintiff has preferred Second Appeal No. 424 of 1961 in so far as it declares that the property is liable to be sold in the execution application filed by the defendant; while the defendant has preferred Second Appeal No. 539 of 1961 in so far as the first appellate Court has ordered the property to be sold subject to the plaintiff's charge over it.

4. Both these appeals were heard together. In Second Appeal No. 424 of 1961, Mr. S. N. Patel, learned Advocate for the appellant-plaintiff contended that under the provisions of Section 53-A of the Transfer of Property Act, the plaintiff acquires a right to possession of the property and he can protect this right of possession even by instituting a suit. He therefore, supported the conclusion of the lower Court on this point, namely, that the plaintiff can maintain this suit. He, however, contended that the first appellate Court was wrong in coming to the conclusion that the agreement was passed simply by way of security for the amount that the plaintiff had advanced, and was to advance to Alihussain upto Rs. 8,000. He urged that the first appellate Court should have held that he was the absolute owner of the house under the agreement for sale and therefore, should have granted him the relief for the declaration that the property cannot be sold in execution of the decree.

5. The contentions raised by the respondent-defendant are that the plaintiff has not acquired any right in the property and therefore, he cannot maintain this suit; that even if the plaintiff can maintain this suit, yet the defendant was not a person claiming under Alihussain and therefore, the suit of the plaintiff is not maintainable against him and that Alihussain-judgment debtor was a necessary party to this suit and he having not been joined, the suit of the plaintiff must fail.

6. Before we proceed to consider the merits of the case it will be necessary for us to decide as to the facts found by the lower appellate Court. The lower appellate Court framed point No. 4 as "whether the alleged Banakhata and the subsequent sale is real and bona fide?" and the finding recorded thereon is in the negative. Mr. Zaveri, therefore, argued that the lower appellate Court has found the Banakhata as well as the subsequent

sale-deed not to be real and bona fide. He, therefore, urged that the lower appellate Court has held that the Banakhat is made with an intent to defeat and delay the claim of the creditors and therefore, the plaintiff's suit based on the Banakhat and the subsequent sale-deed should have been dismissed. In our opinion, Mr. Zaveri's reading of the judgment of the lower appellate Court is not correct. It may be noted that the sale-deed was not executed in favour of the plaintiff until after the suit was filed. The plaintiff brought the suit, not on the basis of a sale-deed in his favour, but on the basis of a contract for sale in his favour. It is true that at the end of paragraph 12 of his judgment, the learned Assistant Judge has remarked: "So, when ultimately Alihussain knew that the suit house would be lost for ever on being sold out by the creditors, he has passed the sale deed to the plaintiff who is his Kulmukhtyar to oblige him." This remark of the learned Assistant Judge does suggest that when the sale deed was passed by Alihussain he intended to defeat or delay the claim of his creditors. However, this circumstance has no relevance in this case, because the suit was not based on the sale deed. The suit was based only on the contract for sale and therefore, the intention of Alihussain at the time when the sale deed was executed is not at all material for the decision of this suit. It is true that if point No. 4 is read with the finding thereon, it would give an impression that the learned Assistant Judge also found that the Banakhat was not real and bona fide. On a reading of his judgment, however, it appears to us that the negative finding on point No. 4 is recorded by the learned Assistant Judge with reference to the sale deed alone. In paragraph 12 he discussed the question whether the agreement for sale is real and bona fide or is merely colourable. He considered the evidence on record and the reasons given by the learned trial Judge to hold that the agreement is not genuine. Having considered all the circumstances, the learned Assistant Judge has recorded his finding in the following words:—

"Now, when I have come to the conclusion that this Banakhat is genuine, and also have held that the entries in the account books about the payment of Rupees 8,000 are not bogus, we have to consider whether the sale in pursuance to this agreement is real or not."

There is, therefore, a clear finding recorded on a consideration of the evidence on record, that the Banakhat is genuine. In paragraph 13 of his judgment, the learned Assistant Judge considered the finding of the trial Court that the transaction was intended to defraud the defendant and other creditors of Alihussain. Having considered the evidence on the

point the learned Assistant Judge came to the conclusion that "the lower Court has wrongly held that the Banakhat has been effected to defraud the defendant and other creditors." There is, therefore, a clear finding recorded by the learned Assistant Judge that the Banakhat was not made with an intent to defeat or delay the claims of his creditors.

7. Mr. Zaveri then drew our attention to the fact that the learned Assistant Judge has further come to the conclusion that Alihussain did not intend to sell the property to the plaintiff by the Banakhat of 6-11-1952 and wanted to create merely a security for the money advanced to him by the plaintiff. It was categorically stated to us by Mr. Zaveri that it is not his case that the Banakhat was made by Alihussain to secure any money advanced by the plaintiff to Alihussain. It is clear from the plaint that the plaintiff also has not put forward any such claim. Mr. Patel, the learned advocate for the plaintiff also stated to us that, that was not his case at any time. This conclusion of the learned Assistant Judge, therefore, was not called for on the pleadings in the case. Such a contention was not raised by the defendant in the written statement and there was no issue raised on the point. Such a contention was also not advanced on behalf of the defendant before the trial Court. The learned Assistant Judge with respect to him was, therefore, in error when he sought to make out a case not pleaded by either party. Therefore, this part of his finding should be ignored as being unnecessary for the purposes of this litigation. We will, therefore, proceed on the basis that the learned Assistant Judge has found that the contract for sale dated 6-11-1952 is genuine and that it is not made with a view to defeat or delay the creditors. The other facts found by the learned Assistant Judge are that the plaintiff has been put in possession of the property in pursuance of the said agreement by Alihussain and that the plaintiff has paid the whole of the purchase price to Alihussain and thus performed his part of the contract.

8. The plaintiff has based his claim on being a full owner of the property. Since there was no registered sale-deed in his favour at the time when he filed the suit, it is obvious, in view of Section 54 of the Transfer of Property Act, that he had not acquired ownership of the property. The legal position is authoritatively stated by the Privy Council in *Pir Bakhsh v. Mahmood Tahar*, 61 Ind App 388 at p. 395 (AIR 1934 PC 235 at p. 237) as follows:

"By S. 54 of the Transfer of Property Act, a transfer by sale of tangible immovable property of the value of Rs. 100/- and upwards can be made only by a registered instrument. The land in ques-

tion is admittedly worth more than Rs. 100/- and the defendant has no registered instrument of transfer in his favour. The section expressly enacts that a contract for the sale of immovable property 'does not of itself create any interest in or charge on such property'. There is therefore no room for the application of the English equitable doctrine that 'a contract for sale of real property makes the purchaser the owner in equity of the estate'."

9. Mr. Patel, the learned advocate for the plaintiff however stated that the plaintiff has pleaded facts entitling him to rely upon the provisions contained in Section 53-A of the Transfer of Property Act in support of his right to maintain the suit. Mr. Patel argued that the plaintiff has a right to defend his possession conferred upon him by the provisions of Section 53-A and that he can, even as a plaintiff, take steps to defend his possession. Section 53-A reads as under:—

"Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract;

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

10. It is, therefore, necessary to consider whether Section 53-A confers any right on the plaintiff. On a consideration of the language of Section 53-A, it is clear that no right of any kind is conferred on a person who has been put in possession of the property under a contract for sale. The first three paragraphs

of Section 53-A deal with the conditions on fulfilment of which the doctrine of part performance will come to the help of the transferee under a contract for sale. The fourth paragraph then provides as to what benefit is available to the transferee if the conditions set out in the first three paragraphs are fulfilled. If there is no registered document in favour of the transferee who has been delivered possession of the property by the transferor, the latter can immediately evict the transferee from possession of the property, on the ground that he, that is, the transferee, had no legal right to the possession of the property. However, the fourth paragraph in Section 53-A protects the transferee from being dispossessed by the transferor or any person claiming under him, even though the transferee has not acquired any title to the property by a registered document. The fourth paragraph therefore, lays down that even though the contract, though required to be registered, has not been registered, or, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him is estopped from enforcing any right in respect of the property against the transferee or persons claiming under the transferee. The net effect is that so far as the transferor and persons claiming under him are concerned on the one hand and the transferee and persons claiming under him are concerned on the other hand, the former cannot assert any right in respect of the property against the latter. This provision merely debars the transferor or the persons claiming under him from asserting any right in respect of the property, in other words there is an estoppel against the transferor and persons claiming under him preventing them from enforcing any right in respect of the property. This estoppel against the transferor would be available only to the transferee and persons claiming under him and not to any other person. The estoppel arises only against the transferor and persons claiming under him; it does not arise against any other person who may have a right to proceed against the property. It may also be noted that the provisions of this section do not contain any words conferring any right in the property on the transferee. The language of this section and particularly of the fourth paragraph, does not suggest, directly or indirectly, that the transferee is clothed with any right in the property. Since the transferor is estopped from enforcing any right in the property against the transferee, if and when the transferor seeks to enforce any such right, the transferee can always plead the estoppel against the transferor and thus

protect the possession that has been delivered to him by the transferor. In our opinion, the transferee has merely a right to plead estoppel, limited to the case where the transferor or any person claiming under him seeks to enforce any right in respect of the property. It is this restricted right to plead estoppel which is, somewhat loosely, referred to in certain decisions as a right to defend his possession. We may make it clear that in our opinion, under the provisions of Section 53-A, the transferee does not get any right in respect of the property. Section 53-A does not speak of the conferment of the right of possession by the transferor to the transferee. It merely speaks of the estoppel against the transferor preventing him from enforcing any right in the property against the transferee. It is on account of this estoppel against the transferor that it is loosely spoken as if the transferee acquires a right to protect his possession. In our opinion, Section 53-A does not confer any right in respect to property on the transferee to whom possession is delivered. The only right conferred by Section 53-A on the transferee in possession is a right to plead this estoppel against the transferor or persons claiming under him.

11. We will now refer to certain authorities on this point. In *Probooth Kumar Das v. Dantmara Tea Co., Ltd.*, 66 Ind App 293=(AIR 1940 PC 1), the Judicial Committee of the Privy Council was concerned with the possession of a transferee under the provisions of Section 53-A of the Transfer of Property Act. The litigation concerned a Tea estate and the title to export quota rights which were available to the owner of the tea estate. The plaintiff in that case was in possession of a portion of the Tea estate under an unregistered contract of sale. The defendant had, subsequent to the unregistered contract of sale, obtained a title to the estate, but was not in possession of it. The Tea Licensing Committee, recognising the defendant as the owner of the estate, though out of possession, assigned the export quota rights to him. The plaintiff thereupon brought a suit seeking to have it declared that the defendant had no right or title to the estate and that he was debarred from enforcing any right to the estate including the right to sell tea under the export quota allotted to him; the plaintiff also sought an appropriate injunction. The question arose whether under Section 53-A of the Transfer of Property Act, a person in possession of the property under an unregistered contract of sale could maintain such an action. The Judicial Committee negatived the right of the plaintiff to maintain an action of this kind. While interpreting the language of Section 53-A of the

Transfer of Property Act, the Privy Council observed as follows:—

"In their Lordships' opinion, the amendment of the law effected by the enactment of S. 53-A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mitter J. in the High Court 'the right conferred by S. 53-A is a right available only to the defendant to protect his possession.' The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act."

12. A question about the interpretation of Section 53-A also arose before the Supreme Court in *Delhi Motor Co. v. U. A. Basrurkar*, AIR 1968 SC 794. The plaintiff in that case was a partnership firm and it entered into a contract with the defendant company for taking a sub-lease of a building of which the company was a tenant. The said contract of sub-lease was evidenced by three unregistered documents. The plaintiff was given possession of a portion of the building, but, later on, it was dispossessed of it and it brought a suit for possession against the defendant company. A question arose whether the plaintiff could maintain an action for the recovery of possession against the defendant company on the basis of an unregistered document of lease. The argument put forward on behalf of the plaintiff was that though the contract of lease had not been registered, the plaintiff could claim possession under it in view of the provisions of Sec. 53-A of the Transfer of Property Act, because the defendant company would be debarred from enforcing against the plaintiff any right in respect of that property of which the plaintiff had already taken possession. In negativing this argument, the Supreme Court considered the scope of Section 53-A of the Transfer of Property Act and observed as follows:—

"In our opinion, this argument proceeds on an incorrect interpretation of Section 53-A, because that section is only meant to bring about a bar against enforcement of rights by a lessor in respect of property of which the lessee had already taken possession, but does not give any right to the lessee to claim possession or to claim any other rights on the basis of an unregistered lease. Section 53-A of the Transfer of Property Act is only available as a defence to a lessee and not as conferring a right on the basis of which the lessee can claim rights against the lessor."

It may be noted that the Supreme Court approved of the interpretation of Sec.

tion 53-A by the Privy Council in Probodh Kumar Das's case (supra).

13. These two cases which are binding authority on this Court, clearly lay down the following propositions:—

(1) Section 53-A only creates an estoppel against the transferor or persons claiming under him from enforcing any right in respect of the property against the transferee or persons claiming under him.

(2) The transferee or persons claiming under him have a right to plead the bar of estoppel to protect their possession against the transferor or persons claiming under him.

(3) The transferee does not get any right to claim possession or any other right in the property on the basis of an unregistered document.

(4) The right to plead estoppel conferred by Section 53-A on a transferee is a right available to the transferee in order to defend his possession, and

(5) Section 53-A confers no active title on the transferee.

14. Since such a transferee does not obtain any right in the property, it follows that he cannot maintain any suit on the allegations that there is a right vested in him and that such a right is infringed. A plaintiff, in order to maintain a suit has to show that he is possessed of a certain legal right and that there is an actual or apprehended infringement of that right. Unless he does so, he cannot maintain a suit. It is precisely on this ground that both the Privy Council and the Supreme Court have emphasised that Section 53-A is available to a transferee by way of defence only, that is, in a case where he is arrayed as a defendant seeking to protect, by pleading estoppel, what he has got and not as a plaintiff seeking to remedy the infringement of a right. We may also note that in *Padmalabha v. Appalnarasamma*, AIR 1952 Orissa 143, a Division Bench of the Orissa High Court has also taken the same view as taken by us. It is observed in relation to Section 53-A as follows:—

"The section can never be availed of as founding a cause of action; and it cannot, therefore, be urged that what is available to the transferee as a defence in a suit in ejectment by the transferor is available to him as a weapon of attack in an action which takes its rise from an invasion of the transferee's rights under the contract."

15. Even this limited right to protect his possession under Section 53-A of the Transfer of Property Act is not available against a transferee for consideration who has no notice of the contract or of the part performance thereof. If any right in property becomes vested in the transferee under Section 53-A, it would be

unreasonable to make this vesting of the right defeasible as against a subsequent transferee from the transferor, if he had no notice of the contract or of the part performance thereof.

16. Mr. Patel, the learned advocate for the plaintiff, relied on a decision in *Achayya v. Venkata Subba Rao*, AIR 1957 Andh Pra 854. That case was decided by a Division Bench of Andhra Pradesh High Court and the judgment was delivered by Subba Rao, C. J. (as he then was in that High Court). It has been held in that case as follows:—

"But, if the conditions laid down in the section (Section 53-A) are complied with, it enables the transferee to defend his possession if the transferor seeks to enforce his rights against the property. This statutory right he can avail himself both as a plaintiff and as a defendant provided he is using his right as a shield and not as a sword."

In that case the transferee under an unregistered document had taken possession of the property. That property was sold in execution of a decree against the transferor and the surplus amount of money was lying in Court and the question arose whether the transferee can maintain a suit to recover that amount. The Court held that the transferee can maintain the suit as a plaintiff, because he had filed the suit in order to defend his possession of the property; in other words, the Court held that in effect and substance, it was a defensive act by the plaintiff. After considering the language of Section 53-A of the Transfer of Property Act on page 855, the learned Chief Justice observed as follows:—

"The section does not either expressly or by necessary implication indicate that the rights conferred on the transferee thereunder can only be invoked as a defendant and not as a plaintiff."

These observations show that the learned Chief Justice proceeds on the basis that Section 53-A confers such rights on the transferee, that, on infringement of those rights the transferee can have a cause of action enabling him to file a suit. In our opinion, this reading of Section 53-A is not proper. As we have indicated above, Section 53-A does not confer any right on the transferee. If a transferee has a right of possession conferred on him by Section 53-A then we would have had no hesitation in holding that the transferee can protect that possession not only as a defendant, but also as a plaintiff basing his cause of action on his right of possession. But in our opinion, no such right is conferred on the transferee. It may also be noted that in this case before the Andhra Pradesh High Court the transferee was not pleading any estoppel against the transferor. The property in

his possession was sold away in execution of a decree. By the suit, the transferee was laying a claim of ownership to the amount lying in Court. In our opinion, Section 53-A does not confer any such right on him. With utmost respect to the learned Judges of the Andhra Pradesh High Court, therefore, we are unable to agree with their decision.

17. Mr. Patel also relied upon the decision in Gulab Chand v. Madholal, AIR 1953 Ajmer 47. In paragraph 5, the learned Judicial Commissioner notes the question that arose before him, namely, whether Section 53-A operates only as an estoppel against the transferor or the persons claiming under the transferor. The learned Judicial Commissioner enumerated the cases for and against the transferee. However, he has not discussed any of these cases. He purports to follow a ruling of the Judicial Commissioner's Court of Ajmer in Fateh Mohd. v. Ghosia Bibi, AIR 1953 Ajmer 19. In that case the learned Judicial Commissioner held that a transferee under an unregistered contract of sale, if he is dispossessed by the transferor, can bring a suit to recover his possession and that such a suit by the transferee would be in reality an attempt made to defend his possession. In view of the clear pronouncements of the Supreme Court in Delhi Motor Co.'s case, AIR 1968 SC 794 (supra), this view of the Judicial Commissioner's Court at Ajmer does not commend itself to us.

18. Mr. Patel also sought to rely upon the decision in Ram Chander v. Maharaj Kunwar, AIR 1939 All 611. In that case the plaintiff was a lessee of a house under a defective lease, as it was not signed by both the parties as required by Sec. 107 of the Transfer of Property Act. The subsequent purchaser of the property was attempting to demolish the house and to interfere otherwise with the plaintiff's right as lessee. The plaintiff, thereupon brought a suit for an injunction to restrain the purchaser from doing so and the question arose whether the plaintiff could maintain the suit. The argument on behalf of the plaintiff was that the plaintiff could do so under the provisions of Section 53-A of the Transfer of Property Act. The learned Judges in the Allahabad High Court proceeded on the basis that the plaintiff was not attempting to set up the transfer which was invalid and that he was merely seeking to debar the defendants from interfering with his possession. In the course of its judgment, the Court observed:—

"He is, in other words, seeking to defend the rights to which he is entitled under Section 53-A of the Transfer of Property Act."

It is clear from the above observations that the learned Judges proceeded upon

the view that under Section 53-A rights are conferred on the transferee. Since in our opinion, no right in property is conferred on the transferee under Sec. 53-A we are unable to agree with this decision.

19. Mr. Patel further relied upon a decision in Ewaz Ali v. Firdous Jehan, AIR 1944 Oudh 212. In that case the plaintiff had an unregistered document of sale in her favour and since she was already in possession of the property, she continued that possession under the contract of sale. The subsequent purchaser from the owner obtained an order of eviction. She filed objections under O. 21, Rules 99 and 100, but her objections were overruled. She then filed a suit under Order 21, Rule 103 for a declaration that she was in possession of the house in suit on her own account and could not be dispossessed in execution of the ejectment decree. We may note that in this case the plaintiff was, for all practical purposes defending her possession against the transferee who was claiming under the transferor. The law debarred the purchaser from enforcing any right against her and all that she wanted to achieve by the Court's help was to see that the estoppel against the purchaser from the transferor created by Sec. 53-A was enforced against him. She was not complaining about any infringement of a right in property vested in her. In our opinion, therefore, this case is distinguishable on its own facts.

20. We are, therefore, of the opinion that under Section 53-A of the Transfer of Property Act, the plaintiff derives no right, title or interest in the property. In the plaint, the plaintiff has claimed to be the full owner of the property. That claim of his must fail on the ground that he does not prove to have any right in the property on the date when he brought the suit. It is urged that by bringing the suit, he is defending his possession. We fail to see how such an argument can be advanced on the facts of this case. By attaching the property in execution of a money decree, all that the attaching creditor seeks to do is to take the first step to put the property of the judgment-debtor to sale. By taking out an attachment, he prohibits his judgment-debtor from transferring his right, title or interest in the property. There is no doubt that the ownership of the property still vests in the judgment-debtor and so long as the ownership vests in him, his right, title and interest in the property can be attached and sold. If a purchaser at an auction sale in execution of the decree were to take steps to assert any right to the property on account of his purchase, the transferee can then protect his possession if he can bring his case under Section 53-A. If the auction pur-

30-31. Section 2 of the Act lays down that an appeal shall lie to His Highness from any decree or final order passed on appeal by the High Court, when the value of the subject matter of the suit in the court of first instance was above Rs. 2,500/- or when the case is certified to be a fit one for appeal to His Highness. After the Board gave its advice to His Highness, the final order of His Highness passed on civil or criminal appeal had to be communicated to the High Court and it was the duty of the High Court and all subordinate Courts and all authorities in the State to carry out such order of His Highness. A plain reading of this provision clearly indicates the scope of the authority of the Board and the orders passed by His Highness thereon. All the relevant sections of the Constitution Act of 1996 or the Appeals to His Highness Act of 1996 clearly indicate that it is in civil and criminal cases that appeals shall lie to His Highness which shall be heard by the Board and their advice, when accepted by His Highness, shall be carried out by all the Courts in the State including the High Court. This clearly shows that the function of the Board was clearly judicial and it clearly connotes that there was no legislative authority vested in the Board. They were the highest court of appeal in the State to interpret the laws of the State and after they interpreted the law that interpretation would be accepted by His Highness. Theirs would not be a role of legislators or in other words whatever they said would not be considered an Act of Legislature receiving the assent of His Highness but, a judicial interpretation of the laws of the State pertaining to civil and criminal matters. Their role would be the same as that of the Privy Council. This would be further made clear in this judgment later. The Privy Council had a Judicial Committee and this Judicial Committee exercised powers in respect of appeals from the courts of colonies and also from the courts set up by the Crown in protectorates and trust territories. The ancient jurisdiction of the King in Council to hear appeals from overseas, which was in practice exercised by the legal members of the Council, was made statutory by the Judicial Committee Act 1833 and later amended by the Judicial Committee Act 1844 and subsequent Acts, which set up a Judicial Committee to hear appeals either under the Act itself or under the customary jurisdiction of the Privy Council. The Judicial Committee did not in theory deliver judgment. It advised the Sovereign who acted on its report and issued an order in Council to give effect thereto. As Viscount Haldane at the time of the hearing of the first appeals to the Judicial Com-

mittee from the Irish Free State in *Hull v. M'Kenna*, (1926) IR 402 observed:—

"We are not Ministers in any sense, we are a Committee of Privy Councillors who are acting in the capacity of Judges, but the peculiarity of the situation is this: It is a long-standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty but in a judicial spirit. We have nothing to do with policies, or party considerations, we are really Judges but in form and in name we are the Committee of the Privy Council. The Sovereign gives the Judgment himself, and always acts upon the report which we make....."

In India by passing the Abolition of Privy Council Jurisdiction Act in October 1949, the authority of the Privy Council vis-a-vis India came to an end. By passing the Indian Independence Act in 1947 all appeals to the Privy Council were stopped from 1-2-1948 and the jurisdiction of the Privy Council was exercised by the then Federal Court and after coming into existence of the Constitution, the Supreme Court became the highest court in the Union of India and under Art. 141 of the Constitution of India the law declared by the Supreme Court is binding on all courts within the territory of India. Similarly by the Constitution (Application to Jammu and Kashmir) Order, 1954 under Part XXI (C) it is laid down, in clause (4) of Article 374 the reference to the authority functioning as the Privy Council of a State shall be construed as a reference to the Advisory Board constituted under the J. & K. Constitution Act, 1996 and reference to the commencement of the Constitution shall be construed as references to the commencement of this Order. This leaves no doubt in anybody's mind that the function of the Board was exactly the same as that of the Privy Council in England. This further strengthens my analysis of the Constitution, and coming into being of the Board. This would in the words of Viscount Haldane mean that the Board of Judicial Advisers were judges who had nothing to do with policies or party considerations much less they were legislators so that any order passed by them would be only a judicial decision and not a piece of legislation.

32. After the jurisdiction of the Supreme Court was applied to the State of Jammu & Kashmir, the position would be that any interpretation of the law given by the Supreme Court would be the law of the State notwithstanding any contrary interpretation given by the Board. It is true that as the Privy Council decisions are entitled to great respect and would be ordinarily binding on courts in India till that point is otherwise decid-

ed by the Supreme Court. I have expressed this opinion earlier also and reiterate that the law as interpreted by the Board and accepted by His Highness would be binding on this High Court unless it is otherwise interpreted by the Supreme Court. The decisions cited for instances AIR 1955 Bom 1, AIR 1955 Nag 293, AIR 1953 Cal 324, AIR 1964 Cal 396 and AIR 1965 All 65 exactly lay down the same thing and nothing more. All these authorities lay down that the view of law expressed by the Privy Council shall be binding on the High Courts unless the Supreme Court lays down otherwise. There is no dispute to that extent. But there is no authority which says that the advice given by the Privy Council to the King or the advice given by the Board to His Highness would have the force of law in the sense of an Act of legislature. The only point that can be urged and the maximum force that can be attributed to the orders issued by His Highness or the advice of the Board is that they are pronouncements of the highest judicial authority on the laws as enacted from time to time and in the State shall hold good till those laws are interpreted in a different or contrary way by the Supreme Court. In AIR 1955 SC 352 all that their Lordships of the Supreme Court laid down was that prior to the Integration of Hyderabad State with Indian Union and coming into force of the Indian Constitution, the Nizam of Hyderabad enjoyed uncontrolled sovereign powers. He was supreme legislature, supreme head of the executive and there were no constitutional limitations on his authority to act in any of these capacities. The Firmans were expressions of the sovereign will of the Nizam and they were binding in the same way as any other law; nay, they would override all other laws which were in conflict with them. There was in this case a conflict between the two Firmans of the Nizam one was of 24-2-1949 and the other was of 7-9-1949. The Firman of 7-9-1949 revoked the earlier Firman but it was held that revocation of the former Firman did not restore the decision given in the earlier Firman. So this authority is not to be interpreted as laying down that any Firman of an erstwhile absolute ruler would be law in the sense of an Act of Legislature. In the State of Jammu & Kashmir firstly His Highness himself created the Legislative Assembly and gave a constitution to the State. Under that constitution he created a Board of Judicial Advisers to advise him in the disposal of civil and criminal appeals. He retained the sovereign powers of promulgating ordinances and notifications. If he had promulgated an ordinance or a law in the exercise of his inherent powers that would no doubt be

law but his consent to an advice of the Board would at best be a judicial decision and would have all the force and suffer from all the frailties of a judicial decision.

33. Art. 366 (10) of the Constitution of India defines 'existing law' as any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation. Art. 372 of the Constitution of India lays down that all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority. Similarly Section 157(2) of the Constitution of Jammu and Kashmir lays down that all the laws in force in the State immediately before the commencement of this Constitution shall continue in force until altered or repealed or amended by competent authority. All these provisions either from the Constitution of India or from the State Constitution clearly lay down that laws or orders or bye-laws, rules etc., passed by the legislature or by any competent authority would continue unless they are altered, amended or repealed by competent authority or legislature. It has no reference to judicial pronouncements. There can be as such no dispute with this proposition. All the laws that existed on the statute book before coming into force of the Constitution either of India or of the State, would be good and would be administered and accepted as correct by all courts and other authorities functioning in the State who had to do anything with the administration of law. As already expressed more than once the accepted advice of the Board would not have the rank of legal enactments. No doubt as judicial decisions of the highest authority in the State they had to be followed until a contrary interpretation was given by the Supreme Court to any of the provisions interpreted by that Board. Therefore, there would be no contravention of any of the provisions abovementioned if the Supreme Court gave a different interpretation to any enactment or rule, regulation etc., which was in force before the commencement of the Constitution, whether in the same case or in a different case and again whether expressly or by necessary implication, and the interpretation of the Supreme Court would be binding on all the courts in India including the Courts in the State as against any decision of the Board. I have taken the same view in another case Viz: Sved Siraj-ul-din v. Karim Dar, AIR 1969 J & K 62.

34. I agree with the conclusion of my learned brother that the appeal be dismissed.

35. MIAN JALAL-UD-DIN, J.: I have had the benefit of perusing the elaborate, lucid and well-reasoned judgments prepared by my learned brothers Bhat and Jaswant Singh, JJ., and I would like to add the following words:

36. My learned brother Justice Jaswant Singh has mentioned the circumstances in which the matter under consideration came before the Full Bench and he has also set out in detail the facts involved in the case and I need not reiterate them here.

37. The principal questions that the Full Bench is called upon to decide are:

(i) Whether the case relating to pre-emption instituted by the plaintiff in respect of agricultural land is to be governed by Section 14 or Section 15 of the Right of Prior Purchase Act?

(ii) Whether the opinion given by His Highness' Board of Judicial Advisers in regard to the interpretation of Sections 14 and 15 is binding on this court?

The facts of this case are no longer in controversy and it is conceded before us that the property in dispute i.e. the agricultural land is situated within the limits of town of Kishtwar. It is in respect of this piece of land that the plaintiff brought a suit in exercise of her right of prior purchase. The case of the plaintiff is that the property in dispute being essentially agricultural land her suit is governed by the provisions of Section 14. This is, however controverted by the defendant vendee who asserts that the suit property being situate within the limits of Town of Kishtwar is urban, immovable property and not agricultural land and according to him the case is attracted by the provisions of Section 15 of the Right of Prior Purchase Act.

38. It is true that if the suit property is held to be urban immovable property as defined in Section 3 of the Jammu and Kashmir Right of Prior Purchase Act (hereinafter called the Act) then the plaintiff has got no legs to stand upon and her suit is liable to be dismissed as the classes of persons entitled to claim right of pre-emption under Section 15 are different from those claiming right of prior purchase under Section 14 of the Act which deals with agricultural land. This brings us to the consideration of the question as to whether the suit property is agricultural land or urban immovable property for the purpose of determining the right of prior purchase.

It is true that the definition of the two expressions "urban immovable property" and "agricultural land" as given in the Act itself presents some difficulty. The definition of urban immovable property

is unhappily worded. If urban immovable property is to be construed to include agricultural land situate in the town as well, then it will give rise to an apparent conflict as agricultural land situate within the limits of a town will cease to be agricultural land and will assume the character of urban immovable property which is not provided by the definition assigned to agricultural land in the Act. In the Punjab Pre-emption Act of which the Jammu and Kashmir Right of Prior Purchase Act is almost a verbatim copy with some exception here and there, the difficulty has been resolved by defining urban immovable property as property situated in the town other than agricultural land. But this sort of distinction does not find place in our Act.

39. The result is that it has become necessary to place harmonious construction on the definitions so as to obviate this apparent conflict. An identical question came up for consideration before His Highness' Board of Judicial Advisers and their Lordships resolved the controversy by holding that agricultural land in town would not be deemed to be included in urban immovable property for the purposes of the Act and that Section 15 of the Act is not applicable to such agricultural land and that suits involving right of prior purchase relating to agricultural land are governed by Section 14.

40. In my opinion the interpretation placed by their Lordships of the Board of Judicial Advisers on the definition of 'agricultural land' and of urban immovable property for the purpose of the Act and on the application of Section 14 of the Act to claim pre-emption in respect of agricultural land appears to be sound and plausible. Because the land in question in respect of which the plaintiff has brought her suit is situate within the limits of town area of Kishtwar, is no reason to destroy its character as agricultural land. Nor will the user of land for residential purpose make any difference. I, therefore, concur with the reasoning and also with the finding arrived at by my learned Brothers in regard to the interpretation of the relevant sections of the Act and hold that Section 14 of the Act is applicable to the case and the claim of the plaintiff to pre-empt the suit property is sustainable in the eye of law.

41. The above discussion also brings us to the consideration of the question relating to the effect of the decisions of the Board of Judicial Advisers whose opinion has been accepted by His Highness. A question has been posed before the Bench as to whether the decisions of the Board of Judicial Advisers whose advice was accepted by His Highness would be law to be followed by all the Courts for all times to come. In order to sustain the argument that the decisions of the Board

should be construed as laying down law to be followed by the High Court including all the subordinate Courts and all the authorities in the State, reliance is placed by the learned counsel for the appellant on the Appeals to His Highness Act No. 16 of 1996, Section 4 (b) of Sri Partap Jammu and Kashmir Laws Consolidation Act 1997 and also Section 157 of the State Constitution. It is submitted that orders, Hadyats, Ailans, Notifications, Robkars etc., issued, passed or published or made by and under the authority of His Highness would be the laws to be administered by the Civil and Criminal Courts of the State. By virtue of Section 157 of the State Constitution these laws in the form of commands, orders, Irshads and notifications made and published by His Highness if not repugnant to the constitution or any other law are saved. But it is important to examine the precise nature and scope of the decisions given by the Board whose advice has been accepted by His Highness. In my opinion these decisions are not and cannot be said to be laws in the sense that these are pieces of legislation which have originated and emanated from His Highness. One must not lose sight of the fact that the performance of the functions of the Board was merely judicial and they had no legislative assignment. In the words of their Lordships of the Board the question of a particular case before them was *res integra* and their Lordships were free to arrive at a conclusion on the terms of the statute in force in the State unhampered by any judicial decision binding on them (vide the observations of the Board made in Civil Appeals Nos. 20, 21, 22 and 23 of 2001). This shows that the task before the Board was only to interpret the legal propositions with which they were confronted. The interpretation of the Board on these legal propositions is undoubtedly binding on all the Courts and the authorities in the State. But it cannot be said that the decisions given by the Board and assented to by His Highness have the characteristic of any Ailan, Command or order or Irshad as contemplated by Section 4 of Sri Partap Jammu and Kashmir Consolidation of Laws (Being the highest Court of appeal the decisions of the Board are entitled to great weight and respect and are binding on the High Court as well as on the subordinate Courts just like the decisions of the Privy Council. But if the decision of the Board is overruled either in express terms or by implication by any decision of the Supreme Court the judgement given by the Supreme Court will prevail.)

12. I, therefore, agree with the conclusions arrived at by my learned Brother Bhat, J., in this behalf.

43. In the end I concur with my learned brothers that the appeal be dismissed.

44. **ALI, C. J.:**— I have perused the judgments of my learned brothers and I fully agree with the view taken by them regarding the applicability of Sections 14 and 15 of the Right of Prior Purchase Act which is fortified by the decision of the Board of Judicial Advisers referred to in the Judgments. (As regards the legal effect of the decision of the Board of Judicial Advisers I fully agree with my learned brother Bhat, J., that such a decision is only an interpretation of law and would be binding on this Court unless the same has been expressly or impliedly overruled, by the Supreme Court.) I am, however, unable to subscribe to the view taken by my learned brother Jaswant Singh, J., that the decision of the Board of Judicial Advisers has the force of a legislative enactment and is binding until amended by an Act of the legislature. Such a view, in my opinion, runs contrary to Article 148 of the Constitution of India which makes the decisions of the Supreme Court binding on every authority in India. Even the provisions of Section 157 of our State Constitution have saved only those acts of the Maharaja which are not inconsistent with the provisions of the State Constitution. Furthermore, it is not every Firman, Order, Hidayat or Ailan passed by the Maharaja which has the force of law. The background and the circumstances under which these orders were passed by the Maharaja have to be fully considered because some of these orders are legislative in character, some purely executive in character and some are in the nature of directory instructions. The decision of the Board of Judicial Advisers has, in my opinion, the same effect as that of the Privy Council after Independence. In fact the Board of Judicial Advisers which constituted the Judicial Committee of the Maharaja was the exact prototype of the Privy Council, exercising similar powers.

45. **ANANT SINGH, J.:** I have had the advantage of perusing the Judgments of my other learned brother Judges, and I fully agree with the view taken by brother J. N. Bhat with whom Jalal-ud-din J. and the Hon'ble Chief Justice have also agreed.

46. In the case of AIR 1969 J & K 62 also, I had not taken any view that the decision of the Board of Advisers to His Highness the Maharaja has had the effect of any legislative enactment. But on the other hand, I clearly held in that case that the Board was analogous to the Privy Council for this State, and was the appellate authority for the Jammu and Kashmir High Court. Then I said that the decision of the Board in Dharam Singh v. Sita Ram reported in J & K LR Vol. 3, 2001 p. 210

was never set aside by the Supreme Court in any other case directly or impliedly. As regards the decision of the Supreme Court in *Bishan Singh v. Khazan Singh* reported in AIR 1958 SC 838 which on the interpretation of certain sections like 4, 13, 17, 19 and 20 of the Punjab Pre-emption Act, 1913 as amended by Act 1 of 1944 laid down certain laws about the right of pre-emption, I only distinguished that the decision of the Board did not come up for consideration by the Supreme Court, and, therefore, held that in my opinion, it cannot be said that even by necessary implication, the effect of the decision of the Supreme Court in the above case would be over-riding the decision of the Board. I further held in the same continuation, "After the integration of the State of Jammu and Kashmir, with the Union of India, the decision of the Supreme Court can well override the decision of His Highness' Board, but the Supreme Court has not done it so far in any of its decisions."

47. I adhere to the same view, and may reiterate that the decision of the Board of Advisers of His Highness' being the highest Judicial authority in the State, is binding on this Court and has to be followed until it is set aside, altered or explained or a contrary interpretation is given by the Supreme Court in any case directly or impliedly, and the decision of the Board has not the force of any legislative enactment.

BY THE COURT

48. The majority view in the present case holds that the decision of the Board of Judicial Advisers does not amount to a legislative enactment and is binding only so long as it is not expressly or impliedly overruled by the Supreme Court. To this extent the observations made in the Full Bench decision of this Court in *Sirajuddin* case reported in AIR 1969 J & K 62 are explained and clarified. The appeal is accordingly dismissed.

Appeal dismissed.

AIR 1970 JAMMU & KASHMIR 85
(V 57 C 16)

S. M. FAZL ALI, C. J., JASWANT SINGH, J.

The Hindustan Construction Co. Ltd.,
Petitioner v. The Assessing Authority,
Respondent.

Writ Petn. No. 101 of 1968, D/- 21-10-1969.

(A) Constitution of India, Article 246 (as applicable to Jammu and Kashmir) — Jammu and Kashmir State Constitution, Section 5 — Powers of State Legislature of Jammu and Kashmir — Limitations on—It has power to enact law for taxing not only sales simpliciter but also sales indivisible in character.

Art. 246 has not been applied in toto to the State of Jammu and Kashmir for in its application to that State the reference to clauses (2) and (3) in clause (1) of Article 246, clause (2) alone has been retained and clauses (3) and (4) have been deleted. Similarly the words 'Notwithstanding anything in clause (3)' occurring in clause (2) of Article 246 have been omitted. The State Lists have not been applied to the State of Jammu and Kashmir under Article 370. The State Legislature enjoys a residuary power of legislating even on subjects which do not fall directly within the ambit of the State list or the Concurrent List. The only limitation placed under Section 5 on the legislative powers of the State extends to those matters under which Parliament alone has power to make laws for the State under the provisions of the Constitution of India (Article 246). Hence the State legislature has power to enact a law for taxing sales which were not only sales simpliciter but were sales indivisible in character. (Paras 3, 14)

(B) Constitution of India, Schedule 7, List 2 Entry 54 — Words "tax on sale or purchase of goods" — Words do not embrace individual contract of sale.

The words 'tax on sale or purchase of goods' as used in Entry 54 would only have a limited meaning so as to be confined to pure contracts of sale and would not embrace within its ambit transactions which are coupled with the cost of labour and transaction of sale, that is to say an indivisible contract of sale. (Paras 4, 15)

(C) Sales Tax — Jammu and Kashmir General Sales Tax Act (20 of 1962), Sections 2 (1), 4 — Scope of Section 2 (1) — Indivisible contract does not fall within Section 2 (1) and is not chargeable to tax.

S. 2(1) postulates a pure and simple sale where goods pass from the seller to the buyer on payment of the consideration without the intervention of an intermediary. That Section does not at all envisage a transaction of an indivisible or composite sale and has been used only to bring within its ambits sales properly so called where there is a direct transfer of property from the seller to the buyer on payment of consideration. The Act does not contain any effective intention to tax indivisible sales. (Paras 6, 7)

Where the transaction of sale involves a composite and a complicated process under which the assessee construction company, buy materials required for construction of the bridge through contractors and labourers and invest the same in the construction of the bridges, the sale and the construction of bridges become a composite and an indivisible transaction so that it is difficult to divorce the transaction of the sale from the lump sum contract itself. The assessee's contract there-

fore does not fall within the ambit of S. 2(1) and is therefore not chargeable to tax. (Paras 6, 7, 12, 15)

(D) Civil P. C. (1908), Pre. — Interpretation of Statutes — Fiscal Statutes — Rule of construction — Word "sale" in S. 2(1) of J. & K. General Sales Tax Act, not given extended meaning.

In construing fiscal statutes and in determining the liability of a subject to tax, the courts must have regard to the strict letter of the Law and not merely to the spirit of the Statutes or the substance of the Law. (Para 10)

Hence, Courts should not infer or imply any extended meaning to the word 'sale' beyond what has been indicated in Section 2 (1) of the Act. (Para 11)

Cases Referred: Chronological Paras
(1953) AIR 1953 SC 560 (V 45) =
1959 SCR 379, Madras State v.
G Dunkerley & Co. 4, 10
(1953) AIR 1958 SC 632 (V 45) =
1959 SCR 445, Mithan Lal v.
State of Delhi 10
(1957) AIR 1957 SC 657 (V 44) =
1957 SCJ 689, Fernandes v. State
of Kerala 10

S. P. Mehta and R. C. Dhawan, for Petitioner; A. N. Raina, for Respondent.

S. M. FAZL ALI, C. J.:— This is an application for quashing the order of assessment passed by the Assessing Authority under the Jammu and Kashmir General Sales Tax Act, 1962 (hereinafter to be referred to as the Act) as upheld by the Sales Tax Commr. which is the final authority under the Act. The application arises in the following circumstances.

The petitioners are a public limited company incorporated under the Indian Companies Act with their registered office at Bombay. The petitioners are a firm of Engineers and Contractors and on receiving tender notice for lump sum contracts for construction of bridges in the State, the State accepted the petitioners' tender and a contract was entered into between the petitioners and the State through the Governor for execution of the contract. The petitioners submitted that the contract was an indivisible works contract on a lump sum basis. The contract extended to the construction of a bridge over river Chenab at Bardari near Reasi, two bridges on Beasi-Rajauri road and a road bridge on Suina Nallah. The date of the contract is 29-7-65 and the date of the completion of the contract varies from 18-6-66 to 13-6-67 which has been extended from time to time.

The petitioners contend that in the execution of their contract the firm had to undertake sale of various articles directly or through their contractor used in the building of bridges and for which the State Government had to be charged under the

terms of the agreement. It is therefore not disputed before us that the present contract is a lumpsum works contract and amounts to an indivisible contract of sale. The sales tax authorities have held that the petitioners are liable to pay sales tax on the various sales incurred by them in connection with the execution of the works contract. The petitioners contend that the contract of the petitioners being an indivisible one, any transaction of sale which takes place for the purpose of executing the contract is not covered by the provisions of the Act and therefore the sales tax authorities had no jurisdiction to tax the turnover of the petitioners.

2. Mr. Mehta appearing for the petitioners submitted two points before us. In the first place he argued that the State legislature was not competent to pass any law in order to levy tax on any indivisible contract which fell within the competence of the Parliament under Article 246 of the Constitution of India or at any rate which was beyond the ambit of the State List. Secondly it was contended that even if the State legislature had the power to levy tax on an indivisible contract of sale the provisions of the Act did not effectively express an intention to do so and therefore, the Assessing Authorities had no jurisdiction to levy tax on the petitioners.

3. As regards the first argument advanced by Mr. Mehta, in our opinion it is wholly untenable in law. Article 246 has not been applied in toto to the State, for in its application to the State the reference to clauses (2) and (3) in clause (1) of Article 246, clause (2) alone has been retained and clauses (3) and (4) have been deleted. Similarly the words 'Notwithstanding anything in clause (3)' occurring in Cl. (2) of Art. 246 have been omitted. Furthermore, it is not disputed that the State Lists have not been applied to the State of Jammu and Kashmir under Article 370. Thirdly Section 5 of the Jammu and Kashmir State Constitution provides thus:—

"The executive and legislative powers of the State extend to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India."

From the aforesaid facts it is manifest that the State Legislature enjoys a residuary power of legislating even on subjects which do not fall directly within the ambit of the State list or the Concurrent List. The only limitation placed under Section 5 on the legislative powers of the State extends to those matters under which Parliament alone has power to make laws for the State under the provisions of the Constitution of India (Article 246). In this view of the matter there can be no doubt that the State legislature

had power to enact a law for taxing sales which were not only sales simpliciter but were sales indivisible in character. On being confronted with this position Mr. Mehta did not press his first argument and therefore, this matter need not detain us any further.

4. The second argument advanced by Mr. Mehta warrants a serious and careful consideration. Before, however dealing with this argument it may be necessary to refer to the scheme of the Act and to the intention of the legislature as expressed in the various sections of the Act. To begin with in AIR 1958 SC 560, Madras State v. G. Dunkerley & Co. their Lordships of the Supreme Court pointed out that the words 'sale of goods' appearing in Entry 48 were nomen juris and were to be used in the general sense in which a transaction of sale is legally understood.

In other words the words 'sale of goods' being a term of well-known legal significance would have the same meaning as in the Sale of Goods Act. In this connection their Lordships observed as follows:—

"On these authorities, the contention of the appellant is well founded that as the words 'sale of goods' in Entry 48 occur in a Constitution Act and confer legislative powers on the State Legislature in respect of a topic relating to taxation, they must be interpreted not in a restricted but broad sense."

... .. ?.. ...

"We must accordingly hold that the expression 'sale of goods' in Entry 48 cannot be construed in its popular sense and that it must be interpreted in its legal sense. What its connotation in that sense is must now be ascertained."

... ..

"To sum up, the expression 'sale of goods' in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible — and that is its norm, there is no sale of goods and it is not within the competence of the Provincial legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale."

These observations apply with equal force to Entry 54 of State List which corresponds to Entry 48 of the List under the Government of India Act, 1935. The effect of the decision of the Supreme Court, therefore, is that the words 'tax on sale or purchase of goods' as used in Entry 54 would only have a limited meaning so as to be confined to pure contracts of sale and would not embrace within its ambit transactions which are coupled with the cost of labour and transaction of

sale, that is to say an indivisible contract of sale. Therefore, for the purpose of construing the word 'sale' even in the Act, the observations of their Lordships of the Supreme Court (Supra) have to be followed. In fact what had happened in the Acts passed by other States particularly the Madras Act which was considered by the Supreme Court was that the words 'sale of goods' were sought to be given an extended meaning by introduction of an additional clause which included materials used in the construction, fitting out, improvements, repair of immovable property Thus the definition of Section 2 (h) of the Madras Act was so enlarged as to include an indivisible contract of sale. Their Lordships of the Supreme Court in view of this addition held that this did not fall within the ambit of the legislative powers of the State and was therefore, ultra vires.

5. In the Act passed by our State, however, there is nothing to show that the legislature intended to give any extended meaning to the word 'sale'. In fact the word 'sale' has been defined in Section 2 (1) of the Act thus:—

"Sale means any transfer of property in goods for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge."

6. A perusal of this definition manifestly shows that the section postulates a pure and simple sale where goods pass from the seller to the buyer on payment of the consideration without the intervention of an intermediary. In the instant case on the allegations made by the petitioners in their petition which have not been disputed before us by the Advocate General the transaction of sale involves a composite and a complicated process under which the petitioners buy materials required for construction of the bridges through contractors and labourers and invest the same in the construction of the bridges. Thus the sale and the construction of bridges became a composite and an indivisible transaction so that it is difficult to divorce the transaction of sale from the lumpsum contract itself. It is obvious that after the materials that are purchased by the petitioners through their contractors or labourers are used for the construction of the bridges, the bridges become the property of the State and the petitioners get only their contract money.

7. In our opinion therefore the definition of Cl. 2 (1), (Supra) does not at all envisage a transaction of an indivisible or composite sale and has been used only to bring within its ambit sales properly so-called where there is a direct transfer of property from the seller to the buyer

on payment of consideration. The petitioners' contract therefore does not fall within the ambit of S. 2 (1) and is therefore not chargeable to tax.

8. Similarly in S. 2 (g) the word dealer has been defined thus:-

"Dealer means any person including a Department of Government who carries on the business of selling goods in the State".

It would be pertinent to note that neither in the word 'dealer' nor in the word 'sale' has the legislature expressly or by necessary intendment indicated any intention to include a contract of an indivisible sale. In the definition of the word 'sale' (Supra) only such transactions have been indicated which amount to a simple transfer of property for goods for cash or deferred payment and does not include at all a works contract or an indivisible sale where the transaction of sale is so coupled with the cost of labour that it is difficult to divorce one from the other. It is true that S. 2 (f) (i) defines contract thus:-

"Contract" means any agreement for carrying out for cash or deferred payment or other valuable consideration—

(i) the preparation, construction, fitting out, improvement or repair of any building, road, bridge or other immovable property'

But this by itself does not extend the import and the meaning given to the word "sale" in the definition clause 2(1). Section 2(n) defines the word 'turnover' thus:

"Turnover means the aggregate amount for which goods are sold by a dealer, whether for cash or deferred payment or other valuable consideration."

Here also we find that the word 'sold' is used in the same sense as it is used in clause 2(1).

9. Then we come to Section 4 of the Act which is the charging section and the relevant portion whereof runs thus:

"Subject to the provisions of this Act, every dealer except the one dealing exclusively in goods declared tax free under Section 5, shall pay for each year tax on his total turnover at a rate not exceeding ten per cent of such turnover as may be determined by the Government and notified by the Government in the Government Gazette and such tax shall be charged on the sale of goods once only". Thus the charging section also has reference only to the word 'turnover' as may be determined by the Government and the tax to be charged on the sale of goods which as we have already mentioned is defined in Section 2(1). In these circumstances therefore we agree with the learned counsel for the petitioners that the Act does not contain any effective intention to tax indivisible sales.

10. The Advocate General, however, relied on the definition of the word

'turnover' particularly on the following explanation to this clause:—

(1) the amount for which goods are sold shall in relation to a contract be deemed to be the amount payable to the dealer for carrying out such contract less the cost of labour.

(2) any cash or other discount on the price allowed in respect of any amount refunded in respect of articles returned by the customers shall not be included in the turn-over.

and contended that this definition included a works contract also. We are however, unable to agree with this argument because to begin with the definition of the word 'turnover' has to be understood with reference to two things 1) sale and 2) a dealer. Both the terms have, as discussed above, been defined in Sections 2 (g) and 2 (1) of the Act and neither the definition of a dealer nor that of sale includes a contract of indivisible sale. Sub-clause (1) of the Explanation therefore, does not advance the case of the State any further. It may be that the State Legislature may have wanted to include an indivisible sale also within the ambit of the Act, but there is no effective expression of its intention to do so in the language which it has employed in the Act. In this connection I might advert to a decision of the Supreme Court in *Fernandes v. State of Kerala*, AIR 1957 SC 637 where their Lordships have pointed out that in construing fiscal statutes and in determining the liability of a subject to tax, the Courts must have regard to the strict letter of the law and not merely to the spirit of the Statutes or the substance of the law. In this connection their Lordships observed as follows:—

"It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

The Advocate General, however, submitted that the Supreme Court had modified the view taken by it in *Dunkerley's case* AIR 1958 SC 560 (Supra) in *Mithan Lal v. State of Delhi*, AIR 1958 SC 682. A careful perusal of this decision would clearly reveal that their Lordships have not at all overruled their previous decision in *Dunkerley's case* AIR 1958 SC 560 but have distinguished it on the ground that the Act being applicable to

a Union territory (Delhi), fell clearly within the competence of the Parliament. Their Lordships reiterated in that case that the word 'sale' as defined in Entry 48 of the State List of the Government of India Act, 1935, (which is the same as Entry 54 of the State List of the Constitution of India) has reference only to sales as defined in the Sale of Goods Act and does not apply to building contracts. The legislation in that case was upheld in so far as it related to Delhi which was then a Part C State and Parliament alone was competent to legislate for a Union territory.

Furthermore, in the Bengal Act which was being considered by their Lordships Section 2 (d) which defined the word 'sale' was expressly given an extended meaning in the additional clause which defined goods as including 'all materials, articles and commodities whether or not to be used in the construction, fitting out, improvement or repair of immovable property and similarly the word 'sale' was defined under S. 2 (g) of the Act as including a transfer of property for goods involved in the execution of a contract. These additional clauses are, however, conspicuously absent from the provisions of the State Act. In the Bengal Act the sections expressly included goods involved in the execution of a contract, that is to say an indivisible sale also. The State Act, however, contains no such clause and therefore it is not applicable to sale of goods in execution of a contract or to transactions of an indivisible sale. This case therefore does not appear to be of any assistance to the Advocate General.

11. What is more important to note is that in the Calcutta Act also the word 'sale' had been used in an extended and a popular sense by addition of the clause beginning with 'includes as quoted supra' after defining the word sale. This additional clause is conspicuously absent from the definition of the word 'sale' as given in S. 2(1) of the State Act. In these circumstances therefore we are not in a position to infer or imply any extended meaning to the word 'sale' beyond what has been indicated in S. 2(1) of the Act.

12. For these reasons we are clearly of the opinion that the sales entered into by the petitioners in connection with their works contract did not fall within the charging section of the Act and could not therefore be taxed.

13. It therefore follows that the orders of the Assessing Authority dated 9-2-1968 and 28-8-1968 are without jurisdiction and must be quashed. The petition is accordingly allowed and by a writ of certiorari the orders of the Assessing Authority as confirmed by the Sales Tax Commr. are hereby quashed. In the circumstances there will be no order as to costs.

14. JASWANT SINGH, J.:— I have had the benefit of going through the judgment proposed to be delivered by my Lord the Hon'ble Chief Justice in this writ petition and agree with the order proposed to be made by his Lordship. I also agree that on a true construction of Section 5 of the Constitution of Jammu and Kashmir and the provisions of the Constitution of India as applied by the Constitution (Application to Jammu and Kashmir) Order made by the President of India under clause (1) of Article 370 of the Constitution of India with the concurrence of the Government of the State of Jammu and Kashmir the State Legislature is competent to make a law imposing sales tax on the value of goods utilized by a contractor in the execution of works contracts in the State.

15. I also agree with his Lordship that Section 4 of the Jammu and Kashmir General Sales Tax Act, 1962, which is the charging section does not create an effective charge on the value of goods utilized in the execution of indivisible works contracts. Under the existing law it is only a dealer on whom an obligation is cast to pay sales tax on his annual turnover at a rate not exceeding 10% of such turn-over as may be determined and notified by the Government and such tax is chargeable on sale of goods only. The word 'dealer' has been defined in Section 2 (g) of the Act as meaning a person (including a department of Government) who carries on the business of selling goods in the State. This definition of the word 'dealer' has to be read in conjunction with the definitions of the words 'goods' and 'sale' as contained in clauses (h) and (i) of the same section i.e., Section 2 of the Act construing the word 'dealer' in the light of the definitions of the expressions 'goods' and 'sales'.

I have no hesitation in holding that there has been no sale of goods as envisaged by the Act by the petitioner company and it could not be subjected to sales tax on the value of goods utilized by it in carrying out indivisible works contracts in the State. The mere fact that the word 'turn over' has been defined in clause (n) of the aforesaid Section 2 of the Act as including the amount payable to the dealer for carrying out a contract less the cost of labour cannot ipso facto make him a dealer as contemplated by the Act. The intention of the Legislature to subject to sales tax the amount payable to a contractor for carrying out a contract after deducting the cost of labour could not, in my opinion, be achieved by mere insertion of the definition of the word 'turn over' in the Act. If the legislature intended to subject that amount to sales tax it should have employed appropriate language in this behalf in Sections 2 and 4 of the Act. This view

is in accord with the well settled rule of construction according to which while interpreting a fiscal statute we have to go by the letter of law and not by the intention of the Legislature, and in case of doubt an interpretation favourable to the subject should be preferred.

Petition allowed.

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(V 57 C 17)

J. N BHAT AND MIAN
JALAL-UD-DIN, JJ.

G. M. Dar, Petitioner v. The State and another, Respondents

Letters Patent Appeal No 5 of 1966, D/- 4-9-1969, against order of Ah. J. D/- 4-8-1966

(A) Constitution of India, Art. 226 — Infructuous writ — Appointment of R to post X — Writ petition to quash order of appointment — Petition dismissed — Appeal — During pendency of appeal, abolition of post X and appointment of R to post Y with higher scale of pay — Held, nothing could be adjudicated upon appointment of R to Y post as it would be introducing totally new case — When R did not hold post X after its abolition, writ, even if issued, would be infructuous and meaningless—(Constitution of Jammu and Kashmir (1956), S. 103) — (Letters Patent (Cal) Cl. 15). (Para 10)

(B) Civil Services—Jammu and Kashmir Civil Service (Classification, Control and Appeal) Rules (1936), Rr. 16(2), 14(1), 21 and 23 — Creation of temporary post of Administrative Officer — Held, R. 16 (2) was attracted and not R. 14(1) and while filling that post question of juniority or seniority covered by R. 24 or 25 was not relevant — Scope of R. 16(2) indicated. (Paras 11 and 12)

Cases Referred: Chronological Paras (1969) 1969 Ser LR 445 (SC), A. K. Kraipak v. Union of India 7
(1969) 1969 Ser LR 761 (J & K) (FB), Lal Chand Pargal v. Director, N.E.S. 7

T. R. Bhasin, for Petitioner; A. N. Raina, G. M. Qara and J. N. Bhan, for Respondents.

BHAT, J.:— This is a Letters Patent Appeal against the order passed by Mr. Justice Ali, as his Lordship then was, dated 4-8-1966 dismissing the writ petition of the appellant for the issue of a writ of certiorari quashing the order of the State of Jammu and Kashmir No. T. R. 85 of 1965 dated 6-12-1965 whereby the respondent No 2 had been appointed as the Administrative Officer in the grade of 400-700. The allegations of the appellant in the writ petition were that he had

entered the service of the Transport Department on 16-9-1953 as Head Clerk, held various gazetted posts in the Department both on the operational and administrative units of the Department and that his record of service in the Department was creditable and there was no adverse remark against him, that the respondent No. 2 who was far junior to the petitioner had been appointed temporarily as Administrative Officer in the Government undertaking on the post which was temporarily created by the Government for one year in the first instance. This appointment was challenged on the ground that the petitioner was senior to the respondent No. 2, the record of service of the petitioner was splendid and that the post was not a selection post; it had to be filled up by promotion and thus the appointment of the respondent No. 2 violated Rule 24 of the Jammu & Kashmir Civil Service (Classification, Control and Appeal) Rules, 1936 (hereinafter referred to as 'the Rules' in this judgment for brevity) and further on the ground that the case of the petitioner had not been considered at all.

2. To this writ petition, objections were filed by the respondent No 2 who controverted the allegations of the petitioner and submitted that the respondent No. 2 had undertaken three months' training at Bombay, Poona in Maharashtra State Government undertakings, while promoting respondent No 2, the comparative merits and claims of the employees concerned were considered by the concerned authority as will be obvious from the perusal of certain letters quoted in Paragraph 4 of the reply affidavit; that the respondent No. 2 had been after due consideration found better qualified for the post to which he was promoted; that the post of Administrative Officer could not be filled up on the consideration of seniority alone, comparative merit, qualifications and suitability had been considered while promoting the respondent No. 2, that the post was newly created in order to assist the Officer in administrative matters in view of the expanded works of the Department and a candidate who on the basis of merit and ability could be appointed to that post was in fact appointed to that post.

3. Mr. S. A. S. Qadiri, the then Secretary to Government, Transport Department, also put in an affidavit and controverted the allegations made by the petitioner. He quoted from certain letters written by the Addl. Transport Commissioner to the Secretary to Government Transport Department about the petitioner. He stated on oath that the petitioner had not given a satisfactory account of himself whenever he was given a chance to work on a responsible post; that time and again he was removed from

such posts and kept under supervision or attached to some senior officer and that the respondent No. 2 had been appointed because of his merit, ability, administrative skill and aptitude towards labour and administrative problems. The affidavit further stated that only a very capable, energetic person with outstanding merit and ability like respondent No. 2 could be appointed to the post; that for the post of an Administrative Officer the question of seniority or juniority was not relevant, that the post was a newly created one and only an energetic and suitable candidate would suit the post.

4. A further rejoinder affidavit was put in by the petitioner. It stated that there had been no adverse reflections about the petitioner's work; on the other hand he had been always selected to work on different posts on basis of merit and efficiency, that the petitioner had worked on different posts of responsibility and the allegations that he had to be removed from post to post because of his not giving good account of himself, was not correct; that whatever the Addl. Transport Commissioner had said was without the knowledge and at the back of the petitioner; that the transfer orders of the petitioner would show that there never was a stigma attached to the petitioner; that he had worked most efficiently in various capacities in the Department; that he was allowed to cross the efficiency bar; that this Mr. Jamwal, who as Addl. Transport Commissioner was alleged to have made some adverse remarks against the petitioner, had all along praised the work of the petitioner who worked under him while the former was Deputy Transport Commissioner (Operation); that these adverse remarks were made by Mr. Jamwal when he was holding the post of Addl. Transport Commissioner for a brief period of ten days only and were made by him in order to unduly favour the respondent No. 2 who was a relation of the Chief Minister; that the petitioner had been recommended for the post of a Dy. Transport Commissioner.

5. The learned Judge after hearing the counsel for the parties dismissed the writ petition towards the close of his judgment remarked that

".....As, however, the petitioner has been in service for a pretty long time, and has been holding posts of responsibility from time to time, the Govt. may consider the desirability of accommodating him also in a similar grade if and when a vacancy arises."

Aggrieved by this order, the petitioner has preferred this Letters Patent appeal.

6. We have heard the learned counsel for the appellant petitioner Mr. Bhasin at very great length and we must at the outset remark that he argued the case exhaustively and ably.

7. The points raised by Mr. Bhasin were that the judgment of the learned Single Judge did not at all touch the points in controversy in this case; that the petitioner appellant had submitted a rejoinder in the shape of a detailed affidavit, this was not at all considered by the learned Single Judge, no reference to this rejoinder as such or to any of its contents is made by the learned Judge. He further argued that the petitioner had put in two applications dated 6th June 1966 and 16th June 1966 for summoning of the record; but no notice even was taken of these applications and no orders were passed thereon nor was the Government made to produce the said record; Mr. Bhasin argued that in a writ of certiorari it was necessary for the Government to place the entire record before the Court; that had not been done and the learned Judge had not taken any steps to secure the record from the respondent No. 1, therefore, the judgment of the learned Single Judge was bad. Mr. Bhasin further argued that it was a case of promotion, the post of an Administrative Officer was not a selection post and therefore the promotion should have been made on the basis of seniority. Assuming the verdict of the learned Single Judge as correct, it appears that the Government sought to justify this appointment of the respondent No. 2 to the post on conspicuous merit and ability on the part of the respondent No. 2 and if it was so, it would mean that the appellant had been denied this well-deserved promotion as a result of his bad performance, that the petitioner was not given time to show cause against this refusal to promotion. This violated the principles of natural justice and therefore also the order of the learned Single Judge as well as the impugned order No. T.R. 85 of 1965 dated 6-12-1965 was bad in law.

Mr. Bhasin further argued that a temporary appointment could be made only for three months, therefore, the creation of the post as well as the appointment of the respondent No. 2 was against the provisions of the Rules and lastly, argued Mr. Bhasin, the latest Full Bench decision of this Court namely Lal Chand Pargal v. Director NES decided on April 24, 1969 (reported in 1969 Ser LR 761 (FB) (J & K)) and the decision of the Supreme Court reported as 1969 Ser LR 445 (SC), the orders promoting the respondent No. 2 to the post of the Administrative Officer and ignoring the claims and seniority of the appellant were not speaking orders and were in violation of the principles of natural justice, the scope of which has been very much extended as laid down in the Supreme Court authority referred to above, the order of the appointment of the respondent No. 2 to the post of the Administrative Officer as well as the order

under appeal was bad and should be set aside. Mr. Bhasin referred to a number of authorities in support of the various contentions raised by him.

8. The learned Advocate General, Mr. Raina, on the other hand argued that the petitioner's case had been considered very very carefully and even exhaustively. There had been a lot of correspondence right from the date the post was sought to be created and upto the time the respondent No. 2 was appointed thereto by means of the impugned order. He referred to the remarks of the Addl. Transport Commissioner wherein the cases of both the claimants had been considered and he had clearly held the respondent No. 2 as more suited to this job. This order was not only a speaking order but showed a detailed analysis of the comparative merits and claims of the two contestants. Mr. Raina further argued that there were many other people who were senior to the respondent who were also considered from time to time for this newly created post but none according to the estimate of the appointing authority suited the said post better than the respondent No. 2; that the name of the Hon'ble Chief Minister had been dragged in only to fling mud, otherwise a more dispassionate view of the whole situation could not be had in the case of any appointment. Therefore whether the appointment was considered to be promotion under Rule 25 (2) or even (3) the tests laid down by the Full Bench authority of this Court or by the Supreme Court in the above referred case were fully satisfied.

The learned Advocate General further said that the appellant had not given a good account of his performance at the various jobs held by him; on the other hand he stoutly denied the allegation of Mr. Bhasin that there were any allegations of defalcation of amounts by the respondent No. 2. He could place the whole record before the court, argued the learned Advocate General, and no allegations of any defalcation had ever been made against the respondent No. 2. About Mr. Bhasin's two applications dated 6th June 1966 and 16th June 1966 he said that the whole record was before the learned Single Judge and he after perusing the same passed the order under appeal. The affidavit of the petitioner and the counter affidavit of one Bashir Ahmed, Record Keeper of the Transport Deptt. were also subject of comment. Mr. Bhasin said that certain papers had been removed from the file of the appellant whereas this Bashir Ahmed had deposed that nothing of the sort had been done. The learned Advocate General further pointed out that this temporary post of Administrative Officer had since been abolished by the Government by means of

its order No. FST-38/69 dated 21-2-1969, therefore the whole proceedings were misconceived and the writ had become infructuous.

9. In our opinion this appeal can be disposed of on one or two simple points. As these points are sufficient to dispose of this appeal, we do not propose to enumerate in detail the argument of Mr. Bhasin, his criticism of the judgment of the Hon'ble Chief Justice and the ingenious propositions of law put forward by Mr. Bhasin.

10. In the first place, as was argued by the learned Advocate General and he has placed a copy of the Government order also on the file that this post was created for a period of one year and has been now reduced. Naturally the appointment of the respondent No. 2 to this post also has come to an end. This order reads like this:—

"Sanction is hereby accorded to the—

(a) Reduction of the temporary post of Administrative Officer in the scale of Rs. 400-700 sanctioned under Government order No. T.R.-32 of 1968 and the consequent revival of the post of Deputy TPT. Commissioner (Admn.) in the Govt. Transport undertaking in the scale of Rs. 509-1100

Mr. Bhasin has however argued that this order is simply a ruse to defeat the case of the appellant though the post of the respondent No. 2 the Administrative Officer and his appointment as such has come to an end, yet he has been appointed as Deputy Director (Administration) in a rather higher scale and therefore his writ and the present appeal should succeed. But this appointment of the respondent No. 2 is to a different post with a different scale of pay. If we adjudicate upon the new appointment of the respondent No. 2 in this appeal, or in the writ petition, it would be introducing a totally new case which would require a further hearing from the very beginning. The whole case has to be reopened. The petitioner has to put in a new petition and the respondents have to be given time to put in new rejoinders etc. That would be what is not at all proper and cannot be permitted in this appeal. We are concerned with the appeal as it is. Even if we accept the appeal, the order we pass would be infructuous. All that we can say in this appeal is that the appointment of the respondent No. 2 to the post of the Administrative Officer is bad and is therefore set aside but when the respondent No. 2 does not at all hold any such post or job or does not occupy any such post, the writ that we may issue, even if we do so, will be infructuous and meaningless. Therefore, on this point alone the writ petition as well as the present appeal become infructuous.

11. Furthermore the case can be decided on an entirely new point, which is so clear. It was put to Mr. Bhasin while he argued the case but Mr. Bhasin in our opinion had no explanation to offer. His case was that a temporary appointment can be made only for a period of three months. In this behalf he referred to Rule 14(1) of the Rules which runs as under:—

"Where it is necessary in the public interest owing to an emergency which has arisen and could not have been foreseen to fill immediately a vacancy in a post borne on the cadre of a service, class, or category and the making of an appointment to such vacancy in accordance with these rules would involve undue delay, excessive expenditure, or administrative inconvenience, the appointing authority may appoint a person otherwise than in accordance with these rules temporarily until a person is appointed in accordance with these rules but such temporary appointment shall in no case exceed three months on each occasion."

But clearly this provision does not apply to this case. No emergency had arisen which could not be foreseen. The post did not exist on any cadre or service, class or category, the post was a newly created post. Therefore the appointment of the respondent No. 2 to this post would not be covered by this sub-rule. On the other hand a temporary post was created which did not at all exist, in a new cadre of the service and in our opinion clearly Rule 16(2) of the Rules would apply. This sub-rule is in the following words:—

"Notwithstanding anything contained in these rules, if and when a temporary post is created as an addition to the cadre of any service and the holder thereof is required by Govt. to possess any special qualifications, knowledge or experience, any person who possesses such qualifications, knowledge or experience and who is considered to be best fitted to discharge the duties of such post may, irrespective of other considerations, be appointed to that post. But the person so appointed shall not by reason only of such appointment, be regarded as a probationer in such service, class or category

What this sub-rule lays down is (1) that the post to be filled must not be already existing in the cadre of any service; (2) it must be a temporary post; (3) must be created as an addition to the cadre of any service. The second part of it requires (a) any person possessing special qualifications, knowledge or experience, may be appointed; (b) the person must be considered to be best fitted to discharge the duties of such post; (c) he can be appointed irrespective of any other consideration and (which is most important); (d) notwithstanding anything contained in these rules. This clearly means

that while filling such a temporary post, the questions of seniority or juniority as are covered by Rules 24 and 25 of the Rules are not at all relevant and no other consideration except the opinion of the appointing authority counts, but the appointing authority must be satisfied that the person appointed possesses the special qualifications, knowledge and experience and is otherwise best fitted to discharge the duties of the job. There are no other limitations on the power of the appointing authority. In the instant case, the post was created in the following words by means of Government Order No. TR-85 of 1965 dated 6-12-1965.

"Sanction is accorded to the creation of a temporary post of the Administrative Officer in the scale of Rs. 400-700 in the Government Transport Undertaking for a period of one year in the first instance and to the temporary appointment of Shri G. R. Ashai, Manager, Passenger Service, thereto

It clearly shows that a special post of a temporary nature of the Administrative Officer was created in a particular scale. Therefore, when appointment to any such post was to be made, Rule 16(2) of the Rules empowered the appointing authority to ignore all the rules including rules of seniority, promotion and others and to appoint anybody best suited in its opinion for the job and all other considerations had to be ignored. But the only limitation on the power of the appointing authority was that the person appointed should possess the special qualifications, knowledge and experience requisite for the said post. In this case it is nobody's case that the respondent No. 2 did not possess the requisite qualifications, knowledge or experience. The petitioner himself has given a tabular statement of the experience of this officer as well as of himself and it is nowhere the case of the petitioner that the respondent No. 2 did not possess the necessary qualifications, experience or knowledge required for the job. His actual and main grievance has been that he was senior to the respondent No. 2 and therefore, he should have been promoted. The argument of Mr. Bhasin also centered primarily and principally around Rule 25 of the Rules and as a second argument he took recourse to Rule 14 of the Rules which pertain to temporary appointments which we have stated does not apply to the facts of this case.

12. In our opinion neither Rule 25 nor Rule 14 of the Rules apply to this case and the question of principles of natural justice and other such doctrines do not at all come into play. Therefore, there is nothing wrong with the impugned order in appointing the respondent No. 2 to this post which has since been

abolished also. Therefore, we dismiss this appeal without any order as to costs.

13. MIAN JALAL-UD-DIN, J.: I agree.
Appeal dismissed.

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(V 57 C 18)

S. M. FAZL ALI C. J. AND JASWANT
SINGH, J.

Sheik Ghulam Qadir and others, Petitioners v. State of Jammu and Kashmir and others, Respondents.

Writ Petn No. 143 of 1968 D/- 2-5-1969.

(A) Constitution of India, Arts. 226 and 311 — Affidavit in support of petition — Petitioners claiming rights as permanent employees — No categorical denial by Government — Civil lists and departmental budget showing their names — Petitioners' claim upheld. (Paras 7 & 39)

(B) Constitution of India, Art. 226 — Parties to a writ petition — Government transferring some of its departments to so incorporated company — Employees challenging Government's action to alter their service conditions — Chairman of the Company also impleaded — Held, no writ could issue against him. (Para 7)

(C) Civil Services — Kashmir Civil Services (Classification, Control and Appeal) Rules, R. 52, Note 6 (added by Govt. Notification No. SRO 36 dt. 11-2-66) in exercise of power under S. 124 of the Jammu & Kashmir State Constitution — Articles of Association of Jammu and Kashmir Industries do not contain such power — (Constitution of Jammu and Kashmir, S. 124) — (Jammu and Kashmir Industries Ltd. — Memorandum of Articles of Association, Arts. 89 and 73 (5)).

Note 6 added to Rule 52 of the Kashmir Civil Services Rules by Government Notification No. SRO. 36 dated 11-2-66 concerning the Government employees working in the departments which were transferred to the Jammu and Kashmir Industries Ltd., a company registered under the Jammu and Kashmir Companies Act, must be held to have been made by the Sadar-i-Riyasat in exercise of the General rule-making power given to it under Section 124 of the Jammu and Kashmir State Constitution. Such a power to amend the above Rules could not be traced either to Art. 89 or to Article 73(5) in the Memorandum of Articles of Association of the above Company. Nor was it necessary that Sadar-i-Riyasat should have been authorised by the above Articles of Association. (Para 10)

However, the question as to the validity of the amended rule was a different matter. (Para 10)

(D) Civil Services — Kashmir Civil Services (Classification, Control and Appeal) Rules, R. 52, Note 6 (Note 6 added by Govt. Notification No. SRO. 36 dt. 11-2-66) and Art. 207 — Notification and Note 6 to R. 52 held, invalid — Notification violated S. 126 of the J & K State Constitution — Also violative of Articles 311 (2), 14 and 16 of the Constitution of India — (J & K Government Notification No. SRO. 36, dt. 11-2-66) — (Constitution of Jammu & Kashmir, S. 126) — (Constitution of India, Arts. 311(2), 14, and 16).

In 1963, the Government of the State of Jammu & Kashmir constituted a Board called the Jammu & Kashmir Industries having its own Memorandum and Articles of Association. After its constitution the then Sadar-i-Riyasat issued instructions entrusting 21 Government Industrial undertakings to the Jammu & Kashmir Industries Ltd. The instructions, inter alia, ordained that the administration of the servants of the Company was to be governed by the provision of the Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules as in force from time to time. The petitioners who were confirmed permanent employees entitled to pensionary benefits working in the Government Sericulture Department started working under the Board on the same terms and conditions as applied to them before and they were treated as being on deputation from the State Government to this Government undertaking. While so, Sadar-i-Riyasat issued the impugned notification No. SRO. 36 dated 11-2-66 by which Note 6 was added to Rule 52 of the above Civil Rules. The effect of the Note 6 was that service in the companies owned by the Government should not be treated as foreign service for the purpose of grant of deputation allowance; that those employees of the Industrial concerns who were entitled to pensionary benefits should be treated as employees of the Jammu and Kashmir Industries and the pension of the employees of Sericulture Department entitled to pensionary benefits should be shared by the Government and the company under the rule of proportion but no deputation allowance would be admissible; that a particular set of Government servants, however, who had been deputed to the Government undertaking would continue to receive deputation allowance and that, in future, individual cases for grant of deputation allowance were to be considered on their merits. It finally provided that the employees of the erstwhile Sericulture Department who were entitled to pensionary benefits should be treated as employees of the Jammu and Kashmir Industries. The petitioners assailed this notification on the ground that it sought to alter the entire status, emoluments, conditions of service and other

statutory safeguards of the petitioners so as to terminate their service as Government servants and convert them into servants of the Company. Such an act clearly amounted to a termination of the service or reduction in rank and was therefore violative of S. 126 of the State Constitution corresponding to Art. 311 of the Constitution of India, inasmuch as such an action was resorted to without consent of the petitioners and operated to their serious prejudice. Discrimination and violation of procedure laid down under Article 207 of the Kashmir Civil Service Rules was also alleged. The Government contended that by virtue of the formation of the limited company the Sericulture department was abolished and the service of the petitioners stood automatically terminated and therefore the question of attraction of S. 126 of the State Constitution did not arise.

Held, that the impugned Notification as also Note 6 added by it to Rule 52 of the above Civil Rules terminated petitioners' services under the Government and made them private servants of the Company thus depriving them of the valuable right and immunity they hitherto had under S. 126 of the Jammu & Kashmir State Constitution corresponding to Art. 311 (2) of the Constitution of India) under which the State could not terminate their services without giving them notice. This was so notwithstanding the fact that it was open to the Government to change the conditions of service of the petitioners from time to time unilaterally and without their consent. It was, however, one thing to alter the conditions of service of a Government servant from time to time and quite a different thing to terminate his service altogether or to convert the nature of his service from one form to another resulting in a complete transformation of the character of the service. Even if the above action on the part of the Government was not termination of service, it was a reduction in rank which would also attract the provision under Section 126. (Paras 16 to 26 and 39)

The contention of the Government that the petitioners could have no grievance because the posts were themselves abolished was overruled and it was held that any such abolition must follow the procedure laid under Article 207 of the Kashmir Civil Services Rules and non-compliance with such procedure was another reason to hold the impugned notification as invalid. Note 6 was at the most a supplementary rule and it could not override a specific and substantive provision contained in Art. 207 of the Civil Rules. (Paras 18, 31, 39)

The Note 6 added to R. 52 was also held to be discriminatory and therefore violative of Arts. 14 and 16 of the Constitution of India for the following reason: While

the first part of Note 6 clearly said that service in the companies set up under the Companies Act should not be treated as foreign service for the purpose of grant of deputation allowance, yet it sought to discriminate between two employees both of whom were equally circumstanced. A premium was sought to be placed on the employees of Sericulture Department because they were transferred to the company some time after other employees who were getting deputation allowance. The rule did not give any guidelines to indicate why this discrimination had been made. AIR 1967 SC 1889 at 1894, Ref.; AIR 1958 SC 36 and AIR 1964 SC 600 and AIR 1967 All 197 and AIR 1965 J & K 15 (FB); AIR 1966 SC 1529 and AIR 1966 SC 1197, Foll.; 1940 AC 1014, Dist.

(Paras 35, 39)

Cases Referred: Chronological Paras

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|---|--------|
| (1967) AIR 1967 SC 1889 (V 54) = | |
| (1968) 1 SCR 185, Roshan Lal v. Union of India | 16 |
| (1967) AIR 1967 All 197 (V 54) = | |
| (1968) 2 Lab LJ 6, Kidar Nath v. State of U. P. | 21 |
| (1966) AIR 1966 SC 1197 (V 53) = | |
| (1966) 3 SCR 61, Shitla Shai v. N. E. Rly. Gorakhpur | 26 |
| (1966) AIR 1966 SC 1529 (V 53) = | |
| (1966) 3 SCR 106, Divisional Personnel Officer, Southern Rly., Mysore v. Raghavendrachar | 26 |
| (1965) AIR 1965 J & K 15 (V 52) = | |
| 1964 Kash LJ 366 (FB), Abdul Khalik v. State of J & K | 24 |
| (1964) AIR 1964 SC 600 (V 51) = | |
| (1964) 5 SCR 683, Moti Ram Deka v. General Manager, N. E. Frontier Rly. | 22 |
| (1958) AIR 1958 SC 36 (V 45) = | |
| 1958 SCR 828, Parshotam Lal Dhingra v. Union of India | 20 |
| (1940) 1940 AC 1014 = 1940-3 All ER 549, Nokes v. Doncaster Amalgamated Collieries Ltd. | 12, 13 |
| A. K. Sen and D. N. Mahajan, for Petitioners; M. C. Chagla and Advocate General, for Respondents. | |

ALI, C. J.:— This petition for an appropriate writ arises in the following circumstances.

2. According to the petitioners, two of them, namely petitioners 1 and 2 were gazetted employees and the others non-gazetted employees in the Department of Sericulture of the Government of Jammu and Kashmir. The petitioners further aver that the Sericulture Department is just like other Department of the Government consisting of gazetted and non-gazetted members of the staff and they were and are governed by the Jammu and Kashmir Civil Services Rules and Regulations in all matters and possess the facilities and the safeguards afforded to all Government servants of other departments. The petitioners further allege

that they have always been treated as Government servants and their posts have been shown in the civil list and the budgets of the Departments concerned. In order, however, to stream-line the administration and to give it a commercial colour the Government on 3rd October 1963 constituted a Board called the Jammu and Kashmir Industries which was a State Government undertaking and which had a Memorandum and Articles of Association. After this undertaking came into existence, the then Sadar-i-Riyasat of Jammu and Kashmir (now Governor) issued instructions by which 21 industrial undertakings were entrusted to the Jammu and Kashmir Industries Ltd. The newly formed Jammu and Kashmir Industries was governed by a Board of Directors set up under the Memorandum of Association and was entrusted with several types of responsibilities like management, corporate organization, personnel and financial responsibilities and functions. The instructions further ordained that under the personnel responsibility of the Board the administration of the servants of the company was to be governed by the provisions of the Jammu and Kashmir Civil Services (Classification, Control & Appeal) Rules etc from time to time. After the issue of the aforesaid instructions on 3-10-63 the petitioners who were permanent employees of the Sericulture Department started working under the Board of J & K Industries on the same terms and conditions as applied to them before and they were treated to be as on deputation from the State Government to this Government undertaking.

Subsequently by a notification No. SRO 36 DJ- 11-2-66, note 6 was added to rule 52 of the KCSR which provided that service in the companies owned by the Government should not be treated as foreign service for the purpose of grant of deputation allowance. It was further stipulated that those employees of the Industrial concerns who were entitled to pensionary benefits should be treated as employees of the J & K Industries and the pension of the employees of Sericulture Department entitled to pensionary benefits should be shared by the Government and the company under the rule of proportion but no deputation allowance would be admissible. A particular set of Government servants, however, who had been deputed to the Government undertaking would continue to receive deputation allowance. Lastly It was provided that in future individual cases for grant of deputation allowance were to be considered on their merits. We shall refer to the broad details of this notification a little later when we discuss the arguments advanced before us by the learned counsel for the parties.

3. In short the notification finally provided that henceforward the employees

of the erstwhile Sericulture Department who were entitled to pensionary benefits should be treated as employees of the J & K Industries. It is this notification which has been assailed before us by the petitioners on various grounds. In the first place it was contended before us that the petitioners were only entrusted to the company that is to say they were directed to work under the company on the same terms and conditions which they had enjoyed as Government servants. Thus by asking the petitioners to work under the J & K Industries no change in their status, emoluments, conditions of service and other statutory safeguards was brought about and they continued to be just like Government servants of other departments. By virtue of the impugned notification, however, the Government by one stroke of pen sought to alter the entire status of the petitioners so as to terminate their service as Government servants and convert them into servants of the company. Such an act according to the petitioners clearly amounted to a termination of the service or reduction in rank of the petitioners and was therefore violative of Section 126 of the State Constitution (Art. 311 of the Constitution of India), inasmuch as such an action was resorted to without consent of the petitioners and operated to their serious prejudice.

Secondly it was argued that the impugned notification sought to select the petitioners for hostile discrimination even as between Government employees situated in similar circumstances and therefore was hit by Art. 16 of the Constitution of India. Another objection taken was that the notification amounted merely to an executive order and it could not overrule the statutory provisions contained in the J & K Civil Service Rules which have the authority of the Constitution itself, having been kept alive under the provisions of the State Constitution. Lastly it was submitted that the impugned notification is clearly hit by Art. 207 of the KCSR inasmuch as the procedure laid down therein has not been followed in the present case before applying the impugned notification to the petitioners.

4. On the side of the respondents Mr. Chagla submitted three short points. In the first place he argued that by virtue of the formation of the limited company called the J & K Industries the Sericulture department was abolished and the service of the petitioners stood automatically terminated and therefore the question of attraction of S. 126 of the State Constitution did not arise. It was urged that since the petitioners were permanent employees they were absorbed in the Company on almost the same terms and conditions and therefore they should have no grievance on that account. Secondly it was submitted

On these matters we have found the pleading and the evidence deficient and we are unable to record any definite finding. In paragraph 3 of the points of claim the Liquidator alleged that the estimated deficiency of the Company according to information gathered by him is Rs. 6,50,000/-. In paragraph 6 (d) the Liquidator prayed:

"(1) a declaration that the respondents are liable without any limitation of liability for all the debts of the Company amounting to the sum of Rs. 13,97,300/-.

(2) A declaration that the respondents are jointly and severally liable to pay to the Official Liquidator sums amounting to Rs. 6,50,000/- being the balance amount required to pay the creditors of the Company in full after realising the available assets of the Company.

(3) If necessary, an account of the debts of the Company be taken.

(4) Payment by the respondents to the Official Liquidator of the Company of the said sum of Rs. 6,50,000/- or such other sum for which the respondents may be found liable on the taking of accounts.

(5) An order that the respondents do pay to the applicant costs of and incidental to the application.

(6) Such other order in the premises as the Court shall think fit to make".

In traversing this, in paragraph 33 of the 1st respondent's defence, he stated:

"It is not even known how and why a declaration of liability to the extent of Rs. 13,97,300/- has been claimed which has later been limited to Rs. 6,50,000/-." In paragraph 21 of the defence this was repeated, and the Liquidator was put to strict proof of establishing the deficiency and its quantum. The points of defence of many of the other respondents followed on the same lines.

60. There is not even formal evidence on the side of the Liquidator, either as to how the deficiency was estimated at Rs. 6,50,000/- or as to the totality of the debts or liabilities of the Company. Nothing was said in the Liquidator's evidence as P. W. 24, or on his behalf, in support of the quantification of all the debts of the Company in the Points of claim at Rs. 13,97,500/-. As P. W. 24 the Liquidator only stated that he has claimed Rs. 6,50,000/- as deficiency for paying creditors in full.

61. The learned Trial Judge while rightly noticing that the Court had a discretion in assessing and fixing the liability of the persons concerned, recorded his opinion that respondents 1 to 8 are liable "for all the liabilities of the Bank" (vide page 22 of the printed judgment). At that stage there was no attempt by the learned Judge to quantify "all the liabilities" of the Bank. At

pages 24 and 25 of the judgment the learned Judge recorded that the Liquidator claimed a sum of Rs. 6,50,000/- to meet the deficiency in the assets of the Company to pay the creditors in full. On issue No. 1, the learned Judge found without any consideration or discussion that the deficiency in the assets of the Company is Rs. 6,50,000/-.

62. With respect, we are unable to accept this finding. We have already posed the aspects which appear to us to be germane to the question. We are not to be understood as saying that if the nature and extent of the fraudulent trading was responsible for all the debts and liabilities of the Company, a decree for the same cannot follow. But these matters have neither been adverted to nor found. The extent of the fraudulent trading of the Directors in regard to the claim made in the various Schedules of the Points of claim will have to be reassessed in the light of our finding as to the Directors' knowledge of the true position of the Bank. Again, in schedule VI, the Liquidator pressed before us, and we have found, the liability of the Directors only for items 12 and 15. In the light of these, and the other findings that we have recorded the extent of liability of the Directors will have to be re-estimated and appropriate orders passed.

63. We therefore, set aside the decree of the learned Trial Judge in so far as respondents 1 to 8 are concerned, and remit Application No. 1 of 1959 back to the Trial Judge for the limited purpose of: (1) deciding the extent of all the debts or liabilities of the Bank; and (2) considering and deciding in the light of our findings whether the Respondents-Directors should be made liable for the totality of such debts, and if not for what portion of the same. The parties are at liberty to adduce additional evidence limited to these points. As the appellants-Directors have substantially failed in their contentions, we direct that they pay one-half of the costs of the Liquidator in Appeals 137, 139, 140, 105, 124, 125, 133 and 134 of 1963, and bear their own. Costs before the learned Trial Judge both before and subsequent to this remand will be provided for in the final order to be passed by the learned Judge.

A. S. No. 426 of 1964.

64. This is an appeal by the present Joint Commercial Tax Officer, Tirunelveli, who was the Sales-tax Officer, 1st Circle, Alleppey, till 2-7-1955. He was not a party to Application 1 of 1959, but feels aggrieved by certain observations made by the learned Judge about some writing, signature and seal made

and affixed by him as Sales Tax Officer in two of the Account Books produced by the 3rd Respondent, namely Exts. D81 and D87. In effect, he seeks to expunge the observations made by the learned Judge.

65. Discussing the case of the Liquidator and of the 3rd Respondent regarding the alleged entrustment of the latter's "unaccounted money" to the 10th Respondent and its re-payment, we have had occasion to refer to the 3rd Respondent's case that no payments by cheque were made to him by the 10th respondent and that there were payments in cash on the relevant dates, as seen entered in the 3rd Respondent's Account Books, Exts. D80 to D82. Ext. D87 is a ledger of the 3rd Respondent for the year 1130 and was tendered for the only purpose of showing that it bears the signature, writing and seal on 13-10-55 of the same Sales-tax Officer, as the one whose signature, writing and seal are to be found in Ext. D81. The only purpose in producing D87 seems to have been to add authenticity to Ext. D81 by reason of the presence in the latter of the same signature, writing and seal, and of the same date as in Ext. D87. The learned Judge discussed the matter and recorded his conclusion thus:

"The 3rd Respondent has produced another Account Book Ext. D87 to prove the genuineness of the accounts. Page 739 of this book contains the seal of the Deputy Commercial Tax Officer, Special Circle Madras with the date 30th January 1957. A little below that appears 'Checked' with initials underneath and date: "26-7-1957, A. C. T. O. Madras". In between these two, I mean the seal of the Deputy Commercial Tax Officer, and the endorsement and initials of the A. C. T. O. there is a little space and therein appears the seal of the Sales-tax Officer, 1st Circle, Alleppey. About this seal and below the seal of the Deputy Commercial Tax Officer already referred to, there appear "Examined" and the signature of the S. T. O. with the date "13-10-55". The same seal of the Sales-tax Officer and the word "Examined" with his signature and dated "13-10-55" appear on page 374 of Ext. D81. The case of the 3rd Respondent is that Ext. D81 is genuine because the same seal of the sales-tax Officer and the same signature and date 13-10-55 as appearing in Ext. D87 appear in Ext. D81 also. In other words, the argument is that since Ext. D87 is undoubtedly genuine as the seal of the Deputy Commercial Tax Officer and the initials of the A. C. T. O. Madras will indicate and since the same seal and signature of the Sales-tax Officer, Alleppey, as contained therein appear in

Ext. D81 also, Ext. D81 must be genuine too.

I have closely examined the word "Examined" with the signature of the S. T. O. and dated "13-10-55" under a magnifying glass. It is very clear that the word "examined" overlapping the seal of the Deputy Commercial Tax Officer, Madras, bearing the date 30th January 1957 is on or above the seal. From my examination under the magnifying glass, it is clear too me that the seal of the Deputy Commercial Tax Officer with the date 30th January 1957, was affixed earlier and the word "Examined" was written above it after the seal was affixed and the date "13-10-55" and the signature of the S. T. O. were also put subsequently. It appears to be clear that this alleged examination by the S. T. O. is a subsequent invention, subsequent to 30th January 1957 with an earlier date put thereon. Therefore, I have no hesitation in holding that Ext. D81 is an account subsequently written up and the seal and the signature of the S. T. O. with an earlier date produced for the purpose of this case. The same seal and signature etc., of the same S. T. O. have been procured on page 739 of Ext. D87 also.

(This is a matter for the Government to take up and it is for the Government to decide what action they should take against the Sales-tax Officer responsible for this. A copy of this judgment may be sent to the Government. The Registrar will keep Exts. D81 and D87 in safe custody and these account books will not be returned without orders of this Court.)

In pursuance of these observations of the learned Judge it appears that on 23-1-1964, the Board of Revenue, Commercial Taxes, Madras, served on the appellant in the above appeal, a notice calling upon him, to explain the irregularity committed in his capacity as the then Sales-tax Officer, 1st Circle, Alleppey. The show cause notice is stated to have quoted the first two out of the three paragraphs of the learned Judge's order, which we have extracted, above. Thereupon the appellant filed this appeal.

66. We have examined the two account books Exts. D81 and D87 and also the signature, writing and seal and the juxtaposition of these. In spite of the challenge made by counsel for the appellant and for the 3rd respondent from specimen demonstrations before us that it was impossible to be dogmatic in any given case from mere examination with the naked eye or with a magnifying glass, as to whether the seal is over the writing, or the writing over the seal we are not satisfied that the observations

made by the learned Judge are unjustified. Our own examination of the seal and writing only confirmed the learned Judge's impression and observations.

67. The appellant before us has only been issued a show-cause notice in pursuance of the observations made by the learned Judge in his judgment. He would hereafter have sufficient opportunity to explain, as he has attempted to do before us, that he was not a party to Application No. 1 of 1959, nor even a witness therein and had no occasion to explain the nature of the writing, signature and seal, or the circumstances under which they happened to be made and affixed.

68. We dismiss this appeal, but without any order as to costs.

Order accordingly.

AIR 1970 KERALA 131 (V 57 C 23)

**V. P. GOPALAN NAMBIYAR AND
V. BALAKRISHNA ERADI, JJ.**

K. Madhava Nayak and others, Appellants v. Popular Bank Ltd., Respondent.

Appeal Suits Nos. 370, 381, 382, 395, 396, 399, 400 and 412 of 1963, D/- 29-10-1968.

(A) Companies Act (1956), Section 543 — Scope and applicability — Liability under section — It must first be shown that person proceeded against has been guilty of misapplication etc. — Section covers breach of trust by negligence.

Before liability can be attracted under the section it must be shown that the person proceeded against has been guilty of misapplication, retainer, misfeasance, etc., resulting in loss to the Company as a direct consequence of the act complained of.

The section covers a breach of trust in wide sense, including a breach of trust by negligence or something of that kind; 1882-21 Ch D 492 and 1896-2 Ch 279 and 1928 Ch 861 and AIR 1942 Mad 365 and AIR 1950 Mad 208, Rel. on.

(Para 7)

(B) Companies Act (1956), Section 543 — Misapplication of capital resulting in loss — Meaning of — Declaration of dividend contrary to provisions of Memorandum of Articles of Association — Held, it was case of such misapplication.

Where a clause of the Articles of Association declares that no dividend will be paid otherwise than out of the profits of the year or any other undistributed profits there can be little doubt that a declaration of dividend otherwise than out of the profits, and at a time when the Bank was, to the knowledge

of the Directors, working at a loss, is an act ultra vires the Directors. It is a case of misapplication of the Bank's capital resulting in loss to the Bank.

(Para 13)

(C) Companies Act (1956), Section 543 — Misapplication of capital of company resulting in loss — Burden of proof — Once Liquidator shows that there was declaration of dividend resulting in misapplication, burden shifts on to directors to show that it was not actually paid — (Evidence Act (1872), Sections 101-104) — (Banking Companies Act (1949), Section 45-H).

Once the Liquidator has shown that there was a declaration of dividend amounting to misapplication of the Bank's capital resulting in loss to the Bank, the burden is on the Directors to show that the dividend thus declared had not actually been paid. This is so, by reason of Section 45-H of the Banking Companies Act, according to which, on the Liquidator making out a prima facie case, the burden shifts to the Directors (in this case) to disprove liability.

(Para 13)

The argument that the obligation of the Liquidator to make out only a prima facie case and the burden thereafter on the delinquents proceeded against to disprove the liability can arise only when the relief claimed is repayment or restoration of any money or property of the Company, and not compensation in respect of the misapplication, retainer, misfeasance or breach of trust appears to be only academic. Going purely by the language of Section 45 (H) of the Banking Companies Act the juxtaposition of the words occurring therein, and co-relating them with the words in Section 543 of the Companies Act, it must be admitted that the section has not been artistically drafted. A plainer and simpler drafting was certainly possible.

(Para 23)

(D) Banking Companies Act (1949), Section 45-H — Scope and applicability — Provisions apply to misapplication of Bank's funds — (The question whether Section 45 (H) covers only the cases covered by Section 543 (1) (a) of the Companies Act, 1956, and does not cover the cases contemplated by clause (1) (b) thereof left open.)

(Para 23)

Cases Referred: Chronological Paras
(1950) AIR 1950 Mad 208 (V 37) =

1949-19 Com Cas 311, M. A.

Malik v. V. S. Thiruvengadaswami Mudaliar

(1942) AIR 1942 Mad 365 (V 29) =

1942-1 Mad LJ 207, V. Subbayya

v. C. T. Machayya

(1928) 1928 Ch 861 = 97 LJ Ch

460, In re, Etic Ltd.

(1901) 1901 AC 477 = 70 LJ Ch 20
 753, Dovey v. Cory
 (1896) 1896-2 Ch 279 = 65 LJ Ch 7
 673, Kingston Cotton Mills Co.,
 (No. 2)
 (1882) 21 Ch D 492 = 47 LT 633, 7
 Ex parte, Pelly

V. Rama Shenoi and R. Raya Shenoi, (in No. 370/63); P. Krishnamoorthy, (in No. 381/63); T. N. Subramonia Iyer, P. C. Chacko and P. Krishnamoorthy (in No. 382/63); P. C. Chacko and P. Krishnamoorthy, (in No. 395/63); K. V. Suryanarayana Iyer, C. M. Devan and N. N. Venkitachalam, (in No. 396/63); S. Narayanan Potti, (in No. 399/63); S. Narayanan Potti, (in No. 400/63); K. V. Suryanarayana Iyer and C. M. Devan (in No. 412/63), for Appellants, Mani J. Meenattoor, for Respondent (in all the appeals).

JUDGMENT:— These appeals were heard along with, and in continuation of Appeals Nos. 137, 139, 140 of 1963, etc., in which we have just delivered judgment.* They arise from Application No. 2 of 1959 filed by the Official Liquidator of the Popular Bank Ltd., under Section 543 of the Companies Act. The parties to this application are, with one difference, the same as the parties to Application No. 1 of 1959 against which A. S. Nos. 137, 139, 140 of 1963, etc., were directed, the only difference being, that the 9th respondent in Application No. 1 of 1959, is not a party hereto. The result is, that Respondents 10 and 11 in Application No. 1 of 1959 are respondents 9 and 10 in Application No. 2 of 1959. Save where expressly indicated reference would hereinafter be made to the ranks of the parties as before the Trial Judge.

2. Application No. 2 of 1959 sought to make the Respondents liable for misfeasance and breach of trust, in relation to the Company, and for misapplication and retainer of the money and property of the Company, and as being accountable for such money and property. The misfeasance, mis-application, retainer, breach of trust and accountability were claimed under six principal heads. First it was complained that Respondents 1 to 8, the Directors of the Company did not exercise adequate control in the matter of advances of the Company's funds, and in consequence, Respondents 9 and 10 advanced large amounts to various parties without taking adequate securities for the advances and from whom it was not possible to recover the whole or a substantial portion of the advances. Not only were steps not taken to recover the amounts covered by the advances,

but the Board of Directors ratified the advances on 10-11-1955. A list of such advances made, together with the amounts likely to prove unrealisable was furnished in Schedule I. The unrealisable amounts aggregate to Rs. 4,76,746/-. Secondly, it was alleged that several amounts were withdrawn by Respondents 9 and 10 from other banks, and were wrongfully retained and misappropriated. Respondents 1 to 8, who had knowledge of the said withdrawals did not take any steps to recover the amounts withdrawn. The withdrawals thus made were covered up by false entries, made by Respondents 9 and 10 with the knowledge of the Respondents 1 to 8, of advances to different customers of the Company. These fictitious advances were also ratified on 10-11-1955. The list of the withdrawals from other banks was furnished in Schedule II aggregating to Rs. 1,60,500/-. A list of the false and fictitious entries of advances made to cover up the misappropriations was shown in Schedule III. The amount covered by such entries comes to Rs. 1,99,000/-. Thirdly it was contended that Respondents 1 to 8, prepared and published false balance-sheets for the years 1954 and 1956 showing profits when the Bank had actually incurred heavy loss. The amounts paid as dividends for the said two years was shown in Schedule IV. Rs. 12,311-8-10 was claimed under this head. Fourthly, it was alleged that there were manipulations and falsification of Accounts in the Bills Negotiated Account of the Company. Several bills have been entered as negotiated, which were actually not so negotiated. A list of bills in the Bills Negotiated Account in respect of which no bills have been actually negotiated, was shown in Schedule V. The amount covered thereby totals to Rs. 98,700/-. Fifthly, Respondents 3 and 5 sanctioned and caused to be paid to the 9th Respondent, a sum of Rs. 7,500/- in February 1956, on a Demand Promissory Note without any security, knowing that the 9th Respondent had no means to repay the loan. A sum of Rs. 10,000/- deposited by Sri N. Narayanaswamy was also misappropriated. Sixthly it was alleged that there were manipulations in the Profit and Loss Account of the Company. The defences raised will be referred to in the course of the judgment. On these heads of claim, the learned Trial Judge formulated fifteen points for determination and recorded his findings which may be summarized thus:

(1) That the Directors did not exercise adequate control in the matter of advances, and in consequence, Respondents 9 and 10, advanced large amounts to various parties without adequate secu-

*Reported in AIR 1970 Kerala 120.

erty. The Directors did not take effective steps to recover those advances; (2) that the amounts mentioned in Schedule II, were withdrawn and misappropriated; that the Directors did not take appropriate steps to recover the said amounts from Respondents 9 and 10; and that the misappropriations were covered up by making false entries of fictitious advances, as indicated in Schedule III, with the knowledge and consent of the Directors; (3) that the Liquidator had not established any manipulations in the Profit and Loss Account; (4) that the Fixed Deposit Amount of Rs. 10,000 of Sri Narayanaswamy was misappropriated, but probably this may not be the direct result of misfeasance of the Directors as it could be discovered only if the Directors looked into the Account Books item by item; and that Respondents 3 and 5 had sanctioned a loan of Rs. 7500/- to the 9th Respondent without security; (5) that there were manipulations in the Bills Negotiated Accounts, as a result of which Bank must have lost at least Rs. 61,800/- as shown in Schedule V; (6) that as far as the balance-sheet for 1954 was concerned, Respondents 1 to 8 might not have known that it was false; but regarding the balance-sheet for 1955, the same was false and incorrect, to the knowledge of Respondents 1 to 8, and they had not established that the dividends covered thereby were not disbursed; (7) that the loss sustained by the Bank can be fixed at Rs. 6,50,000/- being the amount claimed in Application No. 1 of 1959; (8) that the Respondents are guilty of misfeasance and breach of trust in relation to the Bank and are liable to contribute the following sums by way of compensation in respect of the mis-application, misfeasance and breach of trust, namely, Respondents 9 and 10, jointly and severally liable for the entire sum of Rupees 6,50,000/-; the 3rd Respondent liable for Rs. 2,00,000/-; Respondents 1, 4, 5 and 7 liable for Rs. 75,000/- each; and Respondents 2, 6 and 8 liable for Rs. 50,000/- each. The Respondents were made liable for the costs of the Liquidator in the same proportion. It was made clear by the learned Trial Judge that the Liquidator will not in any event be entitled to realise more than the amount of Rupees 6,50,000/- and one set of costs by executing either of the decrees or both the decrees in Applications 1 and 2 of 1959 from Respondents 1 to 8 in the proportion directed. A copy of the judgment in Application No. 1 of 1959 was directed to be appended to the judgment in Application No. 2 of 1959.

3. Against this order of the learned Judge A. S. No. 370 of 1963, has been preferred by the 7th Respondent: A. S.

No. 381 of 1963 by the 2nd Respondent; A. S. No. 382 of 1963 by the 3rd Respondent; A. S. No. 395 of 1963 by the 8th Respondent; A. S. No. 396 of 1963 by the 1st Respondent; A. S. No. 399 of 1963 by the 4th Respondent; A. S. No. 400 of 1963 by the 5th Respondent; and A. S. No. 412 of 1963 by the 6th Respondent. Respondents 9 and 10 have not filed any appeal. Nor has the Official Liquidator filed either any appeal, or memorandum of cross objections.

4. Since the filing of these appeals, Respondents 1, 3 and 6 died. The legal representatives of Respondents 1 and 6 have impleaded themselves as appellants in the appeals filed by them.

5. On behalf of the 3rd respondent C. M. P. No. 7082 of 1968 was filed on 16-7-1968 after arguments on the appeals were closed and judgment was reserved on 4-7-1968. It was prayed that the entire proceedings initiated by the Liquidator be declared to have abated. The cases were reposted to argue the subject-matter of the petition alone. Arguments on the same were heard on 25-7-1968 and adjourned at the request of counsel to 31-7-1968. After further submissions made on that day on the subject-matter of the C. M. P., orders thereon were reserved. We have repelled a similar argument addressed to us in A. S. No. 134 of 1963 in the judgment just delivered in that appeal and other connected appeals. For reasons recorded in paras 12 to 14 therein, we have no hesitation in rejecting the contention that the proceedings initiated by the liquidator terminate on the death of the 3rd respondent after decree and pending appeal. We further hold that, as the 3rd respondent died after conclusion of arguments and before delivery of judgment in his appeal, this judgment of ours would have effect as against him as if it were pronounced while he was alive.

6. The learned Trial Judge by his order, directed that the Liquidator will not in any event be entitled to realise more than Rs. 6, 50,000/- and one set of costs by executing either or both, of the decrees in Applications 1 and 2 of 1959 from Respondents 1 to 8 in the proportion of their liabilities, as determined by the judge. The Liquidator has not appealed from this part of the learned Judge's order. For that reason we say nothing about this aspect of the order. We shall now proceed to consider the various heads of claim. The relevant facts have been stated by us in our judgment in A. S. Nos. 137, 139 and 140 of 1963 etc. As we are directing a copy of the said judgment to be appended to this, it is unnecessary to traverse the same ground over again. The facts stated in

the said judgment will serve as a background to these appeals also. The evidence given in Application 1 of 1959 was treated as evidence in Application No. 2 of 1959 also.

7. Section 543 (1) of the Act may conveniently be quoted:

"543. (1) If in the course of winding up a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, managing agent, secretaries and treasurers, manager, liquidator or officer of the company—

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

the Court may, on the application of the Official Liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, managing agent, secretaries and treasurers, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just".

Considerable discussion centred round the meaning of the expression "misfeasance" and the scope of liability sketched by the section. Copious references were made to the English and Indian decisions. We do not think it necessary to survey the entire gamut of these decisions. As we understand them, certain propositions appear to be well settled. Before liability can be attracted under the section it must be shown that the person proceeded against has been guilty of misapplication, retainer, misfeasance, etc., resulting in loss to the Company as a direct consequence of the act complained of. It was argued that mere nonfeasance would not be included within the purview of the section. The observations in some cases seem to countenance such a view. But the view of Jessel M. R. in *Ex parte, Pelly*, 1882-21 Ch D 492 the views expressed in *In re, Kingston Cotton Mills Co. (No. 2)*, 1896-2 Ch 279, and the decision of Maugham J. in *In re, Etic Ltd.*, 1928 Ch 861 are sufficiently clear that the English section — on which the section in the Indian Act has been modelled — covers a breach of trust in the wide sense, including a breach of trust by negligence or something of that kind. The same view has been taken in some of the Indian deci-

sions also. (See *V. Subbaya v. C. T. Machayya*, AIR 1942 Mad 365 and *M. A. Malik v. V. S. Thiruvengadaswami Mndaliar*, 1949-19 Com Cas 311 = (AIR 1950 Mad 208)). The facts presented here and the conclusions that we have formed, do not warrant any greater elaboration or a more detailed examination of the legal position.

8—12. (After discussing the evidence their Lordships proceeded:)

13. Ext. D39 is the Memorandum and Articles of Association of the Bank. Clause 120 of the Articles of Association declares that no dividend will be paid otherwise than out of the profits of the year or any other undistributed profits. In the face of the above provision in Ext. D39, and on the authorities, there can be little doubt that a declaration of dividend otherwise than out of the profits, and at a time when the Bank was, to the knowledge of the Directors, working at a loss, is an act ultra vires the Directors. It was a case of misapplication of the Bank's capital resulting in loss to the Bank. For reasons we have elaborately discussed in the appeals against Application No. 1 of 1959 there can be little doubt that the Directors were aware by the 2nd of July 1955 of the financial bankruptcy of the Bank. They were fully aware that on account of the misappropriations the Bank had suffered heavy loss and that it was not in a position to declare profits or pay dividends. There is also evidence that Nilakanta Iyer (DW. 2) who was the General Manager of the Bank since 21-11-1955 had recommended against the declaration of dividends for 1955 in his draft proposals (Ext. D. 47), that the 1st Respondent corrected the draft proposal, and, contrary to it, proposed a declaration of dividend, which was accepted and passed by the Board of Directors. We agree with the learned Trial Judge that the Liquidator having shown that there was a declaration of dividend the burden is on the Directors to show that the dividend thus declared had not actually been paid. This is so, by reason of Sec. 45-H of the Banking Companies Act, according to which, on the Liquidator making out a prima facie case, the burden shifts to the Directors (in this case) to disprove liability. We shall advert to the section and to the argument based on it, later.

14—19. (After discussing the evidence their Lordships proceeded.)

20. We have extracted the pleading in the Points of claim about the absence of adequate control by the Directors in the matter of advances of the Bank's Funds. The plea of the Directors is that the Executive Committee had been authoris-

ed to sanction and review the loans, that the Committee functioned effectively, and that the Directors were on that account relieved from responsibility. It is also pleaded that the Directors placed trust and confidence — as they were entitled to — in the 9th Respondent, and therefore again they cannot be held liable for these advances. Neither of these contentions appear acceptable to us. It was accepted before us that by reason of clause 105 of the Articles of Association (D. 39), no less than by reason of Regulation 71 of Table A of the Indian Companies Act 1913 (the provision in the Travancore Act was also similar) the responsibility of managing the business of the Bank is laid upon the Directors. We do not think that the said responsibility can be got rid of altogether by a mere delegation in favour of an Executive Committee, or by blindly reposing confidence and trust in the 9th Respondent. In our judgment in the appeals against Application No. 1 of 1959 we stated that we are unable to endorse the broad submission that irrespective of the size and standing of the Bank, the volume of business transacted therein, and the efficiency and trustworthiness of the delegate, a delegation of powers would per se carry with it a denudation of responsibility. The least that the responsibility placed on the Directors by statute and by the Articles of Association would require and expect them to do, is to see that the delegate or the confidant functioned properly and effectively. In the present case, we find that although it was recorded in Ext. P58 that a meeting of the Executive Committee shall be called at least once a month to consider and review the advances, this was not followed in actual practice, especially at the later stages after 1954. We find again that early in 1954 the Reserve Bank had commented in Ext. P62 report about the lack of supervision and control by the Board of Directors in the matter of granting advances and about the passivity of the Committees constituted from time to time for sanctioning and reviewing the advances. It had also commented upon the undefined powers granted to the Manager in the matter of advances and credits. The Directors were aware of this Report at least in July 1954, and their action in not seeing that their resolution of 6-9-1953 was properly implemented and that the Manager was not given a free hand in the matter of advances amounts to a grave dereliction of duty on their part; and, in our opinion, to misfeasance. Our conclusion is strengthened by the fact that even when the irregularities and defalcations were disclosed to them in the end of July 1955, the Directors in the most perfunctory

fashion, which we have detailed in our judgment in the appeals against Application No. 1 of 1959, ratified the whole series of advances in Ext. P61 list. To a situation such as this, and to the facts disclosed here, we have held in our judgment referred to supra, that the principle in *Dovey v. Cory*, 1901 A. C. 477 has no application.

21. The learned Trial Judge was satisfied from Schedule I and from Exts. P73 and P75, that the advances listed in Schedule I were not made on proper security. Ext. P73 dated 19-12-1961, is a statement made by the Liquidator regarding the realisations made. The 7th respondent in Appendix D to his Points of Defence showed the probable amounts that may be realised from the parties mentioned in Schedule I. This was answered by the Official Liquidator in Ext. P75 statement. In the light of these, the learned Judge held that he was inclined to hold that the advances were not on proper and adequate security. This finding has been assailed before us, and, as noticed earlier, our attention was called to the proceedings of the Executive Committee recorded in Ext. P63, which showed that in the case of some at least of these advances, the Executive Committee had called for securities at a certain stage and had also directed action to be taken at a certain stage. For instance proceedings of the Executive Committee dated 14-1-1954 and 17-9-1954 were relied on to show that in respect of item 18 in Schedule I a limit of Rs. 10,000/- was directed to be continued and an equitable mortgage of properties was probably taken. In regard to items 26 again, the insistence on title deeds from the party, as seen from the proceedings of the Executive Committee dated 26-9-1954 and 26-10-1954, were stressed. In addition to these, on the aspect of the irrecoverability of the advances, it was pointed out that a detailed cross-examination had been directed of P. W. 3 and P. W. 22 and D. W. 3 to show that many of the advances mentioned in Schedule I cannot be regarded as irrecoverable. Above all, the Liquidator's affidavit dated 4-6-1968, filed before us was relied on to show that a sum of Rs. 41, 225/- had been thus far realised by the Liquidator out of what he characterised as irrecoverable advances.

22. On these aspects, which bear on the loss caused to the Bank, the learned Trial Judge expressed himself thus:

"Last I come to the amount of loss sustained by the Bank and the respective liabilities of the respondents. According to the Liquidator, who is examined as P. W. 24, the loss comes to over

Rs. 7,00,000/- namely the aggregate of the unrealisable advances shown in Schedule I of Rs. 4, 76, 746/- the amounts withdrawn from other banks and misappropriated of Rs. 1,60,500/- shown in Schedule II, the sum of Rs. 12,311/- being the dividends declared Rs. 61,800/- being items 22 to 24 in Schedule V and the sum of Rs. 10,000/- being the Fixed Deposit of Narayanaswami. Probably the last item may not be the direct result of the misfeasance of the Directors because that amount could be discovered only if the Directors looked into the accounts item by item. Similarly, the dividend declared for 1954 might also be excluded on my finding that the Directors did not know that the Bank was working at loss in 1954. All the other amounts I am inclined to hold, are the result of the misfeasance and breach of trust committed by the respondents. In this case the misfeasance of the Directors ultimately resulted in fraud as I have already indicated in Application No. 1 of 1959. Considering all the circumstances, I am inclined to think that the amount of loss be fixed at Rs. 6,50,000/- being the amount claimed in Application No. 1.

In our judgment in the appeals against Application No. 1 of 1959 we have already held that we cannot accept the finding of the learned Judge quantifying the deficiency in the assets of the Company to pay creditors in full at Rs. 6,50,000/-. Much the less can we accept the figure as a correct estimate of the loss caused to the Bank by reason of the misfeasance, misapplication, etc., of the Directors who are the appellants before us. It is a regrettable fact that there is not even formal evidence on the side of the Liquidator of the loss occasioned to the Bank, as a result of the acts of misapplication, misfeasance, breach of trust, etc., of the Directors. The loss had not been estimated even in the pleading. On the pleading and the evidence, we cannot assess the loss caused to the Bank as a result of the grant of irrecoverable advances specified in Schedule I.

23. We may also advert, in this connection, to an argument that has been advanced to us regarding the scope of Section 45-H of the Banking Companies Act. The section reads:—

"45-H. Special provisions for assessing damages against delinquent directors, etc.

(1) Where an application is made to the High Court under Section 543 of the Companies Act, 1956 (1 of 1956) against any promoter, director, manager, liquidator or officer of a banking Company for repayment or restoration of any money or property and the applicant

makes out a prima facie case against such person, the High Court shall make an order against such person to repay and restore the money or property unless he proves that he is not liable to make the repayment or restoration either wholly or in part:

Provided that where such an order is made jointly against two or more such persons, they shall be jointly and severally liable to make the repayment or restoration of the money or property.

(2) Where an application is made to the High Court under Section 543 of the Companies Act, 1956 (1 of 1956), and the High Court has reason to believe that a property belongs to any promoter, Director, manager, liquidator or officer of the banking company, whether the property stands in the name of such person or any other person as an ostensible owner, then the High Court may, at any time, whether before or after making an order under sub-section (1), direct the attachment of such property, or such portion thereof, as it thinks fit and the property so attached shall remain subject to attachment unless the ostensible owner can prove to the satisfaction of the High Court that he is the real owner and the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to attachment of property shall, as far as may be, apply to such attachment". The words of Section 45 (H) of the Act may be co-related to those occurring in Section 543 (1) of the Companies Act, which may also be extracted:—

"543 (1) If in the course of winding up a company it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, managing agent, secretaries and treasurers, manager, liquidator or officer of the company—

(a) has mis-applied, or retained, or become liable or accountable for, any money or property of the Company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

The Court may, on the application of the Official Liquidator, or the Liquidator, or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, managing agent, secretaries and treasurers, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just".

Based on these, the argument addressed to us was that the obligation of the Liquidator to make out only a prima facie case and the burden thereafter on the delinquents proceeded against to disprove the liability can arise only when the relief claimed is repayment or restoration of any money or property of the Company, and not compensation in respect of the mis-application, retainer, misfeasance or breach of trust. Going purely by the language of Section 45-H of the Banking Regulation Act, the juxtaposition of the words occurring therein, and correlating them with the words in Section 543 of the Companies Act, we are free to admit that the section has not been artistically drafted. A plainer and simpler drafting was certainly possible. But, on the facts found by us, the argument appears quite academic. On the 2nd, 3rd and 5th Heads of claim, we have found that the Directors, or such of them as are liable, are guilty of mis-application of the Bank's funds. We have also expressed, while dealing with the first head of claim, that it is not possible to assess the loss. On the 4th Head of claim, we have held that the Directors are not liable. On the 6th Head of claim again, the trial Judge found against the liquidator and there is no appeal before us. The result is that to the extent to which we have found the liability of the Directors, the same can be rested on the ground of mis-application of the funds of the Bank. Even on the arguments of Counsel for the Directors, the special provision in Section 45-H of the Banking Companies Act is applicable to a case of mis-application of the Bank's funds. Having regard to the conclusion that we have come to in these appeals that the Directors to the extent to which they or any of them are liable are guilty of mis-application of the funds of the Bank, Section 45-H is attracted. It is therefore unnecessary for us to consider in these appeals whether Section 45-H covers only the cases covered by Section 543 (1) (a) of the Companies Act 1956, and does not cover the cases contemplated by clause (1) (b) thereof.

24. In the result, we record our findings as follows:

(1) On the First Head of claim we find that, the liquidator has not proved the loss caused to the Bank by reason of the irrecoverable advances listed in Schedule I and therefore is not entitled to succeed on this head of claim; (2) On the Second Head of claim we find that the Directors were parties to the falsification of the Bank's accounts by making entries relating to the fictitious advances shown in Schedule III for the purpose of covering

up the misappropriations effected by withdrawal of the Bank's monies from its Account with other Banks as shown in Schedule II. We find the loss caused to the Bank under this Head, to be, as stated in Schedule III, a sum of Rs. 1,99,000/-. Respondents 1 to 8 will be jointly liable for this amount. Having regard to all the circumstances, and to the proviso to Section 45-H of the Banking Regulation Act, we fix the several liability of these Respondents for this Head of claim at Rs. 40,000/- each. We make it clear that the total amount recoverable under head of claim will in no event exceed Rs. 1,99,000/-; (3) On the Third Head of claim, we find that all the Directors except the 7th Respondent are responsible for the preparation and acceptance of the false balance sheet for the year 1955 showing profit and declaring dividends when the Bank was, to their knowledge, working at a loss. The loss incurred by the Bank under this head as shown in Sch. IV, is Rs. 6,155-12-5. We hold Respondents 1 to 6 and 8 jointly and severally liable for this amount; (4) On the Fourth Head of claim, we find that the Directors are not liable for the manipulations in the Bills Negotiated Accounts, shown in Schedule V; (5) On the Fifth Head of claim, we find that the 3rd Respondent and the 5th Respondent are liable for the total amount of Rs. 7,500/- given as loan to the 9th Respondent on 13-2-1956, of which the 3rd Respondent is liable for Rs. 7,250/-, and the 5th Respondent for the balance amount of Rs. 250/-.

25. In the result, in modification of the decree passed by the learned Trial Judge, there will be a decree in the following terms:

(1) That Respondents 1 to 8 do jointly contribute to the assets of the Bank a sum of Rs. 1,99,000/- in respect of the Second Head of claim; and that each of them be severally liable under this head for Rs. 40,000/-, the Liquidator not being in any event entitled to recover more than Rs. 1,99,000/- under this head of claim.

(2) That Respondents 1 to 6 and 8 be jointly and severally liable to contribute to the assets of the Bank Rs. 6,155-12-5, being the dividend wrongfully declared for the year 1955.

(3) That the 3rd Respondent be liable to contribute a further sum of Rs. 7,250 to the assets of the Bank under the Fifth Head of Claim, and the 5th Respondent be similarly liable to contribute Rs. 250/- under the same Head of claim.

(4) That in other respects the decree of the learned Trial Judge in so far as the same is against Respondents 1 to 8 do stand vacated.

(5) That the parties do bear their respective costs throughout.

Order accordingly.

AIR 1970 KERALA 138 (V 57 C 24)

V. R. KRISHNA IYER, J.

South India Corporation (Agencies) Private Ltd. Madras, Petitioner v. State Trading Corporation of India Ltd., Cochin, Respondent.

C. R. P. No. 530 of 1968, D/- 20-12-1968, against order of Sub-Court, Cochin in O. S. No. 48 of 1962.

(A) Civil P. C. (1908), Order 6, R. 17, Order 29, Rule 1 — Suit by Corporation — Amendment of written statement sought after evidence of plaintiff was taken, for raising objection to competency of, Company's Officer to sue — Amendment sought held purely technical and of no substance and should be refused

In a suit by a Company the defendant applied, at a very late stage when the evidence had been closed and arguments alone remained to be heard, for amendment of his written statement to enable him to urge the contention that the suit had not been properly instituted as the plaintiff had not complied with the provisions of Order 29, Rule 1. The clear averment in the plaintiff that the Officer signing the plaintiff was the principal officer who would be able to depose to the facts of the case, had not been denied in the written statement.

The amendment had been moved as a result of admission by such officer in his cross-examination that he had no power to institute the suit and omitted to swear that he was the principal officer of the plaintiff company.

Held, that the amendment sought for by the Defendant savoured of mala fides. Further, it merely raised a contention which was purely technical or useless and had no substance. Even if the Officer concerned was not the principal Officer of the Company, a mere authorisation by the plaintiff Company was enough to make his signatures sufficient in law. 1960 Ker LJ 444, Ref.

(Paras 4, 5)

(B) Civil P. C. (1908), Order 6, R. 17 — Amendment of pleading — Delay no ground for refusal — Exceptions.

Amendments of pleadings should be allowed liberally since permission to amend is the rule and refusal the exception, the guiding principle being promotion of justice. Even so, there is limit to this liberality. (Para 1)

It is trite law that ordinarily mere delay is not a ground for refusing an

amendment. As a general rule, however late the amendment is sought to be made, it should be allowed except in cases such as where the amendment is not sought in good faith or is not necessary for the purpose of determining the real question in controversy between the parties, or the objection sought to be raised thereby is purely technical or useless and of no substance or where the amendment would introduce a totally different, new and inconsistent case, or would otherwise inflict serious prejudice to the opposite party which cannot be compensated for by costs. Even where a fresh suit on the amended cause of action would be barred by limitation, an application for introducing that amendment would not be necessarily disallowed although it may be a factor to be taken into account in exercise of the discretion as to whether the amendment should be ordered or not. (1878) 7 Ch D 842, Rel. on. (Para 3)

(C) Civil P. C. (1908), Order 8, R. 5 — Admissions.

What has been alleged in the plaintiff, but has not been denied in the written statement, must be deemed to have admitted by the defendant for all practical purposes. (Para 5)

(D) Civil P. C. (1908), Order 29, R. 1 and Order 6, Rule 14 — Order 29, Rule 1 not mandatory — Pleadings in a suit by or against a Corporation — Signature and verification — Authority to sign a plaintiff on behalf of a Company — Applicability of Order 6, Rule 14 — Affidavit, necessity of.

Order 29, Rule 1 is permissive, and not mandatory. A plaintiff by a Company may be signed by one or the other of the persons mentioned in the rule. But this does not exclude Order 6, Rule 14, and as a company is unable to sign itself, the words 'good cause' in the latter rule enable a Company to authorise a person to sign a plaintiff on its behalf. Therefore, even if the officer is not the principal officer of the Company he may still validly sign a pleading provided he is a person duly authorised to sign it or to sue on behalf of the plaintiff.

In the case of registered company an affidavit is not necessary and a statement in the plaintiff or written statement of the company that a person is the principal officer and able to depose to the facts of the case is sufficient. (Para 5)

(E) Civil P. C. (1908), Section 115, Order 6, Rule 17, Order 29, Rule 1 — Order refusing application for amendment at very late stage raising technical plea (competency to sue under O. 29, Rule 1) — No material irregularity.

The revision power under Section 115 is trammelled, to put it concisely, by

the requirement of jurisdictional error. The refusal to introduce an amendment at a belated stage, which raises a plea which may be characterised as a technicality of technicalities (such as competency to sue under Order 29, Rule 1), liable to be overcome without difficulty by the opposite side and is extraneous to the merits of the subject matter, does not suffer from material irregularity in the exercise of jurisdiction. No revision lies against such an order of refusal. AIR 1931 All 507 (SB), Ref.

(Para 8)

Cases Referred: Chronological Paras
 (1960) 1960 Ker LJ 444, Raghavan v. S. T. A. T. Kerala State 7
 (1931) AIR 1931 All 507 (V 18) = ILR 54 All 57 (SB), Wali Mohammad Khan v. Ishak Ali Khan 8
 (1878) 7 Ch D 842, Collette v. Goode 6

P. K. Kurien, V. Desikan, K. A. Nayar, K. Sukumaran, C. M. Ramachandra Menon and K. K. Usha, for Petitioner; V. Rama Shenoi and R. Raya Shenoi, for Respondent.

ORDER: Amendments of pleadings should be allowed liberally since permission to amend is the rule and refusal the exception, the guiding principle being promotion of justice. Even so, is there no limit to this liberality? This question is highlighted in the present revision petition where the counsel for the petitioner — and, of course, for the respondent too — have pressed before me arguments of learned length, relying on rulings large in number and weighty in authority; at the end of all of which, I am persuaded neither to reverse the discretionary order rejecting the amendment nor to agree that the discretion has been erroneously exercised by the lower Court.

2. A suit was filed as early as 1962 by the State Trading Corporation of India (plaintiff) against the South India Corporation (Agencies) Private Ltd. (2nd defendant) and another, a Shipping Company incorporated in Liberia—West Africa—for compensation for short landed reels of newsprint. The 2nd defendant entered appearance on 17-10-1962 but filed its written statement somewhere about August 1963. In keeping with this snail's pace, issues were settled in July 1965 or thereabout. There were the usual dilatory vicissitudes of litigation. Such as framing of further issues, trial of a preliminary issue, an occasional excursion to the High Court on interlocutory matters, decreeing of the suit *ex parte*, setting it aside and adjournments galore from one side or the other, or on account of the absence of Judge; with result that the oral evidence was begun

in the suit only in the first quarter of 1968. It does not very much serve the purpose of the case to investigate who was responsible for the delay of several years in the career of this litigation since the Court itself cannot be completely free from blame in such cases. The more relevant fact is that the application for amendment of the written statement has been made 5 years after the original written statement, when the suit has reached the last lap of its journey, even the evidence has been closed and arguments alone remain to be heard. Anyway, at a very late stage i.e., on 25-3-1968, following the examination of the plaintiff's only witness, the 2nd defendant applied to amend his written statement to insert the following:

"The defendant does not admit Mr. B. M. Sundra's competency to sue on behalf of the plaintiff and puts the plaintiff to strict proof of his authority to sign and file the plaint".

Of course, the 2nd defendant has contended in his written statement that the suit is not maintainable in law and on the facts, so far as he is concerned, his case being that he has acted with due diligence that there has been excess landing of news-reel elsewhere and that, on the merits, the claim cannot be sustained against him. The present amendment has been moved, largely encouraged by a windfall in the cross-examination of P. W. 1 who is said to have admitted on oath that he had no power to institute the suit and omitted to swear that he was a principal officer of the plaintiff-company. Order 29, Rule 1 of the Civil Procedure Code requires a pleading in suits by or against a Corporation to be signed and verified on behalf of the Corporation either by the Secretary or by any Director or other principal officer of the Corporation who is able to depose to the facts of the case. By making this amendment in the written statement the 2nd defendant wants to urge the contention that the suit has not been properly instituted in that the plaint has not been signed and verified in compliance with O. 29, R. 1, Civil P. C. The learned Subordinate Judge dismissed the application for amendment on several grounds, although it must be frankly stated that he was obsessed by the delay in bringing the application for amendment. Of course, the lower Court also observed:

"..... The additional plea now sought to be raised by the defendant by the amendment of the written statement, I am constrained to observe, is not supported by *bona fides*".

The Court did not stop with this either, for it went on to state,

"By the amendment now sought for, no clarification is intended to express in respect of the issues raised in the suit and therefore, it cannot be said that the purpose to be served—the purpose of determining the real question in controversy between the parties—will in any way be advanced by allowing the amendment now sought for by the defendant".

The learned Subordinate Judge fortified his decision to reject the application on the ground of mala fides by the following argument:

"Here in this case, apart from the fact that no question of law arises, it is also to be noted that when it is specifically alleged in the plaint that Sri B. M. Sundra has been residing at Ernakulam at the time when the suit has been instituted and has been the principal officer of the plaintiff company at Willingdon Island since 1958 for the relevant period and that he will be able to depose to the facts of the case, which averments are not disputed in the written statement, there are no bona fides on the part of the defendant to urge this contention that Sri B. M. Sundra is not competent to sue on behalf of the plaintiff, when it is deposed by him in the box as P. W. 1 and averred by him in the plaint to the effect that he is the principal officer of the plaintiff company at the relevant period, particularly when nearly 7 years have lapsed since the filing of the plaint in the suit".

3. I agree with the petitioner's counsel that delay as such is not destructive of the right of a party to seek permission for amendment of his pleading. It is trite law that ordinarily "mere delay is not a ground for refusing an amendment. As a general rule, however late the amendment is sought to be made, it should be allowed" except in cases such as where the amendment is not sought in good faith or is not necessary for the purpose of determining the real question in controversy between the parties, or the objection sought to be raised thereby is purely technical or useless and of no substance or where the amendment would introduce a totally different, new and inconsistent case, or would otherwise inflict serious prejudice to the opposite party which cannot be compensated for by costs, (I am not attempting to be exhaustive). Even where a fresh suit on the amended cause of action would be barred by limitation, an application for introducing that amendment would not be necessarily disallowed although it may be a factor to be taken into account in exercise of the discretion as to whether the amendment should be ordered or not. I do not propose to rest my decision on mere delay. Nor am I impressed with any possible prejudice to the plaintiff on account of the allowance

of this amendment; for, after all, if Mr. Sundra had really been the principal officer of the plaintiff Corporation in Willingdon Island, there must be some document to prove it and indeed such evidence could easily have been placed before the Court long ago, when this matter was mooted. The plaintiff, instead of resisting the amendment application, could easily have taken the wind out of the sails of the defendant's plea by producing the necessary documentary material; but inscrutable is the reason for the plaintiff not adopting this simple course. That is by the way.

4. There is a clear averment in the plaint—apart from the cause title—which runs as follows:

"Mr. B. M. Sundara, son of M. Monappa, Hindu, residing at Ernakulam has been its principal Officer at Willingdon Island since 1958. He will be able to depose to the facts of this case". The written statement of the defendant does not controvert this allegation nor state that it does not admit the capacity claimed by Sundra. During the long course of this litigation there has been no challenge of position; and one may assume that till the inspiration derived from the answers in the cross-examination of P. W. 1, the 2nd defendant was prepared to proceed on the footing that the suit had been properly instituted. Therefore, there is something to be said in favour of the plaintiff's argument that in a fishing cross-examination about a matter unconnected with the merits of the case an answer has been secured from the witness who might have been caught unawares and this forms the foundation of the application for amendment. It savours of mala fides when so presented.

5. Even otherwise, what has been alleged in the plaint but has not been denied in the written statement, must be deemed to have been admitted by the defendant for all practical purposes. Apart from all this, Order 29, Rule 1, C. P. C. is but permissive and not mandatory. A plaint by a Company may be signed by one or the other of the persons mentioned in the rule. "But" as Mulla points out at page 1340 Vol. 2, C. P. C.:

"This does not exclude Order 6 R. 14, and as a Company is unable to sign itself the words 'good cause' in the latter rule enable a Company to authorise a person to sign a plaint on its behalf".

Therefore, even if Sundra is not the principal Officer of the Company he may, still validly sign pleading provided he is a person duly authorised to sign it or to sue on behalf of the plaintiff. Thus a mere authorisation by the plaintiff Corporation was enough to make Sundra's signature sufficient in law. I may also,

mention that it has been held, as Mulla points out at page 1342 of the same book:

"in the case of registered company an affidavit is not necessary and a statement in the plaint or written statement of the company that a person is the principal officer and able to depose to the facts of the case is sufficient. . ."

From all this, it would appear that the objection taken is purely technical and, even if found sound, could be easily overcome by appropriate amendment of the plaint. After all, the plaintiff has been described in unmistakably clear terms and there is no dispute about the identity of the plaintiff. In such circumstances, it is only reasonable to hold that the amendment sought for by the defendant merely raises a contention which is purely technical or useless and of no substance. Says Mulla:

"If after the evidence for the plaintiff has been taken, the defendant applies for an amendment merely for the purpose of enabling him to raise a purely technical objection to the plaintiff's right to sue, the application should be refused".

Again, the learned author observes:

"As the object of the present rule is to enable the real questions in dispute to be raised on the pleadings, leave to amend should be refused to . . . the defendant, where the proposed amendment would not help him in supporting his defence."

6. In *Collette v. Goode*, (1878) 7 Ch. D 842 Fry J. had to deal with a case with close similarity to the one I am faced with. There also an amendment was sought of the written statement by the defendant with a view to raise a technical plea as to whether the name of the publisher was truly stated in an action for alleged piracy of the plaintiff's copyright by the defendant. The rule regarding amendment with which the learned Judge was concerned is substantially the same as ours and the following observations from the decision are instructive and applicable to our case.

"I have, therefore, to inquire what is the real question in controversy here. Mr. North says, that the real question is whether the defendant shall or shall not pay damages to the plaintiff, and that anything which may tend to the determination of that question is part of the real question in controversy. I do not think that proposition is correct. I think that the real question in controversy is whether Hopwood & Crew have or have not acted in accordance with the bargain between them and the plaintiff, and that I should be bound to allow any amendment necessary for the determination of that question. It is quite true that the point which the defendant now desires

to raise has come out for the first time in the plaintiff's evidence. But I do not think I ought to allow an amendment for the mere purpose of enabling the defendant to raise a purely technical objection to the plaintiff's title to sue, an objection which the defendant never intended to raise, but of which he now adroitly seeks to avail himself. I think that the plaintiff had a right to rely upon that which is in effect an admission in the statement of defence, that, in every respect but that one which is mentioned, the registration was duly made. I therefore, refuse to give leave to amend." The principle of that decision supports the contention of the respondent.

7. I have already stated that when a plea is technical or is liable to be easily met by a simple amendment at the instance of the opposite party, the application for amendment by the plaintiff should be disallowed. The ruling reported in *Raghavan v. S. T. A. T.*, Kerala State, 1960 Ker LJ 444 has held that,

"the absence of signature and verification in plaints are only defects which can be cured at any time during the litigation, and are not of a jurisdictional nature."

This view leads to the conclusion that the amendment sought in the present case should be disallowed.

8. For these reasons, I hold that the lower Court has not mis-exercised its discretionary power in refusing the amendment. Moreover, the revision power under Section 115 of the Civil Procedure Code is trammelled by the requirement of jurisdictional error if I may so concisely put it. It is good to remember that the rulings such as the one reported in *Wali Mohammad Khan v. Ishak Ali Khan*, AIR 1931 All 507 (SB) have gone to the extent of holding that,

"...the absence of signature or verification or for the matter of that the absence of presentation on the part of some of the plaintiffs out of several does not affect the jurisdiction of the Court, and the suit must be deemed to have been duly instituted on their behalf if it was filed with their knowledge and authority."

How can I say that the refusal to introduce an amendment, at a belated stage, which raises a plea which may be characterised as a technicality of technicalities, liable to be overcome without difficulty by the opposite side and the plea itself is extraneous to the merits of the subject matter, suffers from material irregularity in the exercise of jurisdiction? I cannot; and so long as I cannot, I cannot revise the order either.

9. So, I dismiss the revision petition. The reluctance of the respondent, a public body, to produce the necessary documen-

tary evidence to establish the competence of Sundara to subscribe to the plaint cannot be appreciated. My disapprobation can be expressed only by denial of costs. I deny it to the respondent.

Petition dismissed.

AIR 1970 KERALA 142 (V 57 C 25)

P. T. RAMAN NAYAR AND V. R. KRISHNA IYER, JJ.

P. M. Kurien, Appellant v. P. S. Raghavan and others, Respondents.

Writ Appeal No. 98 of 1968, D/- 27-9-1968, from judgment of High Court Kerala, in O. P. No. 1076 of 1967.

(A) Education — Kerala University Act (14 of 1957), S. 19 read with S. 26 — Ordinances under — They have nothing to do with internal affairs of affiliated colleges, such as, examinations held by them, even if incidental result be detention in University course. (Obiter).

(Para 16)

(B) Constitution of India, Art. 226 — Natural justice — Malpractice by candidate at examination — Enquiry — Candidate told in precise terms what charge against him was — Circumstances appearing against him put to him and explanation obtained — Procedure followed in enquiry was as laid down at his instance in writ petition filed by him challenging order of detention passed against him by Principal — College Council was to consider report of enquiry officer, an officer of candidate's choice, and to pass appropriate order — Composition of college Council, which included Principal, was disclosed to him — Procedure agreed upon did not require either that copy of enquiry officer's report should be provided to candidate and be heard by College Council or that he should be given legal assistance — Held tribunal was only contractual domestic tribunal and there was more than sufficient compliance with principles of natural justice.

(Paras 21, 23, 25)

(C) Constitution of India, Art. 226 — Natural justice — It cannot be presumed that person who has once decided matter without due hearing would have such bias in favour of his decision as not to be capable of reaching fair decision after due hearing. (Para 21)

(D) Constitution of India, Art. 226 — Natural justice — Requirements of — Requirements would vary with circumstances of each case — Test as to whether there has been violation would be to consider what would be reaction of fair minded person of ordinary sense and sensibility who has been informed of all

that has happened — Test elaborately explained. (Para 24)

(E) Constitution of India, Arts. 226, 14, 19 — Natural justice — It is not fundamental right under the Constitution, though its non-observance may result in contravention of fundamental rights.

The canons of natural justice cannot be canonised as a fundamental right guaranteed constitutionally. One may safely state that fundamental fairness must be observed even by administrative tribunals, domestic or other, and natural justice must therefore inform their operations. Even so, natural justice is not a fundamental right in our country where the founding fathers of the Constitution deliberately eschewed the expression "due process" found in the American Constitution. Nevertheless, its non-observance, in the context of the constitutional inhibition against arbitrary and unequal exercise of power in Article 14 and unreasonable restrictions on the freedoms enshrined in Article 19, may result in the contravention of fundamental rights.

(Para 31)

(F) Constitution of India, Art. 226 — Natural justice — Natural justice 'unbound' is as bad as its being kept out of bounds; AIR 1968 SC 850 and AIR 1967 SC 361 (365) Rel. on. (Para 32)

(G) Constitution of India, Art. 226 — Bias — When one out of many, is biased, decision of collective body is not necessarily voided. AIR 1953 SC-1144 & AIR 1961 Andh Pra 37, Ref.

(Para 33)

(H) Constitution of India, Art. 226 — Bias — Enquiry by Quasi judicial tribunal — 'Interest' as an objectionable factor is secondary in importance in case of quasi judicial tribunals, a consequence of rule of necessity. AIR 1969 SC 198 (202) Ref. (Para 33)

(I) Constitution of India, Art. 226 — Bias — Enquiry by quasi judicial tribunal — Mere likelihood of bias stemming out of official association with the cause is insufficient. (Para 34)

(J) Constitution of India, Art. 226 — Bias — 'Real likelihood' test or 'instinctive opposition' approach is true one and any insignificant and remote interest will be insufficient to invalidate enquiry by quasi judicial tribunal. (Para 34)

(K) Constitution of India, Art. 226 — Natural justice — Requirements of — Applicability of principles of waiver and consent.

It would be both unnatural and unjust to convert natural justice into a shackle which cannot be shaken off even by a party for whose benefit it is invoked. If such be the law, many persons will be subjected to great delay, expense and intolerable inconvenience if they must

suffer, willynilly, the inexorable processes of natural justice.

(Para 35)

Waiver and consent operate in this field also, although it is not clear how if the order is void and the interested member is disqualified consent can breathe life into it. (1852) 3 H. L. C. 759 and AIR 1957 SC 425 & AIR 1963 SC 1144 & AIR 1958 SC 86 & AIR 1965 SC 1303 & 1963-2 WLR 935, Ref.

(Para 36)

(L) Constitution of India, Art. 226 — Natural justice — Enquiry by domestic tribunal — Need for a 'two-tier hearing' is creature of Art. 311 and not necessarily of natural justice — Law is indulgent to domestic tribunals, depending on variety of factors.

The need for a two-tier hearing is a creature of Article 311 of the Constitution and not necessarily of natural justice.

(Para 37)

The law is indulgent to domestic tribunals, depending on a variety of factors. Domestic tribunals are associations or bodies, voluntary and contractual, like clubs, or statutory, like the Bar Council or Medical Council, but essentially, they exercise jurisdiction over members and others within the organisation or institution or profession i.e. over insiders as against outsiders. Such limited, internal jurisdiction is not interfered with by Courts except upon substantial violation of fair procedure, assuming that natural justice has not been excluded by contract or other law. More so is the case when academic and professional bodies are involved. While scrupulous adherence to the rules of procedure and the principles of natural justice, in the sense of acting in good faith after giving a reasonable opportunity to be heard, is insisted upon, Courts 'fear to tread' and decline 'to rush in' to quash decisions of responsible academic bodies. This does not mean a licence for doing injustice being judicially accorded to such bodies but a fair expectation that they will not deviate ordinarily from the path of fair-play. If they palpably do, the writ must go. The ultimate test is the response of the judicial conscience to the doings of these bodies, in the given case, remembering the incurable wound on the career and the indelible stain on the character of the student that may follow upon an unjust accusation and verdict. AIR 1966 SC 875 (378) Rel. on.

(Para 38)

(M) Constitution of India, Art. 226 — Natural justice — Fair hearing — How far 'fair hearing' involves right to counsel is at least debatable and cannot be taken for granted in view of AIR 1960 SC 914 & 1961 (2) Lab LJ 417 (SC) & AIR 1967 SC 361. (Quaere)

(Para 39)

(N) Constitution of India, Art. 226 — Interference with finding of fact of

Domestic Tribunal — Absence of evidence — What is.

Absence of evidence is for the Judge under Article 226 but the adequacy of it is for the tribunal. Evidence, unless there be specific statutory provision, does not mean, in this context, only what is admissible and proved under the Indian Evidence Act; it embraces everything that appeals to commonsense as having probative force, untrammelled by technical rules: 1968-1 WLR 992, Ref.

(Para 40)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 198 (V 56) = 1968-2 SCWR 117, Suresh Koshe George v. University of Kerala	33, 37
(1968) AIR 1968 SC 850 (V 55) = 1966-2 SCR 186, Union of India v. P. K. Roy	32
(1968) 1968-1 WLR 815 = 1968-1 All ER 354, Metropolitan Properties Co. (F. G. C.) Ltd. v. Lannon	34
(1968) 1968-1 WLR 992 = 1968-2 All ER 633, T. A. Miller Ltd. v. Minister of Housing and Local Govt.	40
(1968) 1968-2 WLR 1471 = 1968-2 All ER 545, Pett v. Greyhound Racing Association Ltd.	39
(1967) AIR 1967 SC 361 (V 54) = 1967-1 SCR 739, Bharat Barrel and Drum Mfg. Co. v. L. K. Bose	32, 39
(1967) 1967 Ker LT 97 = 1967 Ker LR 400, P. M. Kurian v. Principal Govt. Victoria College Palghat	3
(1966) AIR 1966 SC 282 (V 53) = 1965-3 SCR 453, Calcutta Dock Labour Board v. Jaffar Imam	41
(1966) AIR 1966 SC 875 (V 53) = 1963-3 SCR 767, Board of High School and Intermediate Education U. P. v. Baleswar Prasad	38
(1965) AIR 1965 SC 1303 (V 52) = (1965) 2 SC WR 186, Andhra Pradesh Road Transport Corporation v. Satyanarayana Transport	36
(1965) 1965-1 QB 456 = 1965-2 WLR 89, Reg v. Deputy Industrial Injuries Commissioner; Ex parte, Moore	40
(1963) AIR 1963 SC 1144 (V 50) = 1964-1 SCR 1, T. P. Daver v. Lodge Victoria	33, 36
(1963) 1963-2 All ER 66 = 1963-2 WLR 935, Ridge v. Baldwin	36
(1961) 1961-2 Lab LJ 417 = (1961-62) 20 FJR 424 (SC), Brooke Bond India (Private) Ltd. v. Subbaraman	39
(1961) AIR 1961 Andh Pra 37 (V 48), Chari v. Secunderabad Cantonment Board	33
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Nath Bagehi v. Chief Secy. Govt. of West Bengal		(1861) 9 CB NS 793 = 142 ER 312,	
(1961) AIR 1961 Ker 299 (V 48) = 1961 Ker LT 35 = AS No. 220 of 1960, D/- 13-10-1960, Raghava Menon v. Inspector General of Police, Kerala	32	In re, Macqueen and Nottingham Caledonian Society	39
(1961) AIR 1961 Ker 301 (V 48) = 1961 Ker LT 134, Moideenkutty v. State of Kerala		(1852) 3 HLC 759, Dimes v. Grand Junction Canal	33, 34, 36
(1960) AIR 1960 SC 914 (V 47) = 1960-3 SCR 407, Kalindi v. Tata Locomotive Engineering Co. Ltd.	37	(1843) 5 Man & G. 219 = 134 ER 545, Corrigal v. London & Black-wall Ry. Co.	35
(1960) AIR 1960 SC 1073 (V 47) = 1960-3 SCR 742, Narayanappa v. State of Mysore	37	(1841) 1 QB 467 = 113 ER 1211, R. v. Cheltenham Commissioners	30
(1959) AIR 1959 SC 308 (V 46) = (1959) Supp (1) SCR 319, Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation	33, 34	Manuel T. Paikaday and Smt. Leelamma Paikaday, for Appellant; Government Pleader, for Respondent No. 2.	
(1959) AIR 1959 SC 1238 (V 46) = 1959-37 ITR 151, Omar Salay Mohamed Sait v. Commr. of Income Tax, Madras	40	RAMAN NAYAR, J.: This case has a history, and it is necessary to set that out at some length for a proper appreciation of the contentions raised.	
(1958) AIR 1958 SC 86 (V 45) = 1958 SCR 595, State of U. P. v. Mohammad Nooh	36	2. Early in April 1966, the appellant, a student of the Government Victoria College, Palghat, who had just completed the first of the three years of the B.Sc. course of the Kerala University to which the College is affiliated, and sat for the annual promotion examination conducted by the College, received the following communication from the 1st respondent, the Principal of the College:	
(1958) 1958-2 All ER 579 = 1958-1 WLR 762, Byrne v. Kinematograph Renters Society	33	"It has been reported that you have resorted to malpractice during the annual examinations. You are directed to explain in writing why disciplinary action shall not be taken against you. You should submit your explanation to the undersigned on or before 15-4-1966. If no written explanation is forthcoming, it will be presumed that you have no remarks to offer."	
(1957) AIR 1957 SC 425 (V 44) = 1957 SCR 575, Manaklal v. Dr. Premchand Singhvi	36	As a charge this was patently defective for it furnished no particulars whatsoever of the alleged malpractice so as to enable the appellant to submit his defence. But one should have thought that the appellant's natural reaction would have been to protest his innocence forthwith (if he was innocent), and, if the charge was persisted in, to ask for particulars which could be refused only on peril of the entire proceedings being vitiated. Unless, of course, he knew full well what it was all about and had no answer. But, different persons react differently to the same situation. We are assured by counsel that there was a background (which not being relevant for the present purpose has not been disclosed) which would satisfactorily explain why the appellant reacted differently, even the same person might react differently at different times. Be that as it may, the appellant's reaction was to take legal advice and (we are told, on the strength of that advice) to ignore the communication altogether. Not receiving any explanation within the time allowed, the Principal convened a meeting of the College Council (a body, as disclosed in the affidavits filed by the Principal in	
(1956) AIR 1956 SC 285 (V 43) = 1955-2 SCR 1331, Pradyat Kumar Bose v. Honourable Chief Justice of Calcutta High Court	37		
(1955) 1955-1 QB 41 = 1954-3 WLR 415, Reg v. Camborne Justices; Ex parte, Pearce	34		
(1953) 1953-1 WLR 1046 = 1953-2 All ER 652, R. v. Nailsworth Licensing Justices; Ex parte Bird	33		
(1952) 1952-1 KB 189 = 1952-1 All ER, 226, Abbott v. Sullivan	32		
(1949) AIR 1949 PC 313 (V 36) = 1949-2 Mad LJ 574, Lennox Arthur Patrick O'Reilly v. Cyril Cuthbert Gittens	33		
(1943) 1943 AC 627 = 112 LJ KB 529, General Council of Medical Education v. Spackman	32		
(1929) 1929-1 Ch 602 = 98 LJ Ch 293, Maclean v. Worker's Union	33, 39		
(1924) 1924-1 KB 256 = 93 LJ KB 129, Rex v. Sussex Justices; Ex parte, Mc Carthy	34		
(1911) 1911 AC 179 = 80 LJ KB 796, Board of Education v. Rice	40		
(1902) 1902-2 KB 363 = 71 LJ KB 754, R. v. Howard	33		
(1897) 1897 AC 556 = 66 LJ QB 787, Boulter v. Kent Justices	33		
(1866) 1 QB 230 = 35 LJ MC 157, Reg v. Rand	34		

the second of the three writ petitions the appellant has so far brought against him, composed of the Principal and the Professors of the College whose function it is to advise the Principal on matters such as the promotion and detention of students and their discipline) which having duly considered a report (Ext. P-12, dated 19-3-1966) made by the Lecturer appointed to value the answer papers in Inorganic Chemistry come to the conclusion that the appellant must have inserted previously prepared answer books in his answer paper and was therefore, guilty of malpractice. Accordingly, on the recommendation of the Council, the Principal decided to detain the appellant in the first year class for malpractice, and his name was posted on the notice board of the College among those so detained. Thereupon, the appellant came to this Court with the first of his writ petitions, O. P. No. 1683 of 1966, for quashing the entire proceedings of the Principal, mainly on the ground that they were not in conformity with the principles of natural justice. The learned Judge who heard the petition took the view that, defective though the communication received by the appellant was, regarded as a charge, it nevertheless gave the appellant due notice of the inquiry proposed to be held against him and ample opportunity to ascertain the particulars of the charge against him and answer it if he was so minded. That, according to the learned Judge, was all that natural justice demanded in the circumstances of the case. And, since by ignoring the communication, he had with contumely refused the opportunity offered to him of participating in the inquiry and repudiating the allegation, an ex parte inquiry was all that he could reasonably expect. In particular, natural justice did not require that the Principal should have given the appellant notice of the further stages of the inquiry or issued fresh invitation to him to participate in it and make his defence. In this view the learned Judge dismissed the petition.

3. This was on the 30th of June 1966. The appellant took the matter up in appeal forthwith and in the appeal, W. A. No. 151 of 1966 (decided on the 15th September 1966 and reported in 1967 Ker LT 97) a division bench of this Court while deprecating the appellant's conduct in consulting a lawyer and ignoring the Principal's communication instead of asking for clarification, nevertheless came to the conclusion that the inquiry held on a vague and indefinite charge was in violation of the principles of natural justice. This is what their Lordships decided:

"If the appellant has therefore, to be heard and the proceedings before the

authorities were of a quasi-judicial nature, there can be no doubt that the appellant must be told in the first instance with what he is charged and this must be in clear and unambiguous terms. The proceedings in this case are vitiated in that this has not been done. This is a fundamental error and everything that followed however bona fide that may be, is equally vitiated because the appellant has been denied an opportunity to state his case regarding the charges against him.

5. On this short ground we allow this appeal and set aside the detention of the appellant. This will not stand in the way of fresh steps being taken in an appropriate manner and in accordance with law against the appellant, if so advised.

6. We cannot possibly postulate the outcome of any such proceedings, if any such proceedings are taken. In the meantime, we do not want the student to lose the benefit of one year. We therefore, consider it imperative that the appellant must be permitted to attend the Second Year Course and continue his studies. We direct accordingly. We make it clear that such attendance of the appellant which we have permitted will not confer any right on the appellant in case it is found that he is guilty and liable to the punishment of 'detention'."

4. The Principal decided to proceed with the charge against the appellant and, in due course (by Ext. P7 dated 18-11-1966) he appointed a committee consisting of three members of the staff to conduct an inquiry in the matter—meanwhile the appellant had been provisionally admitted to the IInd Year B. Sc. Class in accordance with the directions of this Court. The committee framed a proper charge against the appellant giving full particulars of the alleged malpractice and communicated it to the appellant by a memorandum dated 22-11-1966 which, in addition, required him to appear before it for an inquiry on 29-11-1966. The appellant appeared before the committee and presented a memorandum (Ext. P8) alleging that the members of the committee were disqualified from holding the inquiry by reason of one of them, the President, having been party to the decision of the College Council in the first instance, and the remaining two being under the official control and influence of the Principal who he declared was his prosecutor and avowed opponent. He also raised many other objections and made it clear that he was not prepared to participate in any inquiry by the committee. The committee reported the matter to the Principal without proceeding with the inquiry, and the Principal, warned by his previous experience, not

unnaturally came to the conclusion that this was a matter in which he should proceed with great circumspection after obtaining legal advice. But, since that would take time, the Principal decided to examine the question whether ignoring the alleged malpractice the appellant had passed in the examination—as his report Ext. P 12 shows, the examiner who had reported the alleged malpractice had not, in view of his suspicions, valued the appellant's answer paper in Inorganic Chemistry. Accordingly, (by Ext. P10, dated 1-12-1966) the Principal called for a report regarding this from the Professor of Chemistry and the Professor reported on 6-12-1966 that the appellant had not secured the minimum qualifying marks for promotion even assuming that he had committed no malpractice.

5. Students detained for want of progress at the close of the academic year 1965-66 had been permitted to sit for a re-examination to prove their fitness for promotion. This opportunity had not been offered to the appellant, who had been detained on the ground of misconduct; and it was rightly thought proper to afford him such an opportunity now that the detention was to be on the ground of want of progress. Accordingly, the Principal passed the order Ext. P11 on 7-12-1966 directing the appellant's detention in the First Year Class, but, subject to the result of the inquiry into the charge of malpractice permitting him to sit for a re-examination to prove his fitness for promotion. Pending that, the appellant was provisionally permitted to continue attending the Second Year Class.

6. The re-examination was to be held on the 16th and 17th December 1966. But, to use his own language, the appellant saw this as a new ruse improvised for getting him into the Principal's grip and then throttle him. He refused to step into what he called this trap and forthwith came to this court once again with his second writ petition, O. P. No. 4514 of 1966. It would appear that, while this petition was pending, the Principal affirmed his order, Ext. P11, the appellant not having chosen to sit for the re-examination, and, since the appellant had not sought re-admission into the First Year Class—apparently the practice is that a detained student has to apply for re-admission the following academic year taking his chance with the new entrants—removing his name from the rolls. Thereupon the appellant moved this court for punishing the Principal for contempt—that petition it would appear was eventually withdrawn in view of the order made in the writ petition.

7. The second writ petition, O. P. No. 4514 of 1966, was disposed of by a single judge of this court on 18th January 1967, and, since the present writ petition is the direct outcome of what was ordered therein, it would be as well to set out the operative portion of the judgment (marked here as Ext. P1) in full:

"4. In dealing with the writ appeal (the appeal against the dismissal of the appellant's first writ petition—the learned judge was a member of the bench which heard and decided the appeal) we proceeded on the basis that the only blemish, if any, alleged against the petitioner, was the reported malpractice. I do not think therefore, that at this distance of time there should be a fresh scrutiny of the examination results and a detention on the ground that the petitioner has not secured enough marks. There was no such detention order at any time earlier. The petitioner has been permitted to attend the Second Year Course by this Court by the judgment in Writ Appeal 151 of 1966, and till recently, he has been attending the class. In these circumstances, it was suggested to the respondent that the proceedings commencing from Ext. P4 (Ext. P11 here) should be withdrawn and the learned Advocate General who appeared for the respondent stated before me that the respondent is willing to adopt such a course. In view of the above, the proceedings commencing with Ext. P4 will be ignored.

5. As to whether the proceedings commenced by the issue of the charge sheet Ext. P2 must be pursued is a matter for the respondent to decide. If he decides to conduct an enquiry the enquiry will be conducted by Shri P. Gopalan Nair, Professor of Malayalam as agreed to by either side. It is also agreed that he is a person who had nothing to do with this matter and is in no way incompetent to conduct the enquiry. If such an enquiry is to be held, it will be held on the 25th January 1967 commencing at 10 A. M. in the office of Shri P. Gopalan Nair. The information regarding any material which would be relied on and copies of records, if any, will be given to the petitioner on or before the 20th of this month. A list of the witnesses to be examined will also be furnished. Such of the documents, copies of which cannot be furnished, must be made available for inspection at the office of the enquiry officer Shri P. Gopalan Nair, on Monday the 23rd, between hours that will be notified by Shri P. Gopalan Nair, the inspection to take place in the presence of Shri P. Gopalan Nair.

6. After the enquiry a report will be drawn up by Shri P. Gopalan Nair entering his findings on the charge and this

will be sent to the Principal on or before the 26th January. The College Council will consider this report and pass appropriate orders on or before the 28th of this month. If the petitioner is found not guilty, he will be allowed to continue his studies from the 30th January in the Second Year B.Sc. In that event necessary exemption condoning lack of attendance, if any, arising out of absence of the petitioner from the class because of his original detention and the present expulsion will be granted to him.

7. This writ application is ordered on the above terms. There will be no order as to costs."

It will be noticed that the charge of malpractice pending against the appellant was not the subject-matter of this second writ petition. That petition was concerned only with his detention under Ext. P11 for want of progress. But, oppressed by the circumstance that the career of a young man was at stake, everybody concerned, the judge not least of all, was anxious that if the charge of malpractice was being pursued the inquiry should be brought to as speedy a conclusion as possible and should be conducted in such a manner as to give not the least room for complaint. And it is clear that that was why the learned judge persuaded himself (with, as his judgment indicates, the consent of both sides) to give detailed directions regarding a matter that was not really before him.

8. The Principal decided to prosecute the charge of malpractice, and, since Shri Gopalan Nair, who was to have held the inquiry according to the directions in Ext. P1, proceeded on leave, he applied to the court for further directions. And further inquiry according to the directions in Ext. P2 dated 13-2-1967, in the following terms:

"2. It is agreed now by the parties to the original petition that the enquiry may be conducted by Smt. Anna Vareed, Professor of Zoology. She will therefore conduct the enquiry in her office commencing at 10 A. M. on the 21st February, 1967. The information regarding any material which would be relied on and the copies of records, if any, will be given to the petitioner on or before the 17th February. A list of the witnesses to be examined will also be furnished before the date. Such of the documents, copies of which cannot be furnished, must be made available for inspection by the petitioner at the office of the Enquiry Officer on Saturday the 18th February, 1967. The inspection will take place in the presence of the officer directed to conduct the enquiry. After the enquiry the report of the officer together with the findings will be placed before the College Council and the College Council

will consider the report and findings and pass appropriate orders."

9. Smt. Anna Vareed accordingly held an inquiry from the 21st to the 24th February 1967. At this inquiry the Principal and Shri Lakshminarayanan, the examiner in Inorganic Chemistry for the annual examination of 1966, who had first made the allegation of malpractice, as also Smt. Saraswathi, Professor of Chemistry, were examined in the appellant's presence and the appellant's explanation was recorded. The Principal had (and could have had) nothing relevant to say regarding the charge itself. And, all that Shri Lakshminarayanan and Smt. Saraswathi did was to draw attention to the suspicious features in the appellant's answer book (objective facts speaking for themselves) leading to the inference of malpractice as alleged. They spoke to nothing within their own personal knowledge.

10. Smt. Anna Vareed submitted her report, Ext. X3 to the Principal on 27-2-1967. This is the conclusion she reached:

"The failure on the part of Sri P. M. Kurien to offer an explanation to the memo, dated 6-4-1966 and referred as Ext. P1 in the file, served to him and the facts pointed out by the concerned examiners in Chemistry, such as the abrupt ending on page 4, the overwriting on the original numbers of certain pages, the high standard of the answers on the re-numbered sheets and the observed breadthwise foldings on pages 5 to 16 indicate that Kurien must have resorted to the alleged malpractice reported against him. However being a teacher in Zoology I am not an authority to distinguish the difference in standard between the answers to questions 2 and 3 and the answer to question 1. The poor standard of the answer to question 5 is quite obvious. So far as the re-numbering is concerned the explanation given by Shri Kurien does not sound satisfactory. The distinct breadthwise foldings on the reported inserted sheets I am unable to detect at this stage because the whole file appears to be soiled and crushed by too much of handling. A year is over now since the alleged malpractice committed by Sri Kurien has been reported.

Taking all these facts into consideration I find it difficult to prove definitely that Kurien had resorted to the malpractice reported against him."

11. As the minutes Exts. X1 and X2 disclose, the report was considered at two meetings of the College Council held on the 4th and 7th March 1967 respectively. Ext. X1 shows that the report which had been previously circulated among the members was discussed in detail with

reference to the file. Of the 16 members of the Council (including the Principal) 12 held the appellant guilty of the malpractice alleged, two including Smt. Anna Vareed, endorsed the conclusion reached by her in the report, one, Shri Gopalan Nair (who by his absence on leave had relieved himself of the responsibility of holding the inquiry as ordered by Ext. P1) chose to refrain from expressing any opinion, while the remaining member wanted time to go through the file before coming to a conclusion. It was to give that member the time he wanted that the meeting was adjourned. At the adjourned meeting held on 7-3-1967 the matter was again discussed at length and a resolution was moved to the effect that the Council had come to the conclusion that the appellant was "guilty of the offence of malpractice reported against him by Shri Lakshminarayanan" and that the Council therefore recommended to the Principal that the appellant "should be punished with detention in the First B.Sc. Chemistry Class at the end of the academic year 1966-67". The resolution was put to vote and carried, 13 voting for, none against, and three abstaining.

12. Another resolution was also moved and carried by 15 votes with one abstention. That was to the effect that "in consideration of the peculiar turn of events and the time factor" the Principal should, as a special case, regard the appellant as having been re-admitted to the First Year Class for the academic year 1966-67, provided he made an application in writing to the Principal for the purpose on or before 31-3-1967. In that event, his promotion from the First Year Class to the Second Year Class at the end of the year 1966-67 was to be based on his performance in a special examination in the optional subjects to be conducted in the re-opening week in June 1967.

13. The Principal accepted the recommendations of the College Council and accordingly issued the order, Ext. P3 dated 28-3-1967. Needless to say, the appellant was no more prepared to accept this than he was prepared to accept the previous orders of detention, and, on the 6th April 1967, he brought his third writ petition, the present petition, for quashing the Principal's order Ext. P3 and all proceedings leading thereto and for such other consequential and incidental reliefs as to the court may seem just and necessary in the circumstances of the case.

14. Put briefly the grounds on which the appellant assailed, and still assails, Ext. P3 are:

1) That the Ordinances of the University provide for detention only for want of progress and do not contemplate its

imposition as a punishment for misconduct. The order of detention is therefore illegal, and, in any case, beyond the competence of the Principal and the College Council;

2) That the Impugned order, Ext. P3, and the proceedings leading up to it violate the directions given in Exts. P1 and P3; and

3) That the entire proceedings are void for offending against the principles of natural justice.

15. None of these grounds appealed to the learned single Judge who heard this petition in the first instance. Neither do any to us.

16. Section 19 of the Kerala University Act 1957, read with section 26 thereof, empowers the Syndicate to make Ordinances providing for (among other matters) the courses of study and the conduct of examinations, the admission of students to the various courses of study and to the examinations, and the residence and discipline of students. The courses of study and the examinations referred to are those conducted by the University itself either through its own colleges or through colleges affiliated to it, and it seems to us—we must mention that we are not actually deciding this question since the University is not a party before us and a decision on the question is not really necessary for the purposes of this case—that the Ordinances relating to these matters can have nothing to do with the internal affairs of affiliated colleges, such as, examinations held by them and detentions ordered in respect of the classes run by them even if the incidental result be a detention in the University course. And, so far as the remaining matter, namely, the residence and discipline of students is concerned, even assuming that an Ordinance providing for the residence and discipline of students of affiliated Colleges is contemplated by the Act, no such Ordinance has in fact been made. Surely, that cannot mean that no action whatsoever can be taken by anybody in the matter. It is therefore no use urging, as counsel for the appellant has done, that the Ordinances provide for a denial of promotion from one class of the University course to the next higher class only for failure to obtain the minimum marks prescribed for sessional work. Nor is this correct, for, as the learned Government Pleader appearing for the Principal has pointed out the Ordinances make the grant of the annual certificate, entitling a student to proceed from one class to the next higher class, dependent not merely on satisfactory progress but also on satisfactory conduct. If satisfactory conduct is necessary for earning promotion it must necessarily follow that pro-

motion can be withheld as a penalty for proved misconduct.

17. In the absence of provision to the contrary in the rules governing the matter, whether they be statutory or otherwise, the internal administration of a college must necessarily vest in its Principal as the head of the institution and it follows that matters like the discipline of the students and their detention or promotion must be within his control. Therefore, in the absence of any such rule it must be within the competence of the Principal to punish a student for misconduct. No such rule has been brought to our notice; on the contrary clause 8 (d) of Chapter I of the Ordinance expressly lays down that a student of a college shall be under the disciplinary control of the head of the institution. The contention is, however, raised that the directions in Exts. P1 and P2 divest the Principal of this power in so far as the matter now on hand is concerned.

18. Whether the source of the authority of Exts. P1 and P2 be adjudication or consent, both sides regard those orders as binding on them. That, we think, is as it ought to be. But, as we have seen, it is the case of the appellant that those orders have been violated, for, according to him, those orders vest the person appointed to hold the inquiry with exclusive jurisdiction to pronounce on his guilt or innocence, leaving for the College Council only the power of passing appropriate consequential orders. And, in any case, they give the Principal no authority to pass any order — the impugned order, Ext. P2, it is pointed out, was passed by the Principal and not by the College Council.

19. Both Exts. P1 and P2 say that the report drawn up by the person holding the inquiry, together with the findings will be placed before the College Council and the College Council will consider the report and the findings and pass appropriate orders. We have no doubt that this does not mean that the College Council is only to pass appropriate orders on the findings but that it is to consider the findings and arrive at its own decision, both with regard to the guilt or innocence of the appellant and with regard to the consequential orders that are to be passed.

20. It is no doubt true that under Exts. P1 and P2 it is the College Council that has to pass orders in the matter, not, it would appear, the Principal. But, even if it was intended to deprive the Principal of powers which would otherwise vest in him, we should think that, in substance even if not in form, the decision was taken by the College Council and that the impugned order by the Prin-

icipal was only a communication of that decision.

21. As for the alleged violation of the principles of natural justice, we have first to point out that the very elaborate and exhaustive prescription in Exts. P1 and P2, made with the consent of both sides, as to the person who should hold the inquiry, the authority who should pass orders in the matter, and the procedure to be followed, was designed to ensure that the requirements of natural justice, indeed something more than that, were complied with in full. That being so, it does not lie in the mouth of the petitioner to say that the Principal and the members of the Council who were party to the first order of detention made against him were disqualified, because of bias, from judging him — the composition of the College Council had already been disclosed and he was fully aware of it when the orders Exts. P1 and P2 were made with his consent—or that he should have been provided with a copy of the enquiry officer's report and then heard by the College Council itself before a decision was taken. Exts. P1 and P2 did not provide for this. And, since they make no reference to legal assistance at the inquiry to be held, it would appear that the appellant no longer insisted on the demand he had made for such assistance by Ext. P8. Neither does it appear that he made any such demand before the enquiry officer so that the appellant's complaint that he was not allowed to engage a lawyer to defend him merits little attention. (Not that we think that natural justice demands that he who hears must decide, or, that when the person who decides is not the person who has heard, a copy of the latter's report and findings should be made available to the person affected and he be given an opportunity to make a further representation, or that the person affected must be allowed to engage a lawyer to defend him although, no doubt, these may properly be prescribed by any rules governing the matter). Nor do we see the least ground for thinking that the Principal or the members of the College Council were actuated by bias or mala fides — that the appellant has chosen to repeatedly charge them with that in language which, for acrimonious vituperation, would be difficult to beat, cannot by itself prove anything. (Along with his reply affidavit the appellant produced copies of the affidavits filed in an interlocutory proceeding in his second writ petition from the Chairman and Secretary of the College Union to the effect that when they interceded with the Principal on the appellant's behalf on the second order of detention being made, the Principal told them that there was no room in the Col-

lege for both of them and that he would see the appellant out even if it cost him his job. It is surprising that counsel should have thought that reliance could be placed on such material in proof of the allegation of bias and mala fides. In any case, Ext. R1 a copy of the counter affidavit filed by the Principal in that prior proceeding, which he has incorporated as part of his counter-affidavit in the present case contains a denial of this charge. According to the Principal, all he told the deputationists is that they should not interfere with the administration of the institution. In circumstances in which the authority competent to decide is the very authority to initiate proceedings, the fulfilment to some extent of the double role of prosecutor and judge is inevitable, and it is not to be presumed that a person who has once decided a matter without due hearing would have such a bias in favour of his decision as not to be capable of reaching a fair decision after due hearing. Even the two procedure codes do not require that a remand should be to a different judge and that would not be so were there any such presumption. And, although the Principal and Smt. Saraswathi who sat on the Council which pronounced the appellant guilty gave evidence at the inquiry, their testimony, as we have seen, did not relate to any matters within their personal knowledge and the adjudication did not involve any appreciation thereof or any conclusion as to its veracity. The facts spoken to by Smt. Saraswathi were objective facts which were there for all to see, and the proper inference to be drawn from them was really a judicial rather than testimonial function.

22. We might add that the inference of malpractice which the College Council drew from these facts, (a remarkable fact was that the answer to each question occupied a complete answer book or books, no more and no less) considered in the light of the appellant's explanation (and this indeed seems to have been the inference which the enquiry officer herself drew although she seems to have fought shy of coming to the logical conclusion, possibly under the mistaken impression that direct evidence of the malpractice was essential) seems to us legitimate.

23. There has been considerable discussion at the bar as to whether the College Council acted as a judicial tribunal or was only a domestic tribunal, a contractual domestic tribunal at that (whether the contract be that implied when the appellant sought and obtained admission to the college or that created by the consent embodied in Exts. P1 and P2) since, admittedly, there are no statutory provisions governing the matter. We

do not think it really necessary to make the classification — as we shall show nothing much turns on that, at any rate so far as this case is concerned—although we have little doubt that the tribunal was only a contractual domestic tribunal. For, even if it be regarded as a creature of the adjudication in Exts. P1 and P2, that will not make it a judicial tribunal entrusted with the adjudicative function of the State.

24. It seems to us that, although the requirements of natural justice must necessarily vary according to the circumstances of each case, the test as to whether there has been a violation is simple, disarmingly simple, although, perhaps for that very reason, difficult of application in practice. The test is much the same whether the tribunal be a judicial or merely a domestic tribunal. It is essentially whether there has been such a manifest failure of justice as to shock the conscience — in the case of judicial tribunals, where public policy demands that there must not be even the appearance of injustice, a presumption of such a failure will be drawn from such appearance just as a failure of justice will be presumed when a mandatory safeguard for ensuring fair trial is disregarded. What would be the reaction of a fair-minded person of ordinary sense and ordinary sensibility who has been informed of all that has happened? Would it be: Poor man! He has not had a square deal. He has been condemned without being heard. And the consequences are serious. Or, as variations of the same theme, he was not even told and had no means of knowing what it was that was being held against him. He was not given a fair opportunity to state his case or meet what was said against him. His "judges" did not act in good faith. They were so biased against him that they came with a closed mind. They had already made up their minds to convict—the so-called inquiry was a farce. There was really no decision, no real satisfaction of guilt, only blind prejudice. How else can you account for the conviction when there is not a scintilla of evidence, nothing on which a reasonable man could possibly hold the accused guilty? Or would it be: He knew or could easily have found out what precisely was the accusation against him. He was given sufficient opportunity to meet it, to state his case and to controvert or explain what there was against him, and has only himself to thank if he did not take it. His "judges" considered the matter fairly and came to a conclusion which it is possible for a reasonable man to reach. True, one or two of them might have been ill-disposed towards him. But that could not have really affected the deci-

sion — there were so many others against whom nothing can be said. Perhaps things could have been better done but then there are no rules and this is not a court and you really cannot ask for more from ordinary men of affairs. The consequences are not very serious and what has been done is fair enough in the circumstances and the man can have no real grievance. Or, where the rules, whether statutory or contractual, dispense with what are usually regarded as the dictates of natural justice: No doubt it is rather hard on him, but then that is all that the rules require, that is all that he bargained for. (Even so, where rights regarded as fundamental and inalienable are concerned, when the very right to live is involved, when the matter is, as it is commonly put, a matter of life and death, the reaction might nevertheless be: It is not fair. It is monstrous that, in a matter like this, a man should be held to his bond, that such a rule should be upheld).

25. Applying this simple test to the present case, we should think that, far from the appellant having been condemned without a fair hearing, he has been dealt with, with a degree of patience and leniency that is no doubt commendable having regard to the fact that the career of a young man was at stake—whether it was altogether so commendable from the point of maintaining discipline and good conduct in the college we do not know. The appellant was told in precise terms what the charge against him was. The circumstances appearing against him were put to him and his explanation was obtained. And he was judged fairly by persons of his own choice in accordance with a procedure laid down at his own instance.

26. We might perhaps mention that at no time was the jurisdiction of this Court to interfere, should it think fit, under Article 226 of the Constitution questioned. Possibly because, apart from the stigma involved, the impugned order is fraught with the most serious consequences, and an affiliated college, whether private or government owned, acts so far as the university courses and examinations are concerned, as a limb of the University.

27. One of us is supplementing this judgment with reference to the authorities cited at the bar, and, to save repetition, we are not referring to them here. All we need here say is that there is no authority cited which is against the view we are taking.

28. We dismiss this appeal but make no order as to costs.

29. KRISHNA IYER, J.: My learned brother has spoken for both of us and I

should myself have thought it supererogatory to break my silence, which I do out of regard for the rather elaborate arguments addressed by counsel on both sides who have spared no pains in unearthing precedents and articulating the nuances of natural justice and administrative fair-play. I desist from discussing the facts and confine myself to a few public law questions bearing on natural justice. The central issue in the case is whether the student-appellant has been visited by the College Council and the Principal with punitive "detention" in gross disregard of the obligatory essence of fair hearing. The chequered academic career of the writ petitioner, who has very nearly martyred himself in the cause of natural justice, even after three rounds of writ proceedings, arouses my sympathy, when his lot is viewed in the retrospect of years during which he has sat through his classes but has not accomplished the degree for which he joined the University course. Judicial sympathy, in itself, is of no consequence for a litigant but the circumstances of this case will, I hope, receive compassionate consideration at the hands of the Principal of the College, who, the Government Pleader assured us, is the appropriate authority empowered to salvage students in similar situations. I must express the disquieting feeling here that viewed from the strict stance of natural justice, the proceedings resulting in the detention of the pupil appeared to hover about the unfair margin, although we have, after anxious examination of the matter, declined to demolish the order impugned for reasons based on Exts. P1 and P2 and the entire history of the case and because the ends of justice do not demand such a course in this case.

30. Two facets of natural justice have been highlighted viz., (i) the vice of bias as voiding a tribunal's verdict and (ii) the legality of dichotomizing the adjudicatory process between the agency which bears, collects evidence and makes a report and the authority which decides, without further hearing, on the basis of the data contained in the report. Of course, in the course of the extensive submissions at the bar, questions like waiver, right to counsel etc., have also been debated. The learned Government Pleader, by way of answer, has also called in aid the principle that domestic tribunals — the College Council is one such, according to him, — enjoy considerable freedom, both from the obligation to observe all the canons of natural justice and from the subjection to close judicial X-ray and correction. Omitting some of the less important points discussed at the bar, one might set out the

following four problems in natural justice as falling for consideration.

(1) What is a domestic tribunal and what is the extent of immunity, if any, enjoyed by it from the Court's scrutiny? What is the measure of relaxation from the rigour of rules of natural justice permitted under the law to a domestic tribunal as distinguished from other tribunals and Courts?

(2) What is the degree of bias sufficient to destroy the validity of a decision by a domestic or other quasi-judicial tribunal?

(3) Can a party waive his objections based on violation of natural justice?

(4) When is a delegation of power to collect data and record conclusions permissible and what is the true scope and application of the rule that he who hears must decide?

31. At the threshold of the discussion, a few observations fall to be made as a key to my approach to the matters covered by counsel for the appellant. He began by exalting the principle of natural justice as a fundamental right, violation of which is fatal under the Indian Constitution. While I may wish for a large extension of the empire of natural justice even into administrative spheres — within cautious limits — and may even assent to the democratic proposition that fair hearing is implicit in the now internationally accepted doctrine of the rule of law—with richer content than Professor Dicey had put into it—I cannot persuade myself, after a full hearing and fair consideration of all that has been strenuously urged by Shri Palakadey, that the canons of natural justice can be canonised as a fundamental right guaranteed constitutionally. One may safely state that fundamental fairness must be observed even by administrative tribunals, domestic or other, and natural justice must therefore inform their operations. Even so, natural justice is not a fundamental right in our country where the founding fathers of the Constitution deliberately eschewed the expression "due process" found in the American Constitution. Nevertheless, its non-observance, in the context of the constitutional inhibition against arbitrary and unequal exercise of power in Article 14 and unreasonable restrictions on the freedoms enshrined in Article 19, may result in the contravention of fundamental rights. But we are not in those regions in this case.

32. 'Natural Justice, like modern physics,' is expanding rapidly and becoming even metaphysical, as an inevitable sequel to the insistence of civilised man on civilised processes for affecting a citizen's civil rights, i.e., on just means to reach just ends. But let us be clear that

the obligations of the Principal and the College Council in dealing with a delinquent student cannot be equated with those of Courts and tribunals with detailed procedural prescriptions. Not because it is an administrative, as distinguished from a quasi-judicial, act—a false dilemma introduced into the law relating to natural justice, for it is largely the serious impact on civil rights like life, liberty, livelihood and reputation that impresses upon the exercise of that power the duty to act judicially. The judicial element is to be inferred from the nature of the power i.e., "that powers so far-reaching, affecting as they do individuals as well as property, are powers to be exercised judicially, and not ministerially....." Courts are more often faced with problems in applied natural justice, if I may say so, rather than with the classification of the power as judicial, ministerial and what not. The Supreme Court has clarified this feature recently in the decision reported in 1968-2 SCR 186 = (AIR 1968 SC 850), thus:

"The extent and application of the doctrine of natural justice cannot be imprisoned within the strait-jacket of rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authorities, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case".

It behoves the Courts to avoid the extremes of making natural justice a ubiquitous bogie of the Administration and the nostrum in the hands of every afflicted litigant on the one hand and of emasculating its potency and applicability by verbal devices like administrative act, ministerial duty, privilege (not right), disciplined forces, domestic tribunals etc., on the other. Natural justice "unbound" is as bad as its being kept out of bounds. The warning sounded by the Supreme Court in *Bharat Barrel and Drum Mfg. Co. v. L. K. Bose*, AIR 1967 SC 361 at p. 365 is apposite in the context of the present case. Sbelat J., speaking for the Court, made the following observations:

"It is now well settled that while considering the question of breach of the principles of natural justice the Court should not proceed as if there are any inflexible rules of natural justice of universal application. The Court, therefore, has to consider in each case whether in the light of the facts and circumstances of that case, the nature of the issues involved in the enquiry, the nature of the order passed and the interests affected thereby, a fair and reasonable opportunity of

being heard was furnished to the person affected.

"Rules of natural justice vary with the varying constitutions of statutory bodies and the rules prescribed by the legislature under which they have to act, and the question whether in a particular case they have been contravened must be judged not by any preconceived notion of what they may be but in the light of the provisions of the relevant Act".

To adapt a famous passage of Sir Ivor Jennings, the intangible values of civilised procedure cannot easily be forced into a formal concept dignified by such a name as natural justice. Evershed M. R. rightly observed if I may say so with great deference, in *Abbott v. Sullivan*, 1952-1 KB 189 at p. 195:

"The principles of natural justice are easy to proclaim but their precise extent is far less easy to define."

In short, we must remember that while the College Council has a duty to act judicially, it is composed of laymen ignorant of the niceties of legal procedure, it consists not of the Principal alone but of a number of academic dignitaries—of the same College, though—and the subject of the enquiry is essentially an internal matter of discipline; furthermore, no procedural prescriptions regulating its deliberations exist except such as they, in their wisdom and sense of expediency, may devise. One cannot, at the same time, forget that in the present case the academic career of a student is at stake and the very seriousness of the consequence may instinctively insist on a scrupulous adherence to the quintessence of natural justice viz., a full opportunity at some stage being given to the student to meet the materials which might eventually be used to his prejudice and a fair consideration of the case in good faith and without a closed mind i. e., in a judicial spirit. From the days when God punished Adam we are told that principles of natural justice, in this sense, have been applied. But it is not the principles but the application thereof which create difficulties, because of varying factors present in the adjudicatory situation in the complex conditions of modern society. We are confronted, in the present case, with one such instance. The basic fallacy in the appellant's argument lies in forgetting the theory of relativity when dealing with different types of tribunals and situations. Expressed in the words of Lord Wright in *General Council of Medical Education v. Spackman*, 1943 AC 627:

"Perhaps, it is not desirable to force it into any Procrustean bed".

When Courts have declined to interfere with domestic tribunals or with professional and academic bodies—I do not

refer here to the effect of contract on the exclusion of natural justice—what mattered has not been so much the inviolability of these areas to forensic probing as the judicial appreciation of the needs and circumstances, particular patterns, and situations in each case. Judges, like Caesar's wife, should be above suspicion, as Lord Justice Bowen beautifully expressed but, quasi-Judges enjoy, out of practical necessity, a certain measure of latitude. I agree with counsel for the appellant that all this flexibility in application must be subject to the anxiety of the Court to ensure administrative fair play. I confess that an element of uncertainty is injected into this unstandardised branch of the law and that is why the maze of case-law, Anglo-American and Indian, on natural justice and fair hearing, their ramifications and exceptions, is so puzzling sometimes that the only comfort lies in the thought that such a dynamic concept vitally bearing on human rights, and so sensitively regarded in the legal world, will naturally generate forensic ferment and diversity of judicial thought characteristic of progressive societies. All the same I pensively agree with Mr. Justice P. B. Mukherjea that:

"Disciplinary tribunals, on whose findings the whole life's career of a public servant depends, should not in fairness be allowed to remain in this state of primitive procedure, and distressing obscurity, which are not calculated to offer and foster that sense of security in the service which is fundamental in any ordered society". (Nripendra Nath Bagchi v. Chief Secretary, Government of West Bengal, AIR 1961 Cal 1 (SB).)

From all this, it follows that the true solution must be sought in legislative prescriptions of the minimum standards of fair procedure to be followed by administrative tribunals and not in judicial exercise smitten by conscience and attuned to the exigencies of the case. With all the many exceptions wrought into the rule regarding bias one may, in unhappy indefiniteness, state that natural justice is "the natural sense of what is right and wrong".

33. As a principle, nothing is more eloquent—as was spectacularly demonstrated in *Dimes' case*, *Dimes v. Grand Junction Canal*, (1852) 3 HLC 759—than that "if a member of such (judicial) a body is subject to a bias, whether financial or other, in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal". But Lord Halsbury L. C. relieving licensing justices from the taboo of being objectors and judges at the same time, stated

in *Boulter v. Kent Justices*, (1897 AC 556) "I do not think they are a Court at all". Again, Collins M. R. said in *R v. Howard*, (1902-2 KB 363) "the key to the position appears to be that justices in dealing with licences are not a judicial body The standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges". In *R v. Nailsworth Licensing Justices*; *Ex parte, Bird*, 1953-1 WLR 1046, it was held that "Although it is undesirable for a justice who has signed a petition in favour of a matter to sit as a member of the committee adjudicating thereon, it had not been established in that case that there was any such bias on the part of the justice concerned as would render her unfit to sit". (Marshall on Natural Justice, page 49). The holding in *Lennox Arthur Patrick O'Reilly v. Cyril Cuthbert Gittens*, AIR 1949 PC 313, is in similar strain:

"The jurisdiction of the Courts in regard to tribunals of a domestic nature has been discussed in many cases but their Lordships think that the observations which apply most directly to the present case are those contained in the judgment of Maugham J. as he then was, in the case of *Maclean v. Workers' Union*, 1929-1 Ch 602 'It is not bound by the rules of evidence; it is indeed probably ignorant of them. It may act, and it sometimes must act, on mere hearsay, and in many cases the members present or some of them (like an English jury in ancient days) are themselves both the witnesses and the judges' Their Lordships now turn to the question of bias 'It is unreasonable to expect that the standard of impartiality and detachment in a domestic tribunal's members should be as impeccable as in Courts of Law, and therefore, I consider that the oft repeated maxim that justice must not only be done but appear to be done, should not be applied too rigorously in the case of domestic tribunals. I think the test should be whether the presence of prejudiced persons inject such an element of bias into the tribunal as to give rise to a reasonable suspicion that the trial was not a fair one'." Again, Courts have made mention of the fact that when one out of many is biased the decision of the collective body is not necessarily voided (*T. P. Dayer v. Lodge Victoria*, AIR 1963 SC 1144, *Chari v. Secunderabad Cantonment Board*, AIR 1961 Andh Pra 37, Civil Appeal No. 1579 of 1966 and *DeSmith* page 161). In the case dealing with nationalisation of motor transport, the Supreme Court has observed:

"It is also true that the Government

on whom the duty to decide the dispute rests, is substantially a party to the dispute, but if the Government or the authority to whom the power is delegated acts judicially approval or modification is not open to challenge on a presumption of bias. The Minister is acting in his official capacity and unless there is reliable evidence to show that he is biased his decision will not be liable to be called in question". *Narayanappa v. State of Mysore*, AIR 1960 SC 1073.

The Principal, who is chairman of the College Council, is in no worse position than the Chief Minister in the Governmental set-up, from this angle. Before parting with this aspect, I must say that while dealing with domestic tribunals, we cannot over-rate its importance as is evident from the excerpt from the judgment of Lord Harman J. in 1958-2 All ER 579, extracted approvingly in the judgment of Herde J. (1960) 2 SCWR 117 at p 125--(AIR 1969 SC 198 at p 202).

"What then, are the requirements of natural justice in a case of this kind? First, I think that the person accused of should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more".

So, in the scheme of things 'Interest' as an objectionable factor is 'secondary' in importance in the case of quasi-judicial tribunals—a consequence of the rule of necessity. That is why in cases under the Industrial Disputes Act and Shops and Establishments Act, for instance, a person who has an interest in the subject matter holds the enquiry or takes the decision and yet the order is upheld, if otherwise passed in good faith. The attention of bias when a plurality of persons constitutes a tribunal and only a few out of them are tainted by bias has also been taken note of in some decided cases already adverted to by me.

31. Pecuniary interest provokes peculiar sensitivity in the Court, as *Dimes' case*, 1852-3 HLC 759 has shown, although I am not too sure whether its rigour should apply in the same degree to quasi-judicial tribunals and administrative bodies and domestic enquiries. However, that question does not arise here and we need only consider personal and official bias. The ruling already referred to i.e., AIR 1960 SC 1073, shows that 'official' bias cannot avail the petitioner "unless there is reliable evidence to show that he (the principal) is biased". Mere likelihood of bias stemming out of official association with the cause is insufficient. There is no reliable evidence of actual, substantial official bias entertained by

the Principal, although it would have been desirable for him to have detached himself from the council deliberations. As for personal bias, much has been alleged and urged against the Principal and duly denied by him. The learned single Judge has rejected this ground and there is nothing on record so strong as to induce dissent on my part. It might not be out of place, in this context, to say that Lord Hewart's classic dictum on the subject in *Rex v. Sussex Justices; Ex parte McCarthy*, 1924-1 KB 256 to the effect that

"Nothing is to be done which created even a suspicion that there has been an improper interference with the course of justice"

stands eroded by later pronouncements; for instance, Slade J. observed in *Reg v. Camborne Justices; Ex parte Pearce*, 1955-1 QB 41, after surveying the authorities on the subject in the following words:

"In the judgment of this Court the right test is that prescribed by Blackburn J. in *Reg. v. Rand*, 1866-1 QB 230, namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown". There has been some debate on this subject in a recent ruling reported in *Metropolitan Properties Co. (F. G. C.), Ltd. v. Lannon*, 1968-1 WLR 815. Of course, actual bias, if it is proved, is fatal, but short of that, what is the quantum of interest that will disqualify a quasi-judicial body is best expressed in a passage in the judgment of Widgery J. in the ruling referred to.

"As Sir Derek put it in a vivid phrase; the question here is whether the Chairman's interest in Regency Lodge and all that goes with it would be such as to put him in a position of instinctive opposition to the landlords in the present case".

The "real likelihood" test or the "instinctive opposition" approach is the true one, in my view, and any insignificant and remote interest will be insufficient to invalidate. Judged by this token, *Ext. P3* is not vulnerable because I do not think "a reasonable person would think it likely 'in all the circumstances' that there was bias. (See *Reg. v. London Rent Assessment Penal Committee; Ex parte Metropolitan Properties, Co. (F. G. C.) Ltd.* (Lord Denning M. R., Danckwerts and Edmund Davies L. JJ.)

35. Waiver, as an answer to violation of natural justice, was pressed by the learned Government Pleader. According to him, the appellant had agreed

before Govindan Nair J. to the College Council (its composition being known to him from the earlier affidavits of the Principal) taking the decision on the report of the Inquiring Officer; so that he must be taken to have consented to the Council proceeding to judgment on the report; and all breaches of natural justice implied in this procedure must be deemed to have been waived. I have already held that negation of natural justice does not sound in denial of fundamental rights but it does sound in jurisdiction, according to many rulings of the House of Lords and the Supreme Court. And consent can neither create jurisdiction nor cure defects, jurisdictional. Yet, the authorities have upheld the application of waiver. Dr. Amnon Rubinstein in *Jurisdiction and Illegality* has brought out this incongruity thus:

"But, from the start, some difficulties arose: If bias and disqualification go to jurisdiction these defects cannot be consented to or waived. Faced with the consequences of this rule, the Courts recoiled from the proposition that even the party who tacitly waived the objection available to him, and even the party 'benefiting' by the interest or bias, could raise the nullity of the proceedings; 'it would be unreasonable that (the parties) should lie by and await the result of the proceedings, and raise no difficulty until after they have seen the decision, and can determine whether or not it is satisfactory to themselves' (*Corrigal v. London and Blackwall Ry. Co.*, (1843) 5 Man and G 219 at p. 247). 'If there be anything like consent', said Denman C. J. 'It would be monstrous to say that the presence of the magistrate vitiated the proceedings' (*R. v. Cheltenham Commissioners*, (1841) 1 QB 467 at p. 475). But if waiver or consent could cure the defects, how could these be considered as going to jurisdiction?"

It would be both unnatural and unjust to convert natural justice into a shackle which cannot be shaken off even by a party for whose benefit it is invoked. If such be the law, many persons will be subjected to great delay, expense and intolerable inconvenience if they must suffer, willy-nilly, the inexorable processes of natural justice. (Vide Marshall, *Natural Justice* page 191).

36. It is interesting to notice that the House of Lords in *Dimes' case*, 1852-3 HLC 759, ruled that violation of natural justice made the order voidable, not void, but *Ridge v. Baldwin*, 1963-2 WLR 935 found the same august Court hold that "a decision given without regard to the principles of natural justice is void" The real reason—or partly the reason—for these divergencies in the decisions, is

perhaps, what Lord Reid hinted at in 1963-2 WLR 935. "We do not have a developed system of administrative law—perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the Courts have had to grope for solutions " Marshall in his Natural Justice (page 51) quotes Cockburn L. J., as upholding express and implied waiver as valid pleas;

"..... although Colonel Smyth may have been interested so as to incapacitate him from acting, yet as the parties were aware of the objection and waived it, he had jurisdiction to make the order".

All that I can say is that the House of Lords in Dimes' case; 1852-3 HLC 759, and the Supreme Court in Dr. Prem Chand's case, and the Lodge Victoria case, (AIR 1957 SC 425 and AIR 1963 SC 1144), to mention a few, have laid down the law that waiver and consent operate in this field also, although it is not clear how if the order is void (Cf. Ridge v. Baldwin, 1963-2 WLR 935 already cited and Mohammed Nooh, AIR 1958 SC 86) and the interested member is disqualified (AIR 1965 SC 1303 para 9) consent can breathe life into it. If waiver is permissible, and it is (at least if the species of violation relates to bias), the appellant by agreeing to Ext. P1 has waived his objections on the ground of bias to the further consideration by the College Council.

37. Based on the ruling reported in AIR 1959 SC 308 the learned advocate for the appellant has vehemently urged that the basic principle that 'he who hears must decide' has been breached and invalidity of the order is the result. The Inquiring Officer alone heard the student and the Council considered the report without inviting him to offer his explanation. I am constrained to observe that it would have been more correct to ask the student to show cause at the final council consideration stage. But illegality does not follow on the failure to take this step, if the holding in Moideenkutty v. State of Kerala, 1961 Ker LT 134 = (AIR 1961 Ker 301), were correct. Ansari C. J., speaking for the Court, stated the law thus:

"We come to the third ground of the decision not being really of the deciding authority inasmuch as the order rests on the office report. One of us have in Raghava Menon v. Inspector General of Police, Kerala, A. S. No. 220/60, decided on Oct. 13, 1960, 1961 Ker LT 35 = (AIR 1961 Ker 299), held that the rule of 'authority, who hears, must decide' does not preclude administrative tribunals from reasonably delegating some of their functions. What is required of such authorities is that they must conscientiously

apply their mind to the records of the case and reach their own conclusions on the material so placed. Judged from the aforesaid standard, we feel the rejection orders in the case, either of the original authority or of the appellate authority, are not so tainted. The appellate authority has called for the Collector's explanation, a note has been put on it and a conclusion been reached on the materials placed before the authority. In these circumstances, the appellate order cannot be said to be one not conscientiously reached on the record before it; nor can the original order be said to be otherwise. This ground also therefore fails".

The recent decision of the Supreme Court in 1968-2 SCWR 117 = (AIR 1969 SC 198) silences the appellant's submission regarding furnishing of the enquiry report and a second opportunity to be heard. But, if under guise of a report, new material is used against the student he should be given a chance to challenge and correct or contradict it. Such improper assistance has not been derived by the College Council from the report which, according to the petitioner is in his favour, but which, on a plain reading, virtually accepts the evidence of the 'prosecution' witnesses, winding up dubiously in half-hearted favour of the petitioner. Even as early as the case reported in Pradyat Kumar Bosa v. Honourable Chief Justice of Calcutta High Court, AIR 1956 SC 285 delegation of the power to collect the evidence and make a report has been upheld by the Supreme Court.

"It is well recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report What cannot be delegated except where the law specifically so provides—is the ultimate responsibility for the exercise of such power".

The need for a two-tier hearing is a creature of Article 311 of the Constitution and not necessarily of natural justice, 1968-2 SCWR 117 = (AIR 1969 SC 198).

38. The law is indulgent to domestic tribunals, depending on a variety of factors. Domestic tribunals are associations or bodies, voluntary and contractual like clubs, or statutory, like the Bar Council or Medical Council, but essentially, they exercise jurisdiction over members and others within the organisation or institution or profession i.e., over insiders as against outsiders. Such limited, internal jurisdiction is not interfered with by Courts except upon substantial violation of fair procedure, assuming that natural justice has not been excluded.

ed by contract or other law. More so is the case when academic and professional bodies are involved. The observations of Gajendragadkar, J. (as he then was) in Board of High School and Intermediate Education U. P. v. Bagleswar Prasad. 1963 (3) SCR 767 at p. 775 = (AIR 1966 SC 875 at p. 878) are pertinent in this connection:

"In dealing with petitions of this type, it is necessary to bear in mind that educational institutions like the Universities set up Enquiry Committees to deal with the problem posed by the adoption of unfair means by candidates, and normally it is within the jurisdiction of such domestic tribunals to decide all relevant questions in the light of the evidence adduced before them. In the matter of the adoption of unfair means, direct evidence may sometimes be available, but cases may arise where direct evidence is not available and the question will have to be considered in the light of probabilities and circumstantial evidence. This problem which educational institutions have to face from time to time is a serious problem and unless there is justification to do so, Courts should be slow to interfere with the decisions of domestic Tribunals appointed by educational bodies like the Universities The enquiry has been fair and the respondent has had an opportunity of making his defence. That being so, we think the High Court was not justified in interfering with the order passed against the respondent".

While scrupulous adherence to the rules of procedure and the principles of natural justice, in the sense of acting in good faith after giving a reasonable opportunity to be heard, is insisted upon, Courts 'fear to tread' and decline 'to rush in' to quash decisions of responsible academic bodies. This does not mean a licence for doing injustice being judicially accorded to such bodies but a fair expectation that they will not deviate ordinarily from the path of fair-play. If they palpably do, the writ must go. The ultimate test is the response of the judicial conscience to the doings of these bodies, in the given case, remembering the incurable wound on the career and the indelible stain on the character of the student that may follow upon an unjust accusation and verdict.

39. Although Mr. Paikaday only made a feeble reference to the right to counsel before an administrative tribunal, and the earlier rulings of our Courts do not generally concede such a right except in cases which are complicated and involve elaborate evidence and difficult legal propositions, the recent decision of the Court of Appeal in *Pett v. Grey Hound Racing Association Ltd.*, 1968 (2) WLR

1471, puts new life into this demand. Lord Denning M.R. in the above case, which relates to the expulsion of a trainer from the Racing Association, set out the proposition in the following words:

Now the point arises: Has the trainer a right to be legally represented? On such an inquiry. I think that he is entitled not only to appear by himself but also to appoint an agent to act for him ... Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: 'You can ask any questions you like'; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor".
Maugham J. had once expressed a different view in 1929-1 Ch 602. Lord Denning, when his attention was drawn to this view, stated:

"All I would say is that much water has passed under the bridges since 1929. The dictum may be correct when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation. (In re, Macqueen and the Nottingham Caledonian Society, 1861-9 CBNS 793—seems to have been such a case.) but the dictum does not apply to tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import. Natural justice then requires that he can be defended, if he wishes, by counsel or solicitor."

How far in our country "fair hearing" involves this right is at least debatable and is certainly not to be taken for granted, in view of the Supreme Court's observations in AIR 1960 SC 914, 1961-2 Lab LJ 417 (SC), AIR 1967 SC 361 and many other decisions of various other High Courts striking a contrary note. The appellant's alleged grievance traceable to right to counsel being declined, is, to say the least, chimerical in this case and I see no force in it at all.

40. Quoting a passage from the ruling reported in AIR 1959 SC 1238 at p. 1252 which runs:

"On no account whatever should the tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all and if it does anything of the sort, its findings even though on questions of fact will be liable to be set aside by this Court". (This is a ruling under Section 65 (1) of the Income-tax Act, 1922).

Shri Paikadey pressed before us that if there is no evidence at all in support of the finding of the authority, there is no doubt about its invalidity. But if there is no reliable evidence, in the view of the High Court, the writ will not issue. Absence of evidence is for the Judge under Article 226 but the adequacy of it is for the tribunal. Evidence, unless there be specific statutory provision, does not mean, in this context, only what is admissible and proved under the Indian Evidence Act; it embraces everything that appeals to commonsense as having probative force, untrammelled by technical rules. Lord Denning M. R. in a recent decision *T. A. Miller Ltd. v. Minister of Housing and Local Government*, 1968-1 WLR 995, has this to say on the subject:

"A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a Court of law. See *Reg. v. Deputy Industrial Injuries Commissioner*, *Ex parte Moore*, 1965-1 QB 456. During this very week in Parliament we have had the second reading of the Civil Evidence Bill. It abolishes the rule against hearsay, even in the ordinary Courts of the land. It allows first-hand hearsay to be admitted in civil proceedings, subject to safeguards. Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it. See *Board of Education v. Rice*, 1911 AC 179 at p. 182: 1965-1 QB 456. The Inspector here did that. Mr. Fogwill's letter of November, 19, 1964, was put to the witnesses and they contradicted it. No application was made for an adjournment to deal further with it. In these circumstances I do not see there was anything contrary to natural justice in admitting it".

In the instant case, there is some evidence, circumstantial, in support of the conclusion and I am unable to interpose

my judgment on this evidence since its quality and quantum are within the exclusive domain of the College Council except where it acts irrationally, perversely or mala fide (epithets with which the appellant has liberally peppered his submissions unavailingly, as we see it).

41. Shri Paikadey, learned counsel for the appellant, invoked the passage in *Calcutta Dock Labour Board v. Jaffar Imam*, AIR 1966 SC 282 that:

"Any attempt to short-circuit the procedure based on considerations of natural justice, must, we think, be discouraged if the rule of law has to prevail, and in dealing with the question, of the liberty and livelihood of a citizen, considerations of expediency which are not permitted by law can have no relevance whatever". Obviously, I agree heartily with this high mandate but enough has been said as to why we are not interfering with the College Council's decision. A hard case, I agree; but I cannot assent, for that reason, to bad law.

Appeal dismissed.

AIR 1970 KERALA 158 (V 57 C 26)

FULL BENCH

P. T. RAMAN NAYAR C. J., P.
GOVINDAN NAIR AND V. P.
GOPALAN NAMBIYAR JJ.

Dy. Accountant General (Admn) Office of the Accountant General, Kerala Trivandrum, Petitioner v. State of Kerala and others, Respondents.

Criminal Revn. Petns. Nos. 201 to 206, 210, 213, 217, 229, 230, 237, 240, 249, 252 and 284 of 1969, D/- 6-8-1969.

(A) Criminal P. C. (1898), S. 494 — Withdrawal of prosecution — Power must be exercised by Public Prosecutor in the light of his own judgment and not at dictation of some other authority, however high — Grounds for withdrawal, stated — Consent of Court, when can be given, indicated — Prosecution against strikers for offences under Essential Services Maintenance Ordinance, 1963 — Application by public prosecutor for consent to withdraw cases — State Government's order mentioned as one of grounds — State Government's order disclosing no legitimate ground — Consent refused — Object of Ordinance pointed out.

The power to withdraw under S. 494 of Criminal P. C. is conferred on the public prosecutor and on no one else; and, although this is an executive power, it is a power which he must exercise in the light of his own judgment and not at the dictation of some other authority, how-

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ever high. The power of withdrawal conferred on the Public Prosecutor is not an absolute power. He can withdraw from the prosecution only with the consent of the Court and this curb is placed on his power in order to ensure that the power is not abused. In other words, it is not exercised for improper reasons or to serve improper ends. AIR 1957 SC 389, Foll. (Paras 2, 3)

It is difficult to formulate a general principle for determining the grounds on which a Public Prosecutor may legitimately seek withdrawal, or looked at from another angle, the grounds on which the Court can properly grant or withhold its consent. The only general test can be that consent should be withheld if the withdrawal would tend to further the mischief the law seeks to prevent and that it should be granted if it is likely to have the opposite effect, is too general to be of much use in practice. The Court gives its consent in the exercise of its judicial discretion and before granting consent, it must be satisfied that the grounds stated for the withdrawal are proper grounds, grounds which, if true, would make the withdrawal a furtherance of, rather than an hindrance to, the object of the law. Further, that there is material to substantiate the grounds alleged though not necessarily material gathered by the judicial method. One of the well-established grounds on which a withdrawal can properly be based is that there is no evidence in the case which would warrant a conviction. In such a case it would certainly not further the object of the law to harass the accused and waste the time of the court, the witness, the prosecution and the defence by going on with the case. (Paras 9, 10)

Where in prosecutions against the strikers for offences under Ss. 4 and 5 of the Essential Services Maintenance Ordinance, 1968 and other laws, such as Penal Code and Telegraph Act, the Public Prosecutor in his applications for necessary consent for withdrawal of cases mentioned as a ground for withdrawal the order of the State Government which recited as:

"consistent with the policy of Government in relation to mass agitation and strike, it has been decided to withdraw with the leave of the court, the cases registered in connection with the Central Government Employees strike on the 19th September, 1968 except those involving serious personal violence or destruction of property. It is ordered accordingly".

Held, that the order of the State Government disclosed no legitimate ground for the withdrawal of cases and hence

consent should not be granted. The policy set out therein being a policy opposed to the law could not be taken into consideration. The order indicated scant respect for the law and was in disregard of the duty and the responsibility of the State Government to enforce the law. The public prosecutors in those cases were not independent members of the legal profession but full time Government servants working under the immediate control and direction of the District Collectors, themselves subordinates of the Government. In the circumstances, every one of the Public Prosecutors must have felt himself bound by the order to withdraw from the prosecution irrespective of his own views in the matter, the only matter left for his decision being whether the case involved serious personal violence or destruction of property, whatever might be meant by the qualification, 'serious'. (Paras 5, 8, 17)

The State Government had not appreciated that there could be no question of executive policy in a region covered by the law. The only valid policy, if policy it could be called and therefore the only relevant policy, was the policy of the law. The law must be enforced whatever be the views the executive might entertain. The policy, such as it was disclosed by the State Government's order was clearly opposed to the law. The law, namely, the Essential Services Maintenance Ordinance, 1968, made certain acts, whether they did or did not involve personal violence or destruction of property, punishable. Its very purpose was to prevent strikes in essential services by prohibiting them on threat of penalty. (Para 6)

That a strike is the result of mass agitation is obviously an aggravating rather than an extenuating factor, for, in such a case, the greater would be the harm which the law seeks to prevent. Mass agitation is not a cover for all sins; on the contrary, it often makes the sin more harmful; and to say that it is the policy of the Government in relation to mass agitation and strikes that, for no other reason than that the offences were committed in the course of a mass agitation or a strike, offenders against the law should not be proceeded against and that is what the withdrawal of the cases against them amounts to except in cases involving serious personal violence or destruction of property, is nothing but a defiance of the law. (Para 6)

(B) Criminal P. C. (1898), S. 439 — Essential Services Maintenance Ordinance (1968), Ss. 4, 5 — Complaints, against strikers for offences under Ss. 4, 5, by persons as officers of Central Government and not to vindicate any personal grievance — Prosecution by police—Con-

sent to withdraw cases granted to Public Prosecutors in spite of opposition by complainants — Revision application by complainants, held maintainable — In a matter of public importance, High Court can exercise its powers of revision *suo motu* and in such cases *locus standi* of person bringing matter to notice of High Court would be of no consequence.

(Para 12)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Bom 109 (V 54) = 1967 Cri LJ 440, Anant Baburao v. State 2
 (1957) AIR 1957 SC 389 (V 44) = 1957 Cri LJ 567, State of Bihar v. Ram Naresh Pandey 2
 (1945) AIR 1945 PC 156 (V 32) = 72 Ind App 241, Emperor v. Sibnath Banerji 2

Cr. R. P. 201 of 1969, P. Raman Menon (Spl. Prosecutor) for Petitioner, Advocate General (for No. 1) and N. Raghava Kurup (for Nos. 2 to 22), for Respondents. Cr. R. P. No. 202 of 1969, P. Raman Menon (Special Prosecutor) for Petitioner; Advocate General, (for No. 1) and N. Raghava Kurup (for Nos. 2 to 5), for Respondents Cr. R. P. No. 203 of 1969, P. Raman Menon (Spl. Prosecutor), for Petitioner, Advocate General (for No. 1) and N. Raghava Kurup (for Nos. 2 to 10) for Respondents. Cr. R. P. No. 203 of 1969, P. Raman Menon (Spl. Prosecutor), for Petitioner; Advocate General (for No. 1) and N. Raghava Kurup (for Nos. 2 to 5) for Respondents. Cr. R. P. No. 205 of 1969, P. Raman Menon (Spl. Prosecutor), for Petitioner, Advocate General (for No. 1) and N. Raghava Kurup (for 2 to 40), for Respondents. In Cr. R. P. 206 of 1969, P. Raman Menon (Spl. Prosecutor), for Petitioner; Advocate General (for No. 1) and N. Raghava Kurup (for Nos. 2 to 12) for Respondents. In Cr. R. P. No. 210 of 1969, V. K. K. Menon, M. Ramachandran, C. J. Balkrishnan and C. Sankaran Nair and P. Raman Menon (Spl. Prosecutors) for Petitioner; T. C. N. Menon, for Respondent. In Cr. R. P. No. 213 of 1969, C. Sankaran Nair and P. Raman Menon (Spl. Prosecutors), for Petitioner; T. C. N. Menon; M. Bhaskara Menon and T. V. Prabhakaran, for Respondent 4. In Cr. R. P. No. 217 of 1969, C. Sankaran Nair and P. Raman Menon (Spl. Prosecutors) for Petitioner. T. C. N. Menon for counter Petitioners. In Cr. R. P. No. 229 of 1969, C. Sankaran Nair and P. Raman Menon, for Petitioner, T. C. N. Menon, for Cr. Petitioners. In Cr. R. P. No. 230 of 1969, V. K. K. Menon, M. Ramachandran, C. J. Balakrishnan & C. Sankaran Nair and P. Raman Menon, (Spl. Prosecutor) for Petitioner; T. C. N. Menon; M. Bhaskara Menon and T. V. Prabhakaran for Res-

pondent No. 2. In Cr. R. P. No. 237 of 1969, C. Sankaran Nair and P. Raman Menon (Spl. Prosecutor), for Petitioner, T. C. N. Menon, for Cr. Petitioners. In Cr. R. P. No. 240 of 1969, C. Sankaran Nair and P. Raman Menon (Spl. Prosecutor), for Petitioner; T. C. N. Menon, for Cr. Petitioners. In Cr. R. P. No. 249 of 1969, C. Sankaran Nair and P. Raman Menon (Spl. Prosecutor), for Petitioner, State Prosecutor (for No. 1) and T. C. N. Menon (for Nos. 2 to 16), for Cr. Petitioners. Cr. R. P. No. 252 of 1969, C. Sankaran Nair and P. Raman Menon (Spl. Prosecutor), for Petitioner, State Prosecutor (for No. 1) and T. C. N. Menon (for No. 2), for Cr. Petitioners. Cr. R. P. No. 284 of 1969, C. Sankaran Nair and P. Raman Menon (Spl. Prosecutor), for Petitioner, State Prosecutor (for No. 1) and T. C. N. Menon, (for No. 2), for Cr. Petitioner.

ORDER: In August 1968, various unions of employees of the Central Government gave notice of a one-day strike on the 19th September to press some demands of theirs, a token strike as it is called, being in token or earnest of what they could and would do if the demand was not met. The Central Government, it would appear, chose to meet the threat rather than the demand. On the 13th September, the President promulgated the Essential Services Maintenance Ordinance, 1968, section 3 whereof empowered the Central Government to prohibit strikes in any essential service as defined in section 2, and sections 4, 5 and 6 whereof provided for penalties for persons participating in any such prohibited strike as well as for persons instigating and financing such strikes. On the same day the Central Government issued an order under section 3 of the Ordinance, in effect prohibiting strikes in any service in connection with the affairs of the Union, although some services, like the postal, telegraph or telephone service, were specifically mentioned. This notwithstanding, the threatened strike did take place it is claimed that it was a signal success in this stage as elsewhere in the country. As a result, numerous complaints (information, in the language of the Criminal Procedure Code; but we are using the words, "complaint" and, "complainant" in the popular sense, not in the sense in which, "complaint" is defined in section 4 (h) of the Code) were made to the police throughout the State by various officers of the Central Government departments concerned, of offences under the Ordinance and under other laws.

These were investigated, and, in due course, a large number of charge-sheets were filed by the police before the magistrates having jurisdiction against the strikers for offences under section 4 or 5

State of U.P., AIR 1964 SC 807, at pp. 816, 817; State of M. P. v. D. K. Jadav, 1968 MP L J 822 at p. 827 = (AIR 1968 SC 1186 at p. 1190). In Desika Charyulu's case, AIR 1964 SC 807 (supra), one of the statutes considered was the Madras Estates (Abolition and Conversion into Ryotwari) Act of 1948. Section 9(1) of the Act empowers the Settlement Officer to "inquire and determine whether any inam village in his jurisdiction is an inam estate or not." Section 9(4) makes provision for an appeal to a tribunal and declares that "the decision of the tribunal under this sub-section shall be final and not be liable to be questioned in any Court of law."

In interpreting these provisions it was held that the question whether any village was an inam village or not was a jurisdictional fact and the decision of the Settlement Officer or of the tribunal in appeal that a particular inam village was an inam estate was liable to be questioned in a Civil suit on the ground that the village was wrongly held to be inam village when in fact it was not so. This case clearly demonstrates that an erroneous decision on a jurisdictional question of fact or law makes the ultimate decision without jurisdiction and a nullity and exclusionary provisions using the formula "the decision shall not be called in question in any Court" are ineffective to prevent the calling in question of such a decision in a Civil suit. Want of jurisdiction after commencement of inquiry may also arise when fundamental provisions of the statute are not complied with or fundamental principles of judicial procedure are not followed making the order of the tribunal invalid or void; such an order can be questioned in a Civil Court even if there be a provision excluding its jurisdiction to question the tribunal's order: Secretary of State v. Mask and Co., AIR 1940 PC 105 at p. 110, as explained in Firm I. S. Chetty and Sons v. State of Andhra Pradesh, AIR 1964 SC 322 at p. 326. If there be a provision in the Act requiring the tribunal to take into consideration certain matters before passing its order, such a provision may be held to be fundamental. Even use of the words "Have regard to" may at times have a compelling or mandatory effect: Union of India v. Kamla Bai, 1968 MP LJ 573 at pp. 579, 580 = (AIR 1968 SC 377 at p. 382). Failure by the tribunal to take into consideration the matters specified, which on a construction of the Act must be taken into consideration, may result in making the order of the tribunal in excess of jurisdiction.

The same result will follow if the tribunal takes into consideration matters which are foreign or irrelevant to the inquiry and its final order is influenced by those matters. An instructive case on

the question of construction of an exclusionary provision like Section 39 of the Bhopal Act is a recent decision of the House of Lords, *Anisminic v. Foreign Compensation*, (1969) 1 All E R 208 (HL). In this case the question related to the construction of Section 4(4) of the Foreign Compensation Act, 1950 which enacts that "the determination by the Commission of any application made to them under this Act shall not be called in question in any Court of law." It was held that this exclusionary clause did not prevent a challenge on the ground that the order of the Commission was a nullity. Lord Reid in that connection observed:

"Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word "determination" as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity.".....

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive." (P. 213).

It will be seen that Lord Reid used the word "jurisdiction" in its original sense limited to the stage of commencement of inquiry and he separately categorised other cases of nullity. Lord Pearce, on the other hand, used the word "jurisdiction" in a wider sense embracing all stages of inquiry; all cases of nullity according to him are cases of lack of jurisdiction; to quote his words:

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity." (P. 233)

The legal position arising from the above discussion may now be summed up as follows:

(1) An Exclusionary Clause using the formula "an order of the tribunal under this Act shall not be called in question in any Court" is ineffective to prevent the calling in question of an order of the tribunal if the order is really not an order under the Act but a nullity.

(2) Cases of nullity may arise when there is lack of jurisdiction at the stage of commencement of inquiry e.g., when (a) authority is assumed under an ultra vires statute, (b) the tribunal is not properly constituted, or is disqualified to act, (c) the subject matter or the parties are such over which the tribunal has no authority to inquire, and (d) there is want of essential preliminaries prescribed by the law for commencement of the inquiry.

(3) Cases of nullity may also arise during the course or at the conclusion of the inquiry. These cases are also cases of want of jurisdiction if the word "jurisdiction" is understood in a wide sense. Some examples of these cases are: (a) when the tribunal has wrongly determined a jurisdictional question of fact or law, (b) when it has failed to follow the fundamental principles of judicial procedure, e.g., has passed the order without giving an opportunity of hearing to the party affected, (c) when it has violated the fundamental provisions of the Act e.g., when it fails to take into account matters which it is required to take into account or when it takes into account extraneous and irrelevant matters, (d) when it has acted in bad faith, and (e) when it grants a relief or makes an order which it has no authority to grant or make.

6. Reverting to Section 10 of the Bhopal Abolition of Jagirs and Land Reforms Act, it has to be noticed that the jurisdiction of the Jagir Commissioner to fix any maintenance allowance receivable out of the Mansab payable to the Jagirdar is in

respect of — to use the words of the section — "any person who under any law, rules or any custom having the force of law is entitled to receive a maintenance allowance out of the income of any jagir". These words of the section limit the class of persons who can invoke for their benefit the authority of the Jagir Commissioner to fix the maintenance allowance. Having regard to the language used in Section 10 and the absence of any provision for appeal against the order passed under Section 10, as applied to a jagir converted into Mansab, the Jagir Commissioner cannot be held to possess power of conclusively deciding facts pertaining to his own jurisdiction. Whenever in course of inquiry under Section 10 a question is raised, whether the person invoking the jurisdiction of the Jagir Commissioner is one falling under the class delimited by the aforesaid words, the Jagir Commissioner will have to decide that question whether it depends upon the construction of the aforesaid words or investigation of facts. But his decision on that question will not be final, for he cannot either by wrong construction of the words of the section or by wrongly determining any fact confer the benefit of the section to persons not entitled to it or deny the benefit to persons entitled to it. An error in that behalf would be an error in relation to a question of jurisdictional law or fact and will result in making his final decision of fixing or declining to fix maintenance allowance a nullity and such a decision will be open to challenge in a civil Court in spite of the exclusionary provision contained in Section 39.

Further, the Jagir Commissioner in fixing the maintenance allowance has to take into consideration matters specified in clauses (i) to (iii) of Section 10 and Rule 21. If the Jagir Commissioner does not take into account these matters at all when those matters are ascertainable and have relevance to the case in hand and if he fixes the maintenance allowance on consideration of matters foreign to section 10, that would again make his decision a nullity liable to be challenged in a civil suit. However, if jurisdiction is invoked in respect of a right person and matters required to be taken into consideration are taken into consideration, the questions as to what weight should be attached to those matters and what amount should be fixed as the maintenance allowance, are questions which will fall within the area where the Jagir Commissioner has the sole authority and is free to err; his order then even if it be erroneous will not be liable to be called in question in any Court.

7. Now, the first ground on which the appellant challenged the order of the Jagir Commissioner is that he miscon-

strued the section and conferred its benefit to the plaintiff who was not receiving any maintenance allowance in cash when the section on its true construction is limited to persons receiving maintenance allowance in cash. This ground pertains to "jurisdictional law" on which the opinion of the Jagir Commissioner is not final and the learned counsel for the appellant is, therefore, right in submitting that the correctness of the ground raised must be examined by us. The learned counsel is, however, not right in contending that the section on its true construction is limited to those persons who were receiving maintenance allowance in cash. The section speaks of persons "entitled to receive a maintenance allowance out of the income of any jagir" and not of persons receiving maintenance allowance in cash out of the income. A person entitled to receive maintenance allowance out of the income of any jagir, may have been receiving the maintenance allowance in various ways depending upon the arrangement which the Jagirdar may have made for paying it. He may have been put in possession of some jagir village or villages for recovering his maintenance from the income of the village, he may have been paid in cash or he may have been granted Khudkasht land (defined by Section 2 (viii) as any parcel of land of a Jagirdar in which the rights of occupant accrue to him) in lieu of maintenance allowance.

The different arrangements which the Jagirdar may have made prior to the conversion of the jagir into Mansab for paying the maintenance do not affect the character of the person receiving it. Whether paid in cash or otherwise he remains a person entitled to receive the maintenance allowance from the income of the jagir. The case of a person who was granted Khudkasht lands in lieu of maintenance allowance is specifically dealt with in Section 23 of the Act and if such a person is in personal cultivation of the land so granted, the land is allotted to him as an occupant on payment of land revenue at the village rate. Being expressly dealt with under a separate provision, a person who was granted Khudkasht land in lieu of maintenance allowance, though satisfying the description of a person entitled to receive maintenance allowance, may fall outside the general provision contained in Section 10. But case of a person who was granted jagir village or villages in lieu of maintenance allowance is not separately dealt with. It is not disputed that such a person does not become a co-sharer and cannot take the benefit of Section 11 where a co-sharer is given the right to share in the Mansab payable to the Jagirdar. The result is that if the case of such a person does not fall under Section 10, he would lose the village after

the jagir is converted into Mansab but will get nothing for his right to receive maintenance from the income of the jagir. Such an unreasonable result could not have been intended by the Legislature. It has, therefore, to be held that Sec. 10 of the Act is not limited to persons who were paid maintenance allowance in cash from the income of the jagir but also applies to a person who was entitled to maintenance allowance from the income of the jagir, but instead of being paid in cash was granted or put in possession of jagir village or villages for realising the maintenance allowance out of the income of the same.

8. The second ground on which the order of the Jagir Commissioner is challenged is that the plaintiff was not in fact a person who was entitled to receive maintenance allowance from the income of the jagir under any law, rule or custom and that he was never in possession of village Ankia as a Guzaredar of the Jagirdar. This raises a question of jurisdictional fact on which the opinion of the Jagir Commissioner is not conclusive and the question has to be examined afresh in these proceedings. To prove that the plaintiff was a Guzaredar, he examined himself as PW 1. He stated that from the time the jagir was granted to Shatrusal, an ancestor of the appellant, village Ankia, which was village out of the jagir, came to be in possession of plaintiff's predecessor in lieu of maintenance allowance which was payable by the jagirdar from the income of the jagir and the village remained in his possession till the date of the conversion of the jagir into Mansab. The plaintiff also stated that Chensingh, the father of the appellant when he was jagirdar, applied in 1921 to the State that Guzaredars of his jagir who were in possession of villages of the jagir in lieu of maintenance should be paid cash allowance and the villages be ordered to be reverted to the jagir and that he along with his application filed a list of Guzaredars of the jagir in which the name of the plaintiff's father was mentioned at Item No. 4 and the amount which used to be received from the village as its income in lieu of Guzara was mentioned at Rs. 2,129-8-11. The originals of this document, forming part of file No. 222, were brought from the Central Record Office, Bhopal and were produced before the trial Court at the time of evidence. Certified copies of the application of Chensingh and the list of Guzaredars attached to it were also produced and marked as Exhibits P. 4 and P. 5 respectively. This application of Chensingh was disposed of by an order of the Finance Secretary of the Government of Bhopal dated 15th December, 1921, a certified copy of which was produced and marked as Exhibit P-7.

The genuineness of the documents exhibits P-4 and P-5, which are more than thirty years old, must be presumed as they were produced from proper custody and their existence was supported by the order of the Finance Secretary (Ex. P-7). The document Exhibit P-5 read along with Exhibit P-4 contains an admission of the appellant's father that the plaintiff was in fact a Guzaredar and was in possession of jagir village Ankia in lieu of Guzara. The evidence of the plaintiff coupled with these documents was thus sufficient to prove that the plaintiff was a Guzaredar and was in possession of village Ankia in lieu of maintenance till the date of conversion of the jagir into Mansab. The appellant did not enter the witness-box to state that the plaintiff was not in fact a Guzaredar or that the documents, Exhibits P-4, P-5 and P-7 were not real. The conduct of the appellant in not entering the witness-box and not giving any evidence raises a strong presumption against him that the plaintiff's case was true. It was argued on behalf of the appellant that the documents, Exhibits P-4 and P-5, were not proved and that they were actually signed by Mukhtar-Aam on behalf of Chensingh, whose authority was not established and therefore, the documents could not be used in evidence as admissions made by the appellant's father. The documents being thirty years old, do not require any proof and were rightly admitted in evidence as they were produced from proper custody. As regards the authority of Mukhtar-Aam, who made this application on behalf of Chensingh, we must infer that the authority existed as the matter was pursued and the final order was passed in that proceeding by the Finance Secretary.

Moreover, the appellant having not entered the witness-box to deny the authority of Mukhtar-Aam, an inference must be drawn that the Mukhtar-Aam was acting within the authority given to him by Chensingh. On the un rebutted evidence of the plaintiff coupled with these documents, it was rightly held that the village Ankia which was a village within the jagir was given to the plaintiff's predecessors in lieu of Guzara and the plaintiff remained in possession of the same till the conversion of jagir into Mansab. It is a significant fact that in 1921 when the appellant's father applied for resumption of this village he offered to pay cash Guzara equal to the income of the village. That goes to show that the plaintiff and his predecessors had a right to receive maintenance allowance from the income of the jagir and it was in recognition of this right that they were put in possession of the jagir village Ankia. It must be assumed that a right which was exercised and recognised for

generations must have had a legal origin. The right to Guzara, in the absence of any statutory law or rule governing the same, must therefore, in the circumstances of this case, be held to have originated in Hindu Law or custom having the force of law. The plaintiff has thus succeeded in establishing that he was a person entitled to receive maintenance allowance from the income of the jagir under Hindu Law or custom having the force of law and that he was in possession of village Ankia, a jagir village, in lieu of maintenance allowance payable to him.

9. Coming to the last ground on which the order of Jagir Commissioner is challenged that he did not take into consideration the matters specified in clauses (i) to (iii) of Section 10 and Rule 21, it has to be noticed that this ground was not taken at any stage in the trial Court. Even here apart from arguing that none of the matters specified were taken into consideration, the learned counsel for the appellant did not point out what particular matter which was present in the instant case and was relevant in the context of Section 10 was not taken into account. Now the Act and the rules nowhere provide that the Jagir Commissioner must mention in his order all the matters that he takes into consideration in fixing maintenance. Out of the matters specified in Section 10 and Rule 21, it is possible that in a particular case some of the matters may have little bearing and may not be even stressed by the parties, some may be non-existent or not ascertainable and the Jagir Commissioner may not find it necessary or useful to mention those matters in his order in that case. From the bare omission to say something on each and every matter specified in Section 10 or Rule 21 it cannot be said that the Jagir Commissioner did not take into consideration the matters not referred to by him in the order. It was, therefore, necessary that the appellant should have taken specific plea in the written statement particularising the matters which according to him, though having an important bearing in his case, were not taken into consideration by the Jagir Commissioner and in the absence of such a plea it is not open for the appellant to urge that the matters specified in Section 10 and Rule 21 were not taken into account. Even otherwise, there is no substance in the objection, for a perusal of the order of the Jagir Commissioner makes it clear that he did take into account all relevant matters before passing the order. He considered the income of the village Ankia as also of the jagir prior to its conversion into Mansab. As regards the income of the village Ankia, he relied more on the admission of the appellant's father in Exhibits P-4 and P-5 where the income as

regards the plaintiff's share had been shown as Rs. 2,129-8-11 though in a later Sanad the income of the village had been shown at a higher figure. This is a factor of which the appellant cannot complain. The Jagir Commissioner had also referred the quantum of Mansab fixed by the Government which was payable to the appellant as also to the Sanadi income of the Jagir. He had also referred to the previous proceedings in between the parties and the orders of the Revenue Authorities and the Government passed from time to time in those proceedings.

Having himself directed the allotment of Khudkasht lands to the appellant and the plaintiff to which there is a reference in his order, it must be presumed that he did also take into consideration income of the parties from these sources. He also knew the maintenance allowance payable to other persons out of the Mansab which he had himself fixed. It must be assumed that he must have taken into account the minimum requirements of appellant and the respondent and the prevailing prices of the essential commodities. After going through the order of the Jagir Commissioner, it is not possible to say that he did not take into account all relevant matters in fixing the amount of maintenance payable out of Mansab. The burden to show that the order of the Jagir Commissioner was 'invalid for non-consideration of matters required to be considered' was on the appellant and it has to be held that he has failed to discharge that burden.

10. All the grounds raised to challenge the order of the Jagir Commissioner thus fail and the said order is upheld as binding on the parties obliging the appellant to pay to the plaintiff the amount of maintenance as fixed in that order from the instalments of Mansab received by him from the Government.

11. The second and the last contention of the learned counsel for the appellant is that the relief as to arrears of maintenance relating to a period prior to three years is barred by limitation. He submits that the proper provision of law applicable is Article 62 of the Limitation Act, 1908. In reply, the learned counsel for the plaintiff-respondent supports the decree for the entire amount claimed in the suit on the footing that Article 131 of the Limitation Act applies. Article 131 provides twelve years as the period of limitation for a suit "to establish a periodically recurring right" and this period is to be counted from the date "when the plaintiff is first refused the enjoyment of the right". Now, on a plain grammatical construction the Article is restricted to suits "to establish a periodically recurring right" and does not embrace a suit for

recovery of arrears due under that right. It is well settled that strict grammatical construction of the words is the only safe guide in interpreting the Limitation Act; *Bootamal v. Union of India*, AIR 1962 SC 1716 at p. 1718; *Nagendranath v. Suresh*, AIR 1932 PC 165 at p. 167. The words of Article 131 cannot, therefore, be extended to cover a relief claiming recovery of arrears that may have fallen due under a periodically recurring right. Even if in the same two reliefs, one for establishing the right and the other for recovery of the arrears, are combined together, Article 131 will apply only to the first relief and some other appropriate Article or Article 120 will apply to the relief for recovery of arrears. This construction of Article 131 is shared by a number of High Courts; *Janardan v. Dinakar*, AIR 1931 Bom 189; *Hakim Hidayatullah v. Gokul Chand*, AIR 1937 All 57; *Baidyanath Jiu v. Har Dutt*, AIR 1926 Pat 205; *State v. J. Namboodripadu*, AIR 1959 Ker 1 (FB) and *Padmanava Singh v. Rajkishori Devi*, AIR 1965 Orissa 138. In all these cases the opinion expressed by a Full Bench of the Madras High Court in *Manavikrama Zamorin v. Achutha Menon*, AIR 1914 Mad 377 that Article 131 applies also to a suit brought to recover sums due under a periodically recurring right has been dissented from. A reading of the Madras ruling will show that Tyabji, J., who was one of the referring Judges, was of the view that Article 131 could not be extended to cover suits for arrears, but the Full Bench took the contrary view mainly because that was the prevailing view of that Court. In *Bhalchandra v. Dattatraya*, ILR (1948) Nag 401 = (AIR 1948 Nag 397), though the point was not directly in issue, Bose, J. expressed that he preferred the opinion of Tyabji, J. in his referring order in *Zamorin's case*, AIR 1914 Mad 377 (supra) to that of the Full Bench.

Reference has also been made in the course of argument to *Nawab Mir Nazarali v. Akaji*, (1928) 11 Nag L J 62 where it was held that a suit for recovery of arrears of lawajama was governed by Article 131. But there being no discussion on the point, that case cannot be regarded as an authority for the proposition that a suit for arrears due under a periodically recurring right also falls within Article 131. As already stated, the correct view is that the claim for arrears is outside the scope of Article 131. The next question is, which other Article applies to the claim for arrears of maintenance which was payable to the plaintiff by the appellant out of the six-monthly instalments of Mansab received from the Government. The learned counsel for the appellant suggests the applicability of Article 62, whereas the learned counsel for the respondents submits that Article

120 will apply. Now Article 120 being the residuary Article can only apply if no other Article applies. It has, therefore, to be first seen whether Article 62 applies. This Article applies to suits for "money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use", and the period of limitation prescribed is three years from the date when the money is received. The amount of maintenance fixed by the Jagir Commissioner in favour of the plaintiff under Section 10 of the Bhopal Abolition of Jagirs and Land Reforms Act is payable under the terms of that section out of the Mansab payable to the appellant.

The appellant thus, from the very moment of receipt of Mansab, was under a legal obligation to pay the amount of maintenance fixed under Section 10 to the plaintiff and that part of the money received as Mansab by the appellant can be said to be received by him for the plaintiff's use. It is true that the appellant had been all along denying the right of the plaintiff and at the time of receipt of Mansab he may have very well intended to receive it wholly for his own benefit. However, the test for application of Article 62 is not whether the defendant intended to receive the money for the plaintiff's use. If the money is received by the defendant in such circumstances that from the very moment of receipt the plaintiff has a right to claim it, it is money had and received for the plaintiff's use though actually not received with that intention; Venkat Subbarao v. State of A.P., AIR 1965 SC 1773. The amount of Mansab received by the defendant-appellant from the Government to the extent of the amount of maintenance payable from it to the plaintiff must, therefore, be taken as money had and received for the plaintiff's use, notwithstanding that the appellant may have intended to receive it wholly for his own benefit. Article 62 thus applies to the suit and the claim for arrears beyond three years is barred by limitation. The claim which is within time works out to Rs. 6,388-10-9 (Rs. 6,388-67).

12. The appeal is partly allowed. The suit is decreed to the extent of Rs. 6,388-67 and rest of the claim in suit is dismissed. The success and failure of the parties being nearly equal, they shall bear their own costs throughout. The decree of the trial Court shall stand modified as above.

Appeal partly allowed.

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(V 57 C 23)

BISHAMBHAR DAYAL, C. J., AND
SHIV DAYAL, J.

Ramnarayan and others, Petitioners v. State of Madhya Pradesh, Bhopal, Respondent.

Misc. Petn. No. 57 of 1969, D/- 1-8-1969.

(A) Constitution of India, Article 19(1),
(2) — Freedom of press — Limitations.

Freedom of the press is included in the freedom of speech and expression under Article 19 (1) (a) of the Constitution. It is not higher than the freedom of speech and expression of an ordinary citizen and is subject to the same limitations as are imposed by Article 19 (2). AIR 1959 SC 395, Rel. on. (Para 8)

(B) Constitution of India, Article 19 (2)
— The expression "in the interest of" —
Meaning of.

The words "in the interest of" in Article 19 (2) are of wide connotation. A law may not have been designed to directly maintain the public order, yet it may have been enacted "in the interest of the public order". (Para 8)

(C) Constitution of India, Article 19 (1)
— Freedom of the press — Must be used
with discretion.

Like every other freedom, freedom of the press is a precious possession of free citizen, but like any other freedom, there is always a danger of its being abused. The press, being a powerful instrument, power has to be exercised with discretion. The press must observe self-imposed restrictions, otherwise there is the risk of public interest being jeopardised. AIR 1957 SC 896, Rel. (Para 9)

(D) Constitution of India, Article 19 (2)
— Freedom of press — Restrictions upon
— Reasonableness — Test stated.

Any restriction upon the right to publish, to disseminate information or to circulate constitutes a restriction upon the freedom of press. The validity of any such restriction has got to be tested by the touch-stone of reasonableness. The force of the word "reasonable" in Article 19 (2) is that the Court can see; (1) Whether the particular activity which is sought to be prevented has got real, proximate and reasonable connection with the maintenance of public order; and also (2) whether the degree of restriction imposed is excessive i.e., more than what is necessary to prevent an evil or the means adopted is arbitrary or unreasonable.

To determine whether the restriction is reasonable or not: (1) the nature of the right infringement of which is complained of; (2) the purpose of the restriction imposed; (3) the extent and urgency of the evil sought to be remedied; (4) the prevailing conditions at the time of its im-

position; and (5) whether the imposition is disproportionate to the extent and urgency of the evil sought to be remedied, must all enter into judicial verdict. AIR 1960 SC 633 and AIR 1951 SC 118 and AIR 1950 SC 211 and AIR 1959 SC 300 and AIR 1960 SC 554, Rel. on.

(Paras 10, 11 12)

(E) Public Safety — Madhya Pradesh Public Security Act (25 of 1959), Section 12 — The restrictions imposed by the section on the freedom of the press are reasonable and constitutional. — (Constitution of India, Article 19 (2).)

(Para 13)

(F) Public Safety—M. P. Public Security Act (25 of 1959), Section 12 — Action under, against 'Swadesh' daily — Satisfaction of the State Government to make the order — Action not for political reasons — Political ideology of paper different from Government — Action taken next day after the Assembly session ended — Action cannot be called mala fide.

Where the action under the section against the newspaper 'Swadesh' was taken by the Government on the advice and at the instance of the District Magistrate and there was sufficient material justifying the satisfaction of the State Government to make the prohibitory order under sub-section (1) of Section 12 and there was no material before the court that the order was passed for political reasons divorced from the exigencies of the situation:

Held, that from the mere fact that the political ideology or views of 'Swadesh' were different from those of the ruling party, or because the action was taken next day after the legislative assembly session had ended it could not be inferred that the impugned order had a political motive and that the exercise of the power was mala fide. (Paras 18, 19)

(G) Public Safety—M. P. Public Security Act (25 of 1959), Section 12 — Action under — Action based on certain news item published in the paper after communal disturbances ended — Action for prevention and not for punishment — Criminal proceedings against the paper in respect of the matter pending — Held, the order was not unjustifiable on that ground. (Paras 20, 21, 22)

(H) Public Safety—M. P. Public Security Act (25 of 1959), Section 12 (5) — Power under — Extent of.

Sub-section (5) of Section 12 affords safeguard not only against capricious or arbitrary exercise of power, but also against excessive exercise of power, all of which are of vital importance in considering whether the restrictions are reasonable. Misc. Civil Case No. 297 of 1962, D/- 16-4-1963 (Madh Pra), Dist.; AIR 1958 SC 398, Rel. on. (Para 23)

(I) Public Safety — M. P. Public Security Act (25 of 1959), Section 12 (1) (i) —

Newspapers already printed within the State — Clause applies.

Clause (i) of Section 12 (1) applies to all newspapers, periodicals, books or documents which have already been printed. It cannot be said that the whole Clause (i) is meant only for such publications as have been printed or published outside the State.

There are four things which may be prohibited under the Clause (i): (1) bringing into, or (2) sale, or (3) distribution or (4) circulation within the State. Nos. 2, 3 and 4 are not necessarily applicable only to something which has been printed or published outside the State. They as well apply to publications which have already come into existence within the State. (Para 25)

(J) Public Safety—M.P. Public Security Act (25 of 1959), Section 12 (i) Clauses (i) and (ii)— Distinction between— Expression "such matter" — Meaning of.

Reading Clauses (i) and (ii) of S. 12 (1) together it becomes clear that while Clause (i) relates to something which has already been printed or published Cl. (ii) relates to a matter which is yet to be printed or published.

The expression "such matter" in Cl. (ii) means such matter as will undermine the security of the State or be prejudicial to the maintenance of public order, or offend against decency or morality. By specifying "such matter" in the order the restriction becomes limited, so that the evil is prevented but the restraint does not go beyond the purpose. (Para 26)

(K) Public Safety — M. P. Public Security Act (25 of 1959), S. 12(5) — Under sub-section (5) of the Section High Court has power to modify an order of the State Government and make it appropriate having regard to the particular facts of the case. (Para 27)

(L) Public Safety—M.P. Public Security Act (25 of 1959), S. 12 — Order under — Sale, distribution or circulation of the paper totally prohibited — Order held excessive and arbitrary — (Constitution of India, Art. 19 (1) (a) and (g)).

When an order under section totally prohibited sale, distribution or circulation of a daily newspaper for one month, it was held that if the object of the State Government was to prevent publications of news about the communal disturbances in a manner likely to promote feelings of enmity and hatred between the different communities or to disturb public tranquillity, the same could have been achieved by making a qualified and limited order and a blanket order of the nature issued by the State Government totally prohibiting the sale, distribution or circulation of the whole paper was absolutely uncalled for and unwarranted. The impugned order could not be held impos-

ing reasonable restrictions in the interest of public order and consequently the said order was excessive, unjust and violative of the provisions of Article 19 (1) (a) and (g) of the Constitution of India.

Cases Referred:	Chronological	Paras
(1963) Misc. Civil Case No. 297 of 1962, D/- 16-4-1963 (Madh Pra)		23
(1962) AIR 1962 SC 305 (V 49) = (1962) 3 SCR 842, Sakal Papers (P) Ltd. v. Union of India		10
(1960) AIR 1960 SC 554 (V 47) = 1960 Cri LJ 735, Hamdard Dawakhana v. Union of India		11
(1960) AIR 1960 SC 633 (V 47) = (1960) 2 SCR 821, Supdt. Central Prison v. Dr. Lohia		10
(1959) AIR 1959 SC 300 (V 46) = 1959 Supp (1) SCR 92, Arunachala Nadar v. State of Madras		11
(1959) AIR 1959 SC 395 (V 46) = 1959 Supp (1) SCR 806, MSM, Sharma v. Sri Krishna Sinha		8
(1958) AIR 1958 SC 398 (V 45) = 1958 SCR 1240, Nagendra Nath Bora v. Commr. of Hills Division and Appeals Assam		23
(1957) AIR 1957 SC 896 (V 44) = 1958 SCR 308, Virendra v. State of Punjab	9, 10	
(1951) AIR 1951 SC 118 (V 38) = 1950 SCR 759, Chintaman Rao v. State of M. P.	10, 11	
(1950) AIR 1950 SC 211 (V 37) = 1950 SCR 519, Dr. Khare v. State of Delhi	10	

S. D. Sanghi, for Petitioners; G. G. Sohanl, Government Advocate, for State.

SHIV DAYAL, J.— This is a petition under Article 226 of the Constitution and also under Section 12 (5) of the M. P. Public Security Act, 1959, (hereinafter called the Act).

2. "Swadesh" is a daily newspaper printed at and published from Indore. Shree Rewa Prakashan Ltd. (petitioner No. 3) is the owner, printer and publisher of the paper. Ramnarayan (petitioner No. 1) is the Chairman of the Board of Directors and Hiralal (Petitioner No. 2) is a member of the Board of Directors.

3. Communal disturbances broke out in Indore in early June 1969.

4. On July 9, 1969, in exercise of their power under clause (i) of sub-section (1) of Section 12 of the Act, the State Government passed an order prohibiting the bringing into sale, distribution and circulation within the State of the said newspaper "Swadesh" for a period of one month from the date of the order. The order is in these words:—

"Whereas the daily newspaper 'Swadesh' Registered No. M. P. 182 published and printed by Bhalchandra Prahlad Deshmukh has been publishing news about the communal disturbances which took place in Indore City on

and after the 2nd of June, 1969 in a manner which promotes feelings of enmity and hatred between the different classes of the citizens of India and is likely to disturb the public tranquillity;

And whereas the State Government is satisfied that bringing into, sale, distribution and circulation of the said newspaper 'Swadesh' will be prejudicial to the maintenance of public order: Now therefore, in exercise of the powers conferred by clause (i) of sub-section (1) of Section 12 of the Madhya Pradesh Public Security Act, 1959 (25 of 1959), the State Government hereby prohibit the bringing into, sale, distribution and circulation within the State of the said newspaper 'Swadesh' for a period of one month from the date of publication of this order in Madhya Pradesh Gazette."

The petitioners are aggrieved by this order and challenge its validity and also pray for quashing it.

5. The petitioners contend that their freedom of the press, which is a fundamental right guaranteed under the Constitution under Article 19 (1) (a), has been infringed by the impugned order. There was no application of the mind. There was no basis for passing the order. The order was passed as a punitive measure. The order is capricious, mala fide and constitutes a fraud on the powers under the Act. It is excessive and arbitrary. The State Government, in its return, denies all these allegations.

6. In order to appreciate the contentions raised before us, we would state a few facts. On June 2, 1969, Communal disturbances broke out at Indore. Curfew was imposed. There were riots. The disturbances ceased on June 8, 1969. Curfew was progressively relaxed and on June 15, 1969, curfew was completely withdrawn. On the 17th June, the newspaper received a letter from the District Magistrate, Indore, stating that such news had been published in the newspaper "Swadesh" which incited communal feelings of enmity between the two communities. The newspaper was, therefore, warned not to publish such news; otherwise, legal steps would be taken. On the 18th June, a Commission of Inquiry under the Commissions of Inquiry Act, 1952, was announced. On the 23rd June, the District Magistrate accorded sanction to the prosecution of the editor, printer and publisher. On the 30th June, a complaint was filed against the editor and Managing Director of Shree Rewa Prakashan, Ltd., under Section 153-A of the Penal Code, in the Court of the Magistrate First Class Indore, (Criminal Case No. 4429 of 1969). That case is still pending. Another complaint was filed on the 1st July under the same section. The budget session of the Madhya Pradesh Legislative Assembly ended on the 8th

July. The impugned order was passed on the 9th July. This petition was filed on the 11th July. The State filed its return on the 15th July. The matter was set down for hearing on the 18th July before the Indore Bench, but on the 25th July, the case was directed to be heard at the main seat and the record was accordingly transmitted here.

7. On the 28th July 1969, the petitioners made an application for curtailing the scope of the petition. In paragraph 6 of the return filed by the State, certain matters, which appeared in this newspaper, were called tendentious and calculated to strain and disrupt feelings between the majority community and the minority community. The petitioners say that in order to avoid any prejudice or embarrassment which may affect the pending proceedings before the Commission of Inquiry and the trial of cases in the Criminal Court, they should not invite a decision from this Court in the present proceedings as to the nature and character of the news item and articles. Therefore, "for the purposes of the present proceedings they take and accept the position that it may be decided on the assumption that after applying its mind to the material now placed on record by the State Government and collectively marked R. III it felt satisfied that it ought to make an order under Section 12" of the Act. The petitioners now seek relief against the impugned order in the present proceedings only on the ground that the order is not warranted by law; that it is illegal and excessive; and that it involves an abuse of the power and imposes unreasonable restrictions on the fundamental right of the petitioners. They want the question as to the nature and character attributed by the State to the abstracts of the news items and articles filed with the return, to be left open.

8. It is undoubted that freedom of the press is included in the freedom of speech and expression under Article 19(1)(a) of the Constitution. Under our Constitution, the freedom of the Press is not higher than the freedom of speech and expression of an ordinary citizen and it is subject to the same limitations as are imposed by Art. 19 (2). (See *M. S. M. Sharma v. Sri Krishna Sinha*, AIR 1959 SC 395). In Article 19(2) the words "in the interests of" are of wide connotation. The law may not have been designed to directly maintain the public order, yet it may have been enacted "in the interests of the public order".

9. Like every other freedom, freedom of the press is a precious possession of free citizen, but like any other freedom, there is always a danger of its being abused. The press, being a powerful instrument, power has to be exercised with dis-

cretion. The press must observe self-imposed restrictions, otherwise there is the risk of public interests being jeopardised. The petitioners initially took the stand that it is the right and duty of the press to publish news which are truthful. In *Virendra v. State of Punjab*, AIR 1957 SC 896 S. R. Das, C. J. speaking for the Court, said:

"It cannot be overlooked that the press is a mighty institution wielding enormous powers which are expected to be exercised for the protection and the good of the people but which may conceivably be abused and exercised for anti-social purposes by exciting the passions and prejudices of a section of the people against another section and thereby disturbing the public order and tranquillity or in support of a policy which may be of a subversive character.

The powerful influence of the newspaper, for good or evil, on the minds of the readers, the wide sweep of their reach, the modern facilities for their swift circulation to territories distant and near, must all enter into the judicial verdict and the reasonableness of the restrictions imposed upon the press has to be tested against this background. It is certainly a serious encroachment on the valuable and cherished right to freedom of speech and expression, if a newspaper is prevented from publishing its own views or the news of its correspondents relating to or concerning what may be the burning topic of the day.

Our social interest ordinarily demands the free propagation and interchange of views but circumstances may arise when the social interest in public order may require a reasonable subordination of the social interest in free speech and expression to the needs of our social interest in public order. Our Constitution recognises this necessity and has attempted to strike a balance between the two social interests. It permits the imposition of reasonable restrictions on the freedom of speech and expression in the interest of public order and on the freedom of carrying on trade or business in the interest of the general public."

10. Section 12 of the Act enacts thus:

"12. Control of publications. (1) If the State Government is satisfied that the bringing into, sale, distribution or circulation of any newspaper, periodical, book or document or the printing or publication of any matter in any newspaper, periodical, book or document will undermine the security of the State or be prejudicial to the maintenance of public order or offend against decency or morality, it may by an order notified in the gazette—

(i) prohibit either absolutely or for a specified period the bringing into, or sale, or distribution, or circulation within the

State of any such newspaper, periodical, book or document, as the case may be.

(ii) prohibit, either absolutely or for a specified period the printing or publication of such matter; or

(iii) prohibit or regulate the making or publishing of any document or class of documents in respect of such matter;

Provided that no order made under the sub-section solely for the purpose of maintenance of public order shall be operative for more than three months from the making thereof.

(2) An order under sub-section (1) may at any time be revoked or modified by the State Government.

(3) If any person contravenes any order made under sub-section (1), then without prejudice to any other proceeding which may be taken against such person, the State Government may declare to be forfeited to the State Government any copy of any newspaper, periodical, book or document brought, sold, distributed, circulated, printed, published or made in contravention of the order.

(4) If any person contravenes any order made under this section, he shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to two thousand rupees or with both.

(5) Any person aggrieved by an order under sub-section (1) or sub-section (3) may, within sixty days from the date of such order, apply to the High Court to set aside the order and upon such application the High Court may pass such order as it deems fit, confirming, varying or reversing the order of the State Government and may pass such consequential or incidental order as may be necessary." There can be no doubt that this section imposes restrictions on the freedom of press. Any restriction upon the right to publish, to disseminate information or to circulate constitutes a restriction upon the freedom of press. (See AIR 1957 SC 896 (Supra) and Sakal Papers Private Ltd. v. Union of India, AIR 1962 SC 305). The validity of any such restriction has to be tested by the touchstone of reasonableness. The force of the word "reasonable" in Article 19 (2) is that the Court can see: (1) whether the particular activity which is sought to be prevented has got real, proximate and reasonable connection with the maintenance of public order; and also (2) whether the degree of restriction imposed is excessive, i.e. more than what is necessary to prevent an evil, or the means adopted is arbitrary or unreasonable. (See Supdt. Central Prison v. Dr. Lohia, AIR 1960 SC 633; Chintaman Rao v. State of M. P., 1950 SCR 759= (AIR 1951 SC 118) and Dr. Khare v. State of Delhi, 1950 SCR 519= (AIR 1950 SC 211)).

11. Certain principles are now well settled for determining the reasonableness of a restriction. What is to be seen is not the reasonableness of the law, but the reasonableness of the restriction imposed by the law. The necessity for the impugned legislation or the wisdom of the policy underlying it are not matters with which the Court is concerned, but the Court is bound to see whether the restriction is in excess of the requirements and whether it is imposed in an arbitrary manner. It will be of an excessive nature, if it is more than what is required in the interests of the public. In order to satisfy the test of reasonableness, it must be shown that the restriction has a reasonable relation to the object which the legislation seeks to achieve and must not go in excess of that object. (See Arunachala Nadar v. State of Madras, AIR 1959 SC 300 and Chintaman Rao's case, 1950 SCR 759= (AIR 1951 SC 118) (Supra)). The Constitution allows restrictions because the interest of public order must necessarily outweigh individual interests of freedom of speech and expression. Therefore, reasonableness of a restriction has to be viewed in an objective manner, that is from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed, nor upon abstract considerations. See Hamdard Dawakhana v. Union of India, AIR 1960 SC 554.

12. To determine whether the restriction is reasonable or not: (1) the nature of the right infringement of which is complained of; (2) the purpose of the restriction imposed; (3) the extent and urgency of the evil sought to be remedied; (4) the prevailing conditions at the time of its imposition; and (5) whether the imposition is disproportionate to the extent and urgency of the evil sought to be remedied, must all enter into judicial verdict.

13. We shall judge the provisions of Section 12 of the M. P. Public Security Act by these tests. The object and purpose is indicated in the first sub-section. It is to prevent security of the State being undermined, to prevent an activity which will be prejudicial to the maintenance of public order and to prevent what may offend against decency or morality. It is for these three purposes that the State Government has been empowered to impose restrictions. Obviously enough, the interests of public order must prevail over the freedom of speech and expression. But a balance must be struck. Where maintenance of public order, etc., so require, the freedom of press may be curtailed, but the power must not exceed the requirement to meet. The power conferred under Section 12 is to impose any of the three restrictions specified under the first sub-section. The

power is not unfettered. The proviso fixes a time limit. No order, if it is made only for the maintenance of public order, shall remain in operation for more than three months. The Government is also empowered to revoke or modify the order at any time. The third and fourth sub-sections provide for the consequences of contravention of an order made under the first sub-section. Sub-section (5) provides safeguard against an arbitrary, capricious or excessive exercise of the power. An application will lie to this Court to set aside the order, and jurisdiction has been conferred on this Court to pass such order as it deems fit, and, in doing so, it may either confirm or reverse or vary the order of the State Government and this Court may pass such consequential or incidental order as may be necessary. We, therefore, hold without hesitation that the provisions of Section 12, although they impose restrictions on the freedom of the press, are reasonable and constitutional.

14. We shall now examine whether the action taken in the present case was within the law and whether the power has been exercised arbitrarily, capriciously or excessively. The operative part of the order is in these words:—

"The State Government hereby prohibit the bringing into, sale, distribution and circulation within the State, of the said newspaper 'Swadesh' for a period of one month from the date of that order." The order purports to have been passed under clause (i) of sub-section (1).

15. It was pointed out that the words "bringing into the State" of the paper, which is actually printed and published within the State, are self-indicative of, the fact that the impugned order was passed mechanically and without any intelligent application of the mind. In its return the State says that the expression "bringing into" means "bringing into existence." This explanation must be rejected outright. In the operative part of the order, the prohibition is "bringing into, sale, distribution and circulation within the State". Four things are prohibited: (1) bringing into the State; (2) sale within the State; (3) distribution within the State; and (4) circulation within the State. Thus, it cannot be said that what was prohibited was the bringing into existence of the said newspaper "Swadesh". The paper was already in existence and since it was printed at, and published from, Indore, there was no question of "bringing it into" the State of Madhya Pradesh. It appears that in the anxiety to reproduce the words of the section in the order, care was not taken to omit what was wholly inapplicable. Be that as it may, having regard to the concession made before us, we are pro-

ceeding on the assumption that it was after applying the mind to the material on record that the Government was satisfied that it ought to make an order under Section 12.

16. It was contended that the impugned order was not made as a preventive measure but is punitive in character. Our attention was drawn to a demi-official letter, dated June 28, 1969, addressed by the District Magistrate, Indore to the Home Secretary, where it was stated that although sanction had been accorded for the prosecution under Section 153-A of the Penal Code, in the competent Court, the prosecution was likely to take sufficient time. Therefore, it was necessary to take action under Section 12 of the Public Security Act:—

"Dhara 153 (A), I. P. C. Ke Abhiyojan Men Kafi Samay Lagne Ki Sambhawana Hai Atah Dhara 12 M. PR. Public Security Act Ke Antargat Karyawahi Awashyak Pratit Hoti Hai".

Emphasis is laid on the word "Atah" (therefore). We have perused the entire letter of the District Magistrate (annexure R-V) filed with the return. We are of the opinion that the words quoted above were loosely employed. In this letter the District Magistrate also says that having regard to the conduct of the newspaper, he was of the opinion that action under Section 12 (1) of the Act was necessary, in spite of the prosecution. We see no reason to hold that the prohibition imposed in the impugned order was in the nature of punishment. The satisfaction required under Section 12 (1) having been reached, and having been conceded before us, it must be said that the prohibition under Sec. 12 was undoubtedly a preventive measure.

17. The petitioners then attack this order as mala fide alleging that the State Government was anxious to exploit every opportunity to strike a blow at the said paper with a view to remove it, being a political opponent. Secondly, the State Government did not deliberately make the impugned order while the State Legislature was in session, lest its caprice may be exposed on the floor of the house; and, as soon as the budget session ended on the 8th July, the State Government came out with the said order on the very next day.

18. With regard to the first aspect, the State Government in its return states that the decision was taken administratively and not as a political decision. It was made at the instance of the District Magistrate and on the advice of the Secretary. We accept this explanation. There is no material before us to show that the impugned order was passed for political reasons, divorced from the exigencies of the situation. We have accepted, on the concession made by the petitioners, that

there was sufficient material justifying the satisfaction of the State Government to make a prohibitory order under sub-Section (1). From the mere fact that the political ideology or views of the "Swadesh" are different from those of the ruling party, it cannot be inferred that the impugned order had a political motive and the exercise of the power was mala fide.

19. As regards the second aspect, the State Government says in its return:—

"It is a matter of mere coincidence that the action could materialise only after the budget session of the Legislative Assembly had ended on the 8th of July 1969".

We see no reason to disbelieve this statement. This is not a case where an authority has only one thing to do at a time. Where several things are to be done and there is no compelling reason to expedite the disposal of a particular matter, there is no justification for attacking the order as deliberately timed. Moreover, the authority which has to take a decision may require thinking, or has to scan the material available. Therefore, no motive can be imputed, just because the decision is delayed. The Government or the Minister concerned may have had to do other things as well and if the decision was taken on the 8th July, it was just a coincidence that it was on the following day after the Assembly session came to a close. We accept the explanation submitted in the return. We are of the view that the action was not mala fide.

20. The order is then attacked as arbitrary on the ground that it was long after the communal disturbances had come to an end and normalcy had been restored. We were told that in the announcement setting up the Commission of Inquiry, the date of the cessation of the disturbances is indicated to be the 8th June. In our opinion, the mere fact that there was no communal riot after the 8th June does not mean that complete normalcy had been restored. It may be noted that although curfew was progressively relaxed, it was withdrawn completely on the 15th June. That apart, there may have been material and Shri Soni told us that certain news were published in the 'Swadesh' even after the 8th June and even in early July—which was taken into consideration by the Government in reaching its satisfaction. However, we are not going into that question. In our opinion, the attack is without force.

21. Another argument advanced to show capriciousness is that criminal proceedings being pending in a competent Criminal Court, the Government ought to have awaited the findings and the decision of the Criminal Court. In our opinion, it is wholly beside the point. We have already said that the measure

does not appear to us to be punitive. It was not aimed at punishing the newspaper for its past acts but the action was preventive. We, therefore, reject this contention also.

22. The conclusion is inescapable that the exercise of the power under Section 12 was justified.

23. We shall now turn to the second aspect of the case. The question is whether the restriction imposed is excessive. Before doing so, we must deal with Shri Soni's objection that this Court cannot go into that question. According to the learned counsel, all that the High Court can see under sub-section (5) of Section 12, is whether there was application of the mind in reaching the satisfaction required under sub-section (1) and whether the power was exercised mala fide, but nothing more can be seen and the power of the State Government is unfettered on the question what action it takes. We are unable to accept this proposition. Sub-section (5) of Section 12 affords safeguard not only against capricious or arbitrary exercise of power, but also against excessive exercise of power, all of which are of vital importance in considering whether the restrictions are reasonable. The jurisdiction of this Court is to be found in the words; "the High Court may pass such order as it deems fit, confirming, varying or reversing the order of the State Government and may pass such consequential or incidental order as may be necessary", which are so wide as to make both the aspects justiciable namely, satisfaction required under sub-section (1) and also the nature and extent of the prohibitory order. Shri Soni strongly relied on a decision of Dixit, C. J. and Pandey, J., in Misc. Civil Case No. 297 of 1962, D/-16-4-1963 (Madh Pra), in support of his contention that this Court cannot review the order of the State Government as regards the extent of the restriction imposed. In our opinion, this decision does not support that contention. What was held in that case is that Section 12 does not impose on the State Government a duty to afford to the applicant an opportunity of being heard; nor does it impose on the State Government a duty to determine the question judicially, nor is there anything to hold that such a duty is implied. The order is therefore, not assailable on the ground that the applicant was not previously given an opportunity of being heard; nor for the reason that the grounds for the satisfaction of the State Government were not disclosed in the order. It was also observed that the existence of a right to have the decision re-examined by a superior tribunal is not enough to indicate that the primary authority is under an obligation to act judicially. The Division Bench has itself

further observed that since the powers under Section 12(5) are undefined and not in any way limited, they should be regarded as co-extensive with the powers of the primary authority: *Nagendra Nath Bora v. The Commissioner of Hills Division and Appeals, Assam*, 1958 SCR 1240 = (AIR 1958 S.C. 398). We respectfully concur in these observations.

24. In the present case, the State Government has prohibited the bringing into or sale or distribution or circulation within the State, of the said newspaper "Swadesh" for a period of one month. The object is maintenance of public order. It is obvious enough that the impugned order has incorporated the words of clause (i) of sub-section (1).

25. As we read it, clause (i) is to be applied to any newspaper, periodical, book or document which has already been printed. What will be prohibited, either absolutely or for a specified period, is the bringing into or sale or distribution or circulation within the State. The words "bringing into" in clause (i) refer to a publication which has been printed or published outside the State. We, however, do not agree with Shri Sanghi that the entire clause (i) is meant only for such publication as has been printed or published outside the State. There are four things which may be prohibited under clause (i): bringing into, or sale, or distribution or circulation within the State. Nos. 2, 3 and 4 are not necessarily applicable only to something which has been printed or published outside the State. They as well apply to a publication which has already come into existence within the State. Indeed, it would have been a more artistic drafting if these four things had been split up into two separate clauses, "bringing into the State" in one clause and the other three in a separate clause.

26. There is a radical difference between clause (i) and clause (ii). A plain reading of the two clauses together makes it very clear that while the former relates to something which has already been printed or published, the latter relates to a matter which is yet to be printed or published. When something has already been printed, what is to be prohibited is its sale or distribution or circulation for the purpose of preventing the evils enumerated in the section. Under clause (ii) what may be prohibited is the printing or publication of "such matter", which means such matter as will undermine the security of the State or be prejudicial to the maintenance of public order, or offend against decency or morality. The import of the words "of such matter" is that the matter must be specified while making an order under clause (ii). By specifying "such matter" the restriction becomes

limited, so that the evil is prevented but the restraint does not go beyond the purpose.

27. On this analysis, we are bound to say that in reproducing clause (i) in the impugned order, it was not the intention of the order, nor was it suggested in the return, nor at the hearing of the petition, that it was meant for those issues which had been printed and published before the date of the order. Shri Sanghi urged that if we found that the order has been wrongly made under clause (i) and should have been made under clause (ii), we are bound to quash it and leave it to the State Government to pass another order, if they think fit. We cannot accede to this request. If under sub-section (5) this Court had no power to modify the order of the State Government, perhaps we would have done so. But if we can vary the order, we must, having regard to the peculiar facts and circumstances of this case, choose to do so and make it appropriate. We would not quash it merely because the reproduction of the words of clause (i) in the impugned order was inept.

28. We have given our considered thought and have heard the parties on the question whether the printing and publication of the "Swadesh" should have been prohibited in toto. In our opinion, the State Government exercised its power excessively. It was quite sufficient to prohibit the printing or publication of such matter as would be prejudicial to the maintenance of public order in the given situation, that is to say, by prohibiting the printing and publication of any matter pertaining to the communal disturbances at Indore, or any other matter whatever which would relate to or would have any effect on the relations between Hindus and Muslims. That would have fully met the requirement of the situation. That would have fully prevented the evil apprehended. There was no justification for totally prohibiting the printing and publication of the newspaper as such. Shri Soni strenuously argued that if the newspaper is allowed to be printed and published, it may print or publish some matter in such a way as to incite hatred and disharmony between the two communities. We do not see any force in this argument. In the first place, Shri Sanghi has made a categorical statement before us that there is no intention of the newspaper to publish anything in respect of relations between the two communities. Secondly, if the newspaper is bent upon contravention of the order, it can even now print or publish the newspaper and suffer its consequences. There will be nothing to prevent the State Government from making a fresh order in future if the conduct of the petitioners would so require.

29. It is remarkable that ground No. (vi) in the petition is in these words:—

"Because, the order is excessive and arbitrary in that it makes an absolute inroad on the fundamental right of freedom of expression and of practising one's profession, of carrying on one's occupation or business, which is guaranteed by clauses (a) and (g) of Article 19(1) of the Constitution of India. 'It is submitted that if the object of the State Government was to prevent publication of news about the communal disturbances in a manner likely to promote feelings of enmity and hatred between the different communities or to disturb public tranquillity, the same could have been achieved by making a qualified and limited order and a blanket order of the nature issued by the State Government totally prohibiting the sale, distribution or circulation of the whole paper was absolutely uncalled for and unwarranted.' It is submitted that the restrictions imposed by the said order cannot be said to be reasonable restrictions in the interest of public order, and consequently the said order is excessive, unjust and violative of the provisions of Article 19(1) (a) and (g) of the Constitution of India."

(Underlined (here in ' ') by us)
In the return, ground No. (vi) is answered thus:—

"That Ground No. 6 is denied. Social control of individual liberty envisaged by Section 12 of the Act is a reasonable restriction and there is, therefore, no inroad on the fundamental right of the petitioners."

The State Government completely omitted to answer that contention raised in paragraph (vi) of the petition, which we have underlined. The return is absolutely silent why an order under clause (ii) would not have met the need; nor could Shri Soni tell us any satisfactory reason for taking the drastic step of completely suspending the printing and publication of the newspaper for the period specified in the order, instead of making an order under clause (ii). We see no reason why the newspaper was not left free to print and publish news and views about other matters, for instance, man's landing on the Moon, ensuing elections of the President and Vice-President of India, commercial advertisements, 'Rashi Phal', cinema fixtures, sports, etc. etc., which had no bearing on the evil which was desired to be prevented.

30. In the result the petition is partly allowed, and the operative part of the impugned order made by the State Government on July 9, 1969, is varied. It shall be substituted by the following order:—

(1) The petitioners shall not print or publish in the "Swadesh" upto August 9,

1969, any matter whatever pertaining to the communal disturbances at Indore, or any other matter whatever which may relate to or which may have any effect on the relations between Hindus and Muslims.

(2) Upto August 9, 1969, no issue or issues of "Swadesh" printed or published between the 2nd June and 9th July, 1969, shall be sold, distributed or circulated within the State of Madhya Pradesh by the petitioners.

The parties shall bear their own costs. The security amount shall be refunded to the petitioners.

Petition partly allowed.

AIR 1970 MADHYA PRADESH 110
(V 57 C 24)

FULL BENCH

BISHAMBHAR DAYAL, C. J.,
SHIV DAYAL AND SURAJBHAN, JJ.

Ramnarayan Dhan Singh, Appellant v.
Anandilal Ratanlal Mahajan and others,
Respondents.

Letters Patent Appeal No. 16 of 1962.
D/- 17-10-1969, from Judgment of Newaskar, J. in C. M. A. No. 76 of 1959, D/- 9-2-1962.

(A) Limitation Act (1963), S. 15 — Word 'execution' embraces all appropriate means by which decree is executed — Injunction partially staying execution — Effect is to prolong the life of whole decree — Civil M. A. 76 of 1959, D/- 9-2-1962, Reversed.

(1) "Execution" in Section 15 embraces all the appropriate means by which a decree is enforced. It includes all processes and proceedings in aid of or supplemental to execution. (2) Stay of any process of execution is stay of execution within the meaning of the section. (3) Where any injunction or order has prevented the decree-holder from executing the decree, then irrespective of the particular stage of execution, or the particular property against which, or the particular judgment-debtor against whom, execution was stayed, the effect of such injunction or order is to prolong the life of the decree itself by the same period during which the injunction or order remained in force. In other words, the period of stay shall be excluded from computation of the period of limitation for further execution without creating any restriction on the rights of the decree-holder to execute the decree as he chooses. AIR 1944 Nag. 155 & (1876) 3 Ind. App. 7 & AIR 1929 Pat. 597 & AIR 1933 P.C. 52, Chitale's Comm. on Lim. Act (3rd Edn.) P. 528 & (1912) ILR 34 All 436 & AIR 1944 Bom. 303 & AIR 1940 Lah 75 & AIR 1924 All 707 & AIR

LM/AN/G198/69/GGM/M

1924 Bom. 383 & AIR 1933 Mad. 418 (FB)
& AIR 1935 Mad 352 & AIR 1955 Andhra
229; AIR 1934 Cal. 140 & (1906) ILR
33 Cal. 689 & AIR 1959 Punj. 613 & AIR
1928 Mad. 627 & AIR 1958 Cal. 1, Ref.

(Paras 33 and 37)

(B) Limitation Act (1963), Preamble
— Construction — Provisions must re-
ceive construction which language in its
plain meaning imports.

The provisions of the Limitation Act,
like any other statute must receive a con-
struction which the language in its plain
meaning imports. It is the duty of the
Court to give full effect to the language
used in the Act. The Court cannot add
words to a section unless the section as
it stands is meaningless or of doubtful
meaning. Section 15 of the Limitation
Act is neither meaningless nor of doubt-
ful meaning. AIR 1963 SC 1882 & AIR
1959 S.C. 1331, Rel. on. (Para 31)

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K. A. Chitaley, for Appellant; S. D.
Sanghi and V. S. Pandit, for Respondents
Nos. 1 and 2.

SHIV DAYAL, J.:— This Letters Pat-
tent Appeal from the judgment of Newas-
kar, J., in Miscellaneous Appeal No. 76
of 1959, was referred to the Full Bench
by a Division Bench consisting of Dixit,
C. J. and Tare, J. The question which
arises in this appeal is whether an order
staying a process in an execution pro-
ceeding, or a "partial stay", as it has
been sometimes called, is within Sec. 15
of the Limitation Act and excludes the
period during which it was in force. That
question arose in the following circum-
stances, which have been stated to us by
the learned counsel as undisputed.

2. On June 14, 1927, a money decree
was passed in Civil Suit No. 62 of Samvat
1983 in the Court of the District Judge,
Ujjain, (in the erstwhile Gwalior State),
in favour of the predecessors-in-title of
Ramnarayan appellant, who is now the
decree-holder, against the predecessors-
in-title of Chunnilal and Anandilal (res-
pondents 3 and 4), now the judgment-
debtors. Aggrieved by that decree, an
appeal was preferred to the Gwalior State
High Court. During the pendency of
the appeal, and in connection with stay
of execution, Ratanlal, father of Anandi-
lal and Jankilal (respondents 1 and 2)
stood surety for the performance of the
decree. On April 5, 1938, the appeal was
dismissed by the Gwalior State High
Court. Against the appellate judgment

and decree, a revision was filed in the Judicial Committee of the Gwalior State (Revision No. 8 of Samvat 1995) under the laws of that State. The revision was dismissed on February 11, 1941. It is that decree of the Judicial Committee which is under execution.

3. The decree passed by the High Court was put in execution on February 23, 1939, (Execution Case No. 41 of Samvat 1995) against the judgment-debtors and the surety. Certain objections were raised by the surety which were overruled by order dated December 9, 1939. From that order an appeal was preferred to the Gwalior State High Court (Appeal No. 9 of Samvat 1996), which was dismissed on July 22, 1940. Aggrieved by it, the surety preferred an appeal to the Judicial Committee of the Gwalior State (Civil Miscellaneous Appeal No. 1 of Samvat 1997).

4. On January 23, 1940, while the said appeal No. 9 of Samvat 1996 had been pending in the High Court certain immoveable properties of the surety (i.e., five houses and land) situated in village Madhopura had been attached. They were to be put to sale, but by an order dated August 16, 1940, the Judicial Committee directed stay of the sale, while attachment was to continue.

"TAA HUKM SAANI QURQI QAYAM RAKHKAR NEELAM KEE MAZEED KARRAVAI MULTAVI RAKHI JAY." On November 24, 1944, Civil Miscellaneous Appeal No. 1 of Samvat 1997 was disposed of in consequence of which the order of stay became dissolved. Execution was then resumed; it was dismissed for default; but again restored; eventually, on January 11, 1954, the decree-holder applied to the executing Court for sale of the attached property. On January 13, 1954, the decree-holder was directed to furnish by January 21, 1954, the particulars of the property to be sold. On January 21, 1954, the decree-holder's counsel reported no instructions. As the decree-holder himself did not appear, the execution was dismissed for default.

5. On February 18, 1954, the decree-holder made a fresh application (No. 7 of 1954) for execution. It is that application for execution from which the present appeal has arisen.

6. Ratanlal surety pleaded bar of Section 48, Code of Civil Procedure. Pending those proceedings, Ratanlal died. His sons, Anandilal and Jankilal (respondents 1 and 2) were brought on record. They pursued the objection. The decree-holder resisted it on various grounds, two of them being that he was entitled to the benefit of Section 15(1) of the Limitation Act because of the stay order passed by the Judicial Committee on August 16, 1940, and, secondly, under Section 48(2)

of the Code of Civil Procedure because the judgment-debtor had by fraud or force prevented execution of the decree.

In his reply, he set out the facts and circumstances in detail. The learned District Judge rejected the objection. Relying on *Bai Ujam v. Bai Rukmani*, ILR 38 Bom. 153 = (AIR 1914 Bom. 330), he held that the benefit of Section 15(1) of the Limitation Act was available to the decree-holder. In view of that decision, he did not consider the contention that the judgment-debtor had by fraud or force prevented the execution of the decree. Anandilal and Jankilal, sons of the surety, appealed to this Court (Civil Miscellaneous Appeal No. 76 of 1959). There, it was conceded that if the order of stay dated August 16, 1940, be held sufficient to attract the provisions of Section 15(1) of the Limitation Act, the present execution petition filed on February 18, 1954, would not be barred by time. Relying on certain decisions, the learned single Judge held that benefit of Section 15(1) of the Limitation Act could not be given because there was no total stay of execution. The appeal was allowed and the application was held barred by time. The decree-holder's plea for exclusion of time under Section 48(2) of the Code of Civil Procedure was again not considered. Aggrieved by that order, this Letters Patent Appeal was preferred by the decree-holder.

7. It is not disputed before us that the period of 12 years, within the meaning of Section 48 of the Code of Civil Procedure is to be computed from February 14, 1941. The present application for execution was made on February 18, 1954, that is, one year and four days beyond 12 years.

8. It is urged by Shri Chitale, learned counsel for the appellant, that the period from August 16, 1940, to November 24, 1944, when the order staying the sale remained in force, must be excluded. The argument is that the language of Section 15 of the Limitation Act is not restricted in its application to a case where there was total stay. Learned counsel relied on *Ghulam Nasir-Ud-Din v. Hardeo Prasad*, (1912) ILR 34 All. 436; *P. V. Itty v. Mani*, AIR 1964 Ker. 134 and *Subramanian v. Venkitadri Iyer*, AIR 1965 Ker. 236. It was further argued that, at any rate, benefit of Section 15(1) of the Limitation Act must be given to the decree-holder in respect of the properties which were attached and the sale of which was stayed by the order of the Judicial Committee, dated August 16, 1940, as was held in *Baljnath Prasad v. Nursingdas*, AIR 1958 Cal. 1, in which *Parneshwaran Nambudri v. Seshan Patkar*, AIR 1928 Mad. 627, was relied on. On the other hand, Shri Sanghi, learned counsel for respondents 1 and 2, contend-

ed that no stay could be excluded in this case because there was total stay of the execution of the decree. The argument is that mere stay of sale of a particular property is not "stay of execution of the decree" within the meaning of Sec. 15. He relied on *Chanbasappa v. Holibasappa*, AIR 1924 Bom. 383; *Kirtyanand v. Pirthichand*, AIR 1929 Pat 597; *Kundo Mal v. Firm Daulat Ram*, AIR 1940 Lah 75; *Virchand v. Marualappa*, AIR 1944 Bom 303; *Soorayya v. Mallayya*, AIR 1955 Andhra 229 and *Union of India v. Moti Ram*, AIR 1959 Punj. 613.

9. It is true that the stay order did not employ any general expression, such as, "execution of the decree is stayed". The order was a limited and specific one, merely directing stay of sale of the attached property of the surety; attachment was to subsist.

10. Before we consider the question in controversy, let it be stated that in this case execution of the decree did not totally stop consequent upon the stay order dated August 16, 1940. The decree-holder did proceed against another property of the surety and also against some property of the judgment-debtor, although the proceedings were abortive. On December 5, 1940, the decree-holder made an application in the executing Court for attachment of certain debts amounting to about Rs. 4000/-, which were due to the surety from third parties. On December 6, 1940, attachment of the debts as prayed for was ordered and notices were issued accordingly to the surety and the judgment-debtor. It appears that certain objections were raised and they were dealt with, but the fact remains that nothing was recovered. So also, on December 9, 1940, the decree-holder applied for attachment of moveable and immoveable property of the principal judgment-debtor.

On December 11, 1940, the executing Court ordered a warrant of attachment of the judgment-debtor's property to be issued. It appears that in execution of this warrant some moveables belonging to the surety were attached by the Nazir. The surety raised an objection whereupon they were released by order dated July 17, 1941. It does not appear that in those proceedings also anything was recovered. Shri Sanghi, even after going through the entire record, could not point out that anything was done after the last mentioned date. The parties did not, nor do we, consider it necessary to enter details of what happened in those two proceedings. The object with which we have mentioned about those two proceedings initiated by the decree-holder (on his application dated December 5, 1940, against the surety, and that dated December 9, 1940, against the principal judgment-debtors) is to remember that

the decree-holder did proceed with the execution of the decree in a manner which was not prohibited by the stay order dated August 16, 1940. We have already stated that that stay order ceased to operate on November 24, 1949. We shall consider the effect of the decree-holder having taken steps in execution during that period.

11. On going through the decisions referred to above, we find that three divergent views have been taken in them. One view is that Section 15 of the Limitation Act comes into play only when there has been absolute stay, by operation of which the execution of the decree could not proceed at all, by any means. The second view is that even in cases of partial stay, in the sense that execution was stayed against any particular property or against any particular judgment-debtor the decree-holder can avail himself of exclusion of time under Section 15 of the Limitation Act. The third view is that where a proceeding in execution is stayed only so far as a particular property is concerned, benefit of Section 15 will be available if execution of the decree is sought against the same property but not where another property is sought to be sold.

12. We shall first consider the decision in *Sitaram v. Chunnilalsa*, AIR 1944 Nag 155, cited by the Division Bench in the order of reference. In that case, the real question was whether Section 48 of the Code of Civil Procedure was controlled by Section 15 of the Limitation Act, so that the provisions of the latter could be invoked in computing the period prescribed by Section 48 of the Code. The Division Bench answered the question in the affirmative, holding that Sec. 15 of the Limitation Act is perfectly general and the provisions contained therein can be invoked in computing the period of limitation prescribed by Section 48 of the Code of Civil Procedure. The decision of the Privy Council in *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*, (1876) 3 Ind App 7, was relied on. That question has not been agitated before us.

The Division Bench gave benefit of Section 15 to the decree-holder and the appeal of the judgment-debtors was dismissed. One of the contentions raised before the Division Bench was that there was no order for stay of execution of the decree; that even if there was such stay of execution, it would only operate in respect of the money recoverable under the decree as against Ramlal but it would not operate as against other judgment-debtors or in respect of claim for possession. This objection was rejected with these observations:—

"A perusal of the order sheets in the case will make it clear that the execution of the decree was stayed. It was not

restricted as regards the judgment-debtor Ramlal or in respect of money recoverable under the decree."

The Division Bench nowhere held that if stay was restricted as regards one judgment-debtor or in respect of any specified property, benefit of Section 15 was not available. The decision in Sitaran's case, AIR 1944 Nag 155 (supra), therefore, cannot be read as lending support to the first of the three views we have enumerated.

13. Shri Sanghi strenuously argued that the expression "execution of which has been stayed" (and "which" here refers to "a decree") connotes that unless execution is totally stayed in the sense that the Court is prohibited to execute the decree at all, benefit of Section 15 will not be available. The argument is that where merely sale of a particular property is stayed, it is open to the decree-holder to find other properties of the judgment-debtor and proceed with the execution.

14. In Kirtyanand v. Pirthichand, AIR 1929 Pat 597, relied on by Shri Sanghi, the question was different. In that case, the decree had been executed not less than six times before the execution proceeding which reached the High Court. It was a compromise decree and the right to execute it accrued on April 1, 1915, under the terms of the compromise. An application for execution was made on July 13, 1927, which was beyond 12 years. Benefit of Section 48(2) of the Code of Civil Procedure and also of Section 15 of the Limitation Act was sought by the decree-holder on the ground that in another suit the property of the surety against whom execution of the decree was sought, had been entrusted to a receiver and the decree-holders were directed to wait for payment. Both the contentions were rejected by the Patna High Court. The matter went to the Privy Council and the decision is reported in Kirtyanand Singh v. Pirthichand, AIR 1933 PC 52, where it was held that where a receiver appointed in a different suit has been directed to make payments in discharge of the decree sought to be executed, the provisions of Section 48(1) (b), Civil Procedure Code, do not apply. It was further held that a statement in an order, in that different suit that the decree-holders of the decree sought to be executed must wait for payment was not an injunction or order staying execution of the decree within Section 15 of the Limitation Act. Therefore, that case is of no help here. Shri Sanghi conceded this position.

15. Reference may also be made to Chitale's Commentary on the Limitation Act (3rd Edition) at page 528, under the heading "Partial Stay of Execution", where it is remarked thus:—

"It has, however, been held in some cases ILR 38 Bom 153=(AIR 1914 Bom 303); Nachappa v. Basiruddin Mandal, AIR 1918 Upp Bur 4 at p. 5; Boyinda Nath Choudhury v. Basiruddin Mandal, AIR 1921 Cal 606 and (1912) ILR 34 All 436, that a stay of execution of a part of the decree or as against a particular property will nevertheless avail to save limitation for the execution of the decree as a whole. The reasoning advanced for this view is that this section does not say that the execution must have been wholly stayed and that it is not justifiable to read into the section more than what it actually says. It is submitted that in view of the decision of the Privy Council in Kirtyanand Singh's case, AIR 1933 PC 52 and the other cases referred to already, these decisions are not good law."

We have just now seen that in Kirtyanand case, AIR 1933 PC 32 (supra) the Privy Council did not decide this point. (See also observations in AIR 1944 Bom 303 at p. 305).

16. We would next refer to the decision in AIR 1940 Lah 75, a Single Bench decision of the Lahore High Court. This decision was relied on by a Division Bench of the Bombay High Court in the Lahore Case, in execution of a decree, a house situated in "Mohalla Rupa Mistri" was sought to be sold on June 12, 1925, but the "execution proceedings were stayed", while the application which went for consideration before the High Court, related to a house situated in "Lakar Bazar". It was observed that the execution of the decree had never been stayed by any order of injunction. Then it was said that it was open to the decree-holders, after order was passed, to have the other properties of the judgment-debtors, both moveable and immoveable, attached and also to have taken action for their arrest. Exclusion of time under Section 15 of the Limitation Act was refused. The learned Judge, who decided that case, referred to the following decisions: Ram Bharosa v. Sohan Lal, AIR 1924 All 707; AIR 1924 Bom 383; the Patna High Court AIR 1929 Pat 597 and the Privy Council decision AIR 1933 PC 52 (supra) and Tripura Sundaram v. Abdul Khadar, AIR 1933 Mad 418. We propose to examine these decisions as well.

17. In AIR 1924 All 707 (supra), Daniels, J., after stating the facts of the case, held that in that case there was no injunction and no order staying execution, still he held that although the decree-holders might have been debarred from one particular mode of execution, it was still open to them to execute their decree in any other way and, therefore, Section 15 of the Limitation Act did not apply.

18. In AIR 1924 Bom 383 (supra), a decree was passed in favour of Basappa Murgeppa against Chanbasappa and another. It was a money decree. It was attached by a creditor of Murgeppa, who had obtained a decree against Basappa. It was held that on the application of the creditor Murgeppa, who had attached the decree of his judgment-debtor Basappa, that Court was bound to proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. Thus, there was no stay of execution of the decree. Section 15 of the Limitation Act, therefore, did not apply. It was held that neither the holder of the decree sought to be executed, nor the judgment-debtor was prevented from seeking to execute the original decree. No doubt, it was also observed:—

"But we think that S. 15 only applies to an absolute stay, and not to a limited stay as would be ordered by the notice under Order 21, R. 53(1) (b)".

For these observations, no reasons were given in the judgment.

19. AIR 1933 Mad 418 (supra) was decided by a Full Bench. In that case, the mortgagee decree-holder applied to sell the mortgage security. He cited a previous application dated October 2, 1922, and claimed to be in time because he was restrained by an injunction from executing the mortgage decree and that injunction was dissolved on August 16, 1927. The executing Court dismissed the application as barred by time. Before the High Court, the appellant no longer maintained that there was an application as originally stated, but it was argued that there was a decree, which in its effect was tantamount to an injunction and which, therefore, attracted the provisions of Section 15 of the Limitation Act. It was found that 8 months after the appellant obtained her decree, certain worshippers, impleading both the mortgagor and the mortgagee, got it declared that the security of the mortgage was a religious endowment and not the property of the mortgagor. It was that decree which the appellant asked the High Court to treat as an order staying the execution of her prior decree until it was set aside on appeal by the High Court on August 16, 1927. It was held that the appellant was not restrained or prevented from executing her decree and if she had applied for execution, the Court could not have refused it. The High Court refused to read the word "stayed" as "inconvenienced".

20. Then there is a decision in Raju v. Ayyaparaju, AIR 1935 Mad 352, delivered by Beasley, C. J., on behalf of the Division Bench. The facts of that case are not stated in the judgment. That

decision has been followed in AIR 1955 Andhra 229 (infra). Beasley, C. J., said:—

"In our view, the stay was a limited one. It was an order merely staying the Court. It did not put an end to the rights of either the judgment-creditor or the judgment-debtor to apply for execution which within the plain terms of the order they are entitled to do. The execution of the decree, therefore, remained stayed, for just so long as the judgment-creditor or the judgment-debtor chose not to apply for execution. As soon as either of these parties applied for execution, then the stay would be removed. It was thus within the power of the execution petitioner at any time himself to remove the stay and under these circumstances, in our view, it is impossible to say that this is a case which comes within S. 15, Limitation Act."

Since this decision has been relied on AIR 1955 Andhra 229, where the question arose in connection with Order 21, R. 53, Civil Procedure Code it may as well be thought that the question in the Madras Case also arose in connection with O. 21, Rule 53, Civil Procedure Code, and that is why the possibility of the judgment-debtor putting the decree into execution was also taken into account.

21. In AIR 1955 Andhra 229 (supra), the facts were that Veerina Venkatarathnam and some others had a preliminary decree, which was followed by a final decree to enforce a mortgage. As the decree-holders made default in payment of income-tax, the Income-tax Officer issued a certificate to the Collector intimating him that a certain sum was due from the decree-holders and requesting him to recover the same under the provisions of Section 46(2) of the Income-tax Act. Pursuant to this certificate, the Collector attached the decree and at the same time requested the Court to stay execution of the decree. The Collector then filed an execution petition for executing the decree. It was held that the Collector had no right to execute the decree. Then the decree-holders filed an execution petition for executing the decree. It was held by the executing Court and the first appellate Court that the application was barred by limitation as having been filed more than three years from the date of the final order. The decree-holders preferred a second appeal to the Madras High Court. The Second Appeal was dismissed, but the learned Judge declared the case fit for Letters Patent Appeal. The Letters Patent Appeal was heard by the Andhra Pradesh High Court. The question, *inter alia*, was whether the period during which the stay order passed by the Collector remained in force, could be excluded under Section 15 of the Limita-

tion Act in computing the period of limitation for executing the decree.

In answering this question in the negative, reliance was placed on AIR 1935 Mad 352 (supra) and Saroj Ranjan Sinha v. Joy Durga Dassi, AIR 1934 Cal 140, which, again, was a case under Order 21, Rule 53, Civil Procedure Code. Having cited those decisions, the principle underlying Section 15 of the Limitation Act was stated thus:—

"If execution of the decree was stayed, it would be an unnecessary burden on the decree-holder and an empty formality if he should be compelled to file execution application at the risk of his decree otherwise getting barred. A decree, which has been stayed, cannot obviously be executed. So under this section, the period covered by the stay order is allowed to be excluded from the period of limitation.

That reason cannot hold good if the decree-holder, or his representative is not prevented from executing the decree. If he has a right to execute the decree and has failed to exercise that right, it can only be at his own risk."

Then the implications of Order 21, R. 53, Civil Procedure Code, were stated, and the appeal was dismissed.

22. In AIR 1944 Bom 303, a stay order was passed as regards a fraction of the property sought to be sold. It was held that there was nothing to show that the decree-holder could not have proceeded against the fractional share of the property which was not affected by the stay order. AIR 1940 Lah 75 (supra) was relied on. The decision in Gurudeo Narayan Sinha v. Amrit Narayan Sinha, (1906) ILR 33 Cal 689, was distinguished. The decision in ILR 38 Bom 153 = (AIR 1914 Bom 303) (supra) was also distinguished as it was found on reference to the facts that in that case stay was of the whole of the decree.

23. In AIR 1959 Punj 613, an application for execution of a decree passed by a Delhi Court on August 12, 1935, was dismissed on January 4, 1936. The decree was transferred to Agra Court for execution, but the execution was stayed under the U.P. Temporary Postponement of Execution of Decrees Act, 1937, and remained pending till January 1950. In the meanwhile, another execution application was filed and dismissed at Delhi in 1939. Then the application for execution, where the question of Section 15, Limitation Act, arose, was filed on January 24, 1961. It was held that there was no absolute stay of execution under the U.P. Act and that what was stayed by the Act was recovery of decretal amount by sale of some land owned by the judgment-debtor in the district of Agra and since there was no

thing to prevent the decree-holder from taking proceedings at Delhi against any assets of the judgment-debtor, which could be found there, and, further, since in fact while the Act which stayed those proceedings was in force, an execution application was filed and dismissed at Delhi, the application in question was held barred under Section 48 (1), Civil Procedure Code. The benefit of Section 15 of the Limitation Act was not given.

24. Having carefully gone through all these decisions, we find that the basis for the first view is that where execution of the decree was stayed as regards merely a part of it, the decree-holder could have obtained execution of the decree against another property, so that, if he did not, he was not entitled to exclusion of time under Section 15.

25. The second view is founded on the following reasoning. There is nothing to limit the wording of Section 15 and there is no justification for adding words to that section. The decree-holder's discretion to execute the decree in any manner he deems fit should not be fettered. To compel him to adopt a particular mode of execution is to take away the discretion vested in him. However, the legal position will be different where a decree is not a single decree but is a composite decree which consists of several decrees and stay of execution, partial or complete, of one or the other of the several decrees, would not be stay in respect of the remaining decrees.

26. A third interpretation to Section 15 of the Limitation Act was given in AIR 1928 Mad 627 and AIR 1958 Cal 1. In the Madras Case it was held that where an order stayed execution of the decree as against one judgment-debtor, the period during which the stay continued cannot be excluded in computing the period of limitation for an execution against the other judgment-debtors, when there was no stay order against them. The Calcutta decision was pronounced by Chakravarti, C. J., speaking for the Division Bench. While notice was taken of the preponderance of judicial opinion in favour of the view that Section 15 contemplated an absolute stay, it was held that it applied also to a case of partial stay but only so as to allow exclusion of the period of stay in computation of time for a further execution against the same person or against the same property against which execution was previously stayed. It was observed that the view they took was not without hesitation and it appears that they found themselves compelled to take that view because they could see anomalous results flowing from the first view and also the second one.

27. These, then are the three views based on the reasons we have summed up above. We shall test these views by the language of Section 15. Omitting the words which are not relevant, it reads thus:—

"In computing the period of limitation prescribed for any application for execution of a decree, the execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

There are no words like "totally", "wholly" or "as a whole" after the word "execution". Therefore, if the first view is accepted, we will have to read those words in the section which are not there and this cannot be justified when that interpretation leads to an obvious anomaly. It is incontestable that the choice is entirely of the decree-holder against what property of the judgment-debtor, and against which of the judgment-debtors, in case they are more than one, he will proceed in execution of the decree. Where he had already got a certain property of a certain judgment-debtor attached and had applied for its sale, but the sale was stayed, it was no duty of his to make a searching enquiry for other properties which the judgment-debtor may have had. To accept the first view as correct, it will have to be said that the decree-holder was under an obligation to trace out another property of the judgment-debtor and to proceed against. If he did not, he cannot avail himself of the benefit of Section 15. To put it differently, the benefit of that section would be denied to the decree-holder if the judgment-debtor is able to show that he had, during the pendency of the stay order, any property moveable or immoveable, in any nook or corner of the country. It would suffice that the judgment-debtor could show some money deposited in some bank in any corner of the country. To chase a wild goose may perhaps be possible, but to require the decree-holder to comb the entire country to trace out some other property, moveable or immoveable, visible or hidden, of the judgment-debtor, will be generally looking to an impossibility. In our opinion, Section 15 does not intend so.

28. Take another case. Suppose, after stay of sale of a particular property, the decree-holder actually proceeded against some other property of the judgment-debtor and got it sold but the decree remained not fully satisfied. After the bar of stay is lifted, he applies for execution and seeks to get the same property sold in respect of which stay order was passed. To deny the benefit of Section 15 in such a case would be to defeat the object and purpose of Section 15. That section

is intended to prevent accrual of any injury to the person who is interdicted by an injunction or order from exercising his right of execution of the decree.

29. Then, suppose, the judgment-debtor had no other property at all but the stay order was in limited terms, directing sale of the particular property attached to be stayed. Still on the first view, it will be argued that benefit of Section 15 is not available to the decree-holder for a further execution. Otherwise, it will have to be said that the impact of the stay order, when it is in limited terms, will depend upon the existence or non-existence of another property of the judgment-debtor for the purpose of application of Section 15, that is to say, if the judgment-debtor had some other property then Section 15 will not apply, but if he had none, then it would apply. In our opinion, the true meaning of Section 15 is not dependent on such an extraneous factor.

30. By giving all these illustrations we do not mean to say that the first view cannot be accepted on the grounds of equity or for considerations of hardship. We have only tried to demonstrate why we are not persuaded to see any justification for adding words to the section, more so when such a course produces anomalous results.

31. The provisions of the Limitation Act, like any other statute, must receive a construction which the language in its plain meaning imports. It is the duty of the Court to give full effect to the language used in the Act. See *London Rubber Co. v. Durex Products Inc.*, AIR 1963 SC 1882. Their Lordships held in *British India General Insurance Co. Ltd. v. Itbar Singh*, AIR 1959 SC 1331, that the Court cannot add words to a section unless the section as it stands is meaningless or of doubtful meaning. In our opinion, Section 15 of the Limitation Act is neither meaningless nor of doubtful meaning. In accepting the first interpretation, the words like "wholly" or "by all possible means" have to be added. We see no justification for reading any such words in the section. The plain object of the section is to exclude the period during which the process of execution was stayed. As regards the third view, we think that it also would involve reading into the section something which it does not contain. The phrase "for any application for execution" will have to be read as "for any application for execution in the same manner in which its execution was stayed". Again, we see no justification for adding those words to the section.

32. As we shall presently say, the intent and purpose of Section 15 are clear enough, and so is its language. We how-

ever, desire to add that even otherwise we would have supported the second view on the principle that where the language is not precise, the provisions of the Limitation Act should be construed equitably and, if alternative constructions are possible, the one which is beneficent should be adopted. This principle was accepted, for instance, in *Kandeswami v. Kannappa*, ILR (1952) Mad 421 = (AIR 1952 Mad 186) (FB).

33. We are clearly of the view that "execution" in Section 15 of the Limitation Act does not mean merely the title of the proceedings, nor necessarily the whole process of execution. "Execution" means enforcement of a decree or an order by the process of Court so as to enable the decree-holder to recover the fruits of the decree. As held in *Sreenath Roy v. Radhanath Mookerjee*, (1883) ILR 9 Cal 773 at page 776, the words "execution of decree" mean the enforcement of the decree by what is generally known as "process of execution". The Code of Civil Procedure deals with different kinds of processes against person and property of the judgment-debtor, or for the restoration of any specific property, land, or goods, or for compelling the judgment-debtor, by attachment, to obey the decree of the Court. In 33 CJS 1, at page 134, there is the following statement:—

"It (execution) sometimes embraces all the appropriate means to execution of the judgment; all means by which the judgments or decrees of Courts are enforced; all processes issued to carry into effect the final judgment of a Court; all processes and proceedings in aid of, or supplemental to execution that are customary in civil cases."

We read the word "execution" in Section 15 in this broad sense so as to embrace the various processes of execution, and any of them. We are further of the view that the words "has been stayed by an injunction or order" are clearly relatable to the factual position. An order or injunction staying execution of a decree may either be in general or unspecified terms (such as 'execution is stayed' or 'the decree-holder is restrained from executing the decree'). It may be in limited or specified terms (such as "the sale of property 'A' is stayed" or "the decree-holder is restrained from taking possession of property 'B', etc."). In the latter case also, it will be said that execution has been stayed because a certain specified process in execution is also 'execution'. If we are right in this interpretation of the word "execution", as we think we are, we are not adding any words to the section.

34. In short, if further progress of an execution of the decree is stayed by an injunction or order, the period of such

stay shall be excluded in computing the period of limitation prescribed for any application for execution of that decree. The word "any" is of emphatic import and the exclusion will be available for any application for execution of the decree by whatever process the decree-holder likes to enforce it. It was, however, contended that some anomalies are also involved in accepting the second view such as those pointed out in *Baljnath Prosad's case*, AIR 1958 Cal 1. It is argued that where sale of property 'A' is stayed, it is not reasonable that limitation should be saved against the sale of property 'B'. This criticism, in our opinion, loses sight of the very purpose of providing limitation. The whole object and purpose of limitation is to create a bar to the decree as a whole being executed after the prescribed time, and not to protect a particular property of the judgment-debtor or to prevent a particular mode of execution after the prescribed time. What has to be seen is whether the decree is executable or not. If it is, then there is no restriction on the decree-holder's right to enforce it as best as he can. The effect of Section 15 of the Limitation Act is to arrest the running of limitation when its execution remained stayed by an injunction or order and thus extend the life of the decree beyond the prescribed time. It is in that light that we have to read the section.

35. We may observe that Section 15 of the Limitation Act appears to be analogous to Section 48 (2) (a) of the Code of Civil Procedure, which applies to a case where the judgment-debtor has, by force or fraud, prevented the execution of the decree. In our opinion, it will not be reasonable to suggest that the benefit of Section 48 (2) (a) of the Code will accrue to the decree-holder only if the judgment-debtor had made it impossible to execute the decree by any possible means. In our view, as long as the decree-holder was prevented from taking steps which he liked to take to execute his decree, limitation did not run against him.

36. The referring Bench, while thinking that the question is of considerable importance, also observed that it involved the question of the correctness of certain observations made in *Sitaram's case*, AIR 1944 Nag 155 (supra). We find that *Sitaram's case*, AIR 1944 Nag 155 does not take a contrary view. There, on the facts of that case it was found that the stay order was not restricted as regards any property or any judgment-debtor. The real question canvassed in that case whether Section 48 of the Code of Civil Procedure was controlled by Section 15 of the Limitation Act and that question was decided in the affirmative.

37. We, therefore, answer the question thus: (1) "Execution" in Section 15 of the Limitation Act embraces all the appropriate means by which a decree is enforced. It includes all processes and proceedings in aid of or supplemental to execution. (2) Stay of any process of execution is stay of execution within the meaning of the section. (3) Where any injunction or order has prevented the decree-holder from executing the decree, then, irrespective of the particular stage of execution, or the particular property against, which, or the particular judgment-debtor against whom, execution was stayed, the effect of such injunction or order is to prolong the life of the decree itself by the same period during which the injunction or order remained in force. In other words, the period of stay shall be excluded from computation of the period of limitation for further execution without creating any restriction on the rights of the decree-holder to execute the decree as he chooses.

38. As this appeal itself was referred to the Full Bench, we shall decide it by applying the conclusions we have just now expressed. By virtue of the order dated August 16, 1940, passed by the Judicial Committee, the sale of the properties of the surety, which had been attached, was stayed. That order became dissolved on November 24, 1944. That entire period must, on the view we have taken, be excluded in computation of the period prescribed by Section 48 of the Code of Civil Procedure. It is without consequence that during the period of stay the decree-holder did take some other steps between December 9, 1940, and July 17, 1941, against another property of the surety and also against some property of the judgment-debtor, which proceedings remained fruitless.

39. This Letters Patent Appeal is allowed. The judgment and order passed by the learned single Judge in Civil Miscellaneous Appeal No. 76 of 1959 are set aside and the order dated April 3, 1959, passed by the learned District Judge is restored. Anandilal and Jankilal (respondents 1 and 2) shall pay to the appellant his costs in this appeal; counsel's fee Rs. 200. They shall also pay to the appellant his costs in Civil Miscellaneous Appeal No. 76 of 1959; counsel's fee according to the prescribed schedule. Chunnilal and Anandilal (respondents 3 and 4) shall bear their own costs in both these appeals.

Appeal allowed.

AIR 1970 MADHYA PRADESH 119
(V 57 C 25)

K. L. PANDEY AND A. P. SEN, JJ.

Jaykumar Jain and others, Appellants
v. Om Prakash and another, Respondents,
Misc. (First) Appeal No. 112 of 1968,
D/- 4-10-1969, from order of 4th Addl.
Dist. J., Jabalpur, D/- 16-2-1968.

(A) Arbitration Act (1940), Ss. 39, 17
— Composite order — Court refusing to
set aside award and also passing decree
in terms of award — Appeal under S. 39
(1) (vi) is still maintainable.

In the case of a composite order, by which a Court refuses to set aside an award and also passes a decree in accordance with its terms, the order refusing to set aside the award and the decree are both appealable as the provisions contained in Ss. 17 and 39 are not mutually exclusive. Therefore, the fact that a decree has been passed does not preclude an appeal against the order refusing to set aside the award. If the order is set aside, the decree which is founded on it would lapse and consequently it cannot operate as a bar to the appeal against the order. A fortiori the making of two separate orders does not, take away the right of appeal given under S. 39(1)(vi) to a person aggrieved by an order setting aside or refusing to set aside an award. AIR 1940 Nag 386 & AIR 1956 Nag 245 & AIR 1959 Madh Pra 102 & F.A. No. 121 of 1957, D/- 11-10-1960 (Madh Pra), Rel. on. (Para 5)

(B) Contract Act (1872), S. 74 —
Earnest money — Not same as part payment of consideration—(Words and Phrases — Earnest money).

There is a distinction between earnest money and part of the purchase price. Earnest money, although taken as part payment of the consideration, is also a guarantee for the due performance of the contract. AIR 1926 PC 1 & AIR 1916 Nag 104 & AIR 1929 Nag 30(2) (FB) & AIR 1947 Nag 193 & AIR 1964 Madh Pra 126 & AIR 1963 SC 1405, Rel. on.

(Para 9)

(C) Arbitration Act (1940), Ss. 13, 30
— Powers in making award — Failure to give reasons or mere error in decision — Not a ground for setting it aside.

When the parties have chosen their own arbitrator to be the judge in the disputes between them, they must accept the award as final for good or bad, and a mere error in decision on the part of the arbitrator or his failure to give reasons for his decision is no ground for setting it aside. The presumption is, that the arbitrator intended to dispose finally all the matters in difference; and the award should be held final, as it is by intention made to be so. AIR 1964 Madh

Pra 15 & AIR 1963 SC 1677 & AIR 1965 SC 214 & 1965 MP LJ 492 & AIR 1967 SC 378 & AIR 1967 SC 1030, Rel. on.

(Para 10)

(D) Arbitration Act (1940), Ss. 16, 30 — Power to remit award — Exercise of discretion by Court — Discretion is to be exercised on substantially same grounds as will justify setting aside of award — Award bad in toto, bad portion not severable from rest of it — One of parties apprehensive that arbitrator might not approach question with fresh mind — Discretion is to be exercised in favour of setting aside award rather than remit it.

(Paras 12, 13)

(E) Contract Act (1872), S. 10 — Construction of contract — Intention is to be gathered from relevant terms of contract and not from subsequent conduct of parties.

(Para 11)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 378 (V 54)=

(1967) 1 SCR 633, Bungo Steel Furniture (Pvt.) Ltd. v. Union of India

(1967) AIR 1967 SC 1030 (V 54)=

(1967) 1 SCR 105, Firm Madanlal Roshanlal v. Hukamchand Mills

(1965) AIR 1965 SC 214 (V 52)=

(1964) 5 SCR 480, Jivrajbhai v. Chintamanrao

(1965) 1965 MP LJ 492=1965 Jab

LJ 567, Radha Wallabb v. Gopal-

das

(1964) AIR 1964 Madh Pra 15 (V 51)

=1963 MP LJ 284, Rustomji v. Manmal

(1964) AIR 1964 Madh Pra 126

(V 51)=1963 MP LJ 184, Chunnial v. Mohanlal

(1963) AIR 1963 SC 1405 (V 50)=

(1964) 1 SCR 515, Fateh Chand v. Balkishan Dass

(1963) AIR 1963 SC 1677 (V 50)=

(1964) 3 SCR 410, Smt. Santa Sila Devi v. Dharendra Nath Sen

(1960) F.A. No. 121 of 1957, D/- 11-10-1960 (Madh Pra), Beniprasad Dixit v. Krishna Murari

(1959) AIR 1959 Madh Pra 102 (V 46)

=ILR (1958) Madh Pra 570, Shivramprasad v. Gokulprasad Parmeshwar Dayal

(1956) AIR 1956 Nag 245 (V 43)=

ILR (1956) Nag 871, Jayantilal v. Surendra

(1947) AIR 1947 Nag 193 (V 34)=

ILR (1947) Nag 60, Bhalchandra v. Mahadeo

(1940) AIR 1940 Nag 386 (V 27)=

ILR (1940) Nag 659, Keshavlal Ramdaival v. Laxmanrao

(1929) AIR 1929 Nag 30 (2) (V 16)=

24 Nag LR 189 (FB), Abas Ali v. Kodhusao

(1926) AIR 1926 PC 1 (V 13)=24

All LJ 248, Chhuranjit Singh v. Bar Swarup

(1916) AIR 1916 Nag 104 (V 3)=12

Nag LR 177, Ballabhdas v. Paikaji

(1902) ILR 29 Cal 167=29 Ind App

51 (PC), Gbulam Jilani v. Mobd. Hussain

(1863) 33 Beav 213=55 ER 349, In re Tidswell

B. L. Seth, for Appellants; P. R. Naolekar (for No. 1) and N. K. Patel (for No. 2), for Respondents.

A. P. SEN, J.:— This is an appeal by the plaintiffs from a decision of the IV. Additional District Judge, Jabalpur, dated 16th February 1968, arising out of proceedings instituted by them under Section 30 of the Arbitration Act, for the setting aside of an award.

2. The relevant facts leading to the appeal are these. By an agreement dated 31st March 1965, the plaintiffs had covenanted to purchase from the defendant, his five storeyed building which was under construction at Napier Town, Jabalpur, for a sum of Rs. 1,55,101/- and in pursuance thereof, paid Rs. 10,101/- as part of the price. It stipulated that the defendant was to execute a sale deed within 4 months from the date of agreement, during which he was also to complete the construction work then in progress, e.g., installation of electricity for pumping of water to the upper floors, affixing of fittings and fixtures, distempering of walls and polishing of floors, etc. The transaction of sale was, however, never completed and disputes arose between the parties, each complaining of the other of breach while signifying his own willingness to fulfil his part of the contract. Eventually, the parties appear to have abandoned the contract, and having done so, referred their dispute to the sole arbitration of one Seth Ramkumar, by their agreement in writing dated 31st July 1965. The reference to arbitration required the arbitrator to determine two questions: firstly, which of the parties had committed a breach of the contract, and, secondly, what were the damages payable to the injured party by the party responsible for the breach.

3. By an award dated 30th November 1965, the arbitrator found the plaintiffs to be guilty of the breach complained of and has accordingly directed the forfeiture of the amount of Rs. 10,101/- paid by them, treating the same as earnest money. The arbitrator, however, directed that if the plaintiffs were so inclined, they could still have a conveyance of the property, on payment by them of the balance amount of Rs. 1,45,000/- within 2 months of the date of his award. The plaintiffs apparently did not want any specific performance of the contract and only wanted their money back and, therefore, applied for setting aside of the award under Section 30 of the Arbitration Act.

The learned Judge has only set aside that part of the award by which the arbitrator had provided for a completion of the sale, upon payment of the balance of the price, on the ground that such a direction was beyond the terms of reference and hence illegal. As to the rest, he was of the view that the award of the arbitrator holding that the plaintiffs were in breach and, therefore, the amount of Rs. 10,101/- deposited by them was liable to be forfeited, was binding on the parties and could not be set aside for the reason that there were no grounds made out for its being set aside under Section 30 of the Arbitration Act.

4. The respondent has raised a preliminary objection as regards the maintainability of the appeal. The argument of Shri P. R. Naolekar, learned counsel proceeds on these lines. It is argued that there were two separate orders—one refusing to set aside the award, and the other making it a rule of the Court and, therefore, appeals should have been filed against both the orders. The decisions in *Shivramprasad v. Gokulprasad Parmeshwardayal*, ILR (1958) Madh Pra 570= (AIR 1959 Madh Pra 102) and *Beniprasad Dixit v. Krishna Murari*, F.A. No. 121 of 1957, D/- 11-10-1960 (Madh Pra) are said to be distinguishable because they concerned a composite order. It is also urged that the decree not being in conformity with the award, an appeal lay under Section 17 of the Arbitration Act; and, that the order refusing to set aside the award had merged in the decree and since there was no appeal filed against the decree, the appeal against the order refusing to set aside the award under Section 30 was not appealable under Section 39(1)(vi) of the Act. These contentions are wholly unfounded and cannot be accepted.

5. After the Privy Council decision in *Ghulam Jilani v. Mohd. Hussain*, (1902) ILR 29 Cal 167 (PC), it can no longer be contended that an appeal lies against a decree in accordance with the award. In delivering their Lordships' judgment, Lord Macnaghten stated:

"They would be doing violence to the plain language of the Section and the obvious intention of the Code, if they were to hold that an appeal lies from a decree pronounced under it, except in so far as the decree may be in excess or not in accordance with the award."

All the Courts in India apart from the Calcutta High Court have uniformly taken the view that no appeal is competent against a decree based even on an invalid award. This follows from the language of Section 17 which admits of no other construction. The principle is so well settled that we feel that no elaborate discussion on our part is needed. Suffice it

to say that in so far as this Court is concerned, the settled view is that in the case of a composite order, by which a Court refuses to set aside an award and also passes a decree in accordance with its terms, the order refusing to set aside the award and the decree are both appealable as the provisions contained in Sections 17 and 39 are not mutually exclusive. Therefore, the fact that a decree has been passed does not preclude an appeal against the order refusing to set aside the award. If the order is set aside, the decree which is founded on it would lapse and consequently it cannot operate as a bar to the appeal against the order (See, *Keshavlal Ramdayal v. Laxmanrao*, ILR (1940) Nag 659= (AIR 1940 Nag 386); *Jayantilal v. Surendra*, AIR 1956 Nag 245 and ILR (1958) Madh Pra 570= (AIR 1959 Madh Pra 102). A fortiori the making of two separate orders does not, in our opinion, take away the right of appeal given under Section 39(1)(vi) to a person aggrieved by an order setting aside or refusing to set aside an award.

6. We fail to appreciate the necessity for the plaintiffs to have filed an appeal against the decree under Section 17 of the Arbitration Act. It is true that the decree in so far as it struck down that part of the award allowing them a right of a specific performance was not in conformity with the award. But the plaintiffs are not aggrieved thereby, for that direction was for their benefit. They have not availed of that direction because they do not want to specifically enforce their rights under the contract. Their grievance only lies against the order which refuses to set aside the award in so far as it directs a forfeiture of the amount of Rs. 10,101/- deposited by them. Now, the scope of an appeal under Section 17 of the Act is restricted by the terms of the section. If the plaintiffs were to file an appeal against the decree, their attack on the judgment and decree would necessarily be confined to the question whether it was in excess or not in accordance with the award F.A. No. 121 of 1957, D/- 11-10-1960 (Madh Pra). In that case this Court ruled that where there are two distinct orders, as here, independent of each other, the appellant would be precluded from challenging the order refusing to set aside the award unless he filed an appeal under Section 39(1)(vi) of the Act. That being so, the appeal against the impugned order is competent even though it was followed by a decree and the preliminary objection must, therefore, stand rejected.

7. We are inclined to think that the learned Judge has perhaps erred in not setting aside the award which was bad on the face of it. The arbitrator had made an award from which it is quite clear that he based his decision entirely

upon the use of the term 'byana' in the agreement of reference. The parties had not by that agreement, referred to the arbitrator any dispute as regards the nature of the deposit of Rs. 10,101/- for adjudication. Nor had they empowered him to determine whether the said amount was liable to be forfeited in the event the plaintiffs were found to have committed a breach. In directing a forfeiture of the amount, the arbitrator has clearly acted beyond the terms of reference.

8. Apart from this, the decision of the arbitrator that the payment of Rs. 10,101/- was by way of earnest money cannot be supported on the terms of the contract of sale. The relevant condition is contained in clause 4 thereof, which reads:

"4. Consideration for the sale agreed upon i.e., Rs. 1,55,101/-. Out of this consideration, the vendor has received this day the sum of Rs. 10,101/-. This is by way of part price. The balance of the price Rs. 1,45,000/- will be payable on the date of execution of the sale deed before the Sub-Registrar."

There was no stipulation anywhere in the contract that due to a nonfulfilment by the plaintiffs of their part of the contract, the amount of Rs. 10,101/- would be liable to be forfeited. The assumption of the arbitrator that there was such a liability on his finding that they had committed a breach of the contract, was clearly an error apparent on the face of the award, and this alone was a ground for setting aside the award or for remitting it to the arbitrator.

9. The essential characteristics of earnest money are well known. Earnest money, although taken as part payment of the consideration, is also a guarantee for the due performance of the contract. As their Lordships of the Privy Council had stated in *Chiranjit Singh v. Har Swarup*: AIR 1926 PC 1—

"Earnest money is part of the purchase price when the transaction goes forward. It is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

In view of this, it is unnecessary for us to deal with this any further. So far as this Court is concerned, the view has throughout been that there is a distinction between earnest money and part of the purchase price (See, *Ballabhdas v. Palkaji*, 12 Nag LR 177=(AIR 1916 Nag 104); *Abbas Ali v. Kodhusao*, 24 Nag LR 189=(AIR 1929 Nag 30 (2)) (FB); *Balachandra v. Mahadeo*, ILR (1947) Nag 60=(AIR 1947 Nag 193) and *Chunnilal v. Mohanlal*, AIR 1964 Madh Pra 126). The decision of their Lordships of the Supreme Court in *Fateh Chand v. Balkishan Dass*, AIR 1963 SC 1405 does not lay down any different principle.

10. The learned counsel for the respondent argued before us that it was for the arbitrator to determine which party was in breach, and once he came to the conclusion that the plaintiffs had committed a breach of the contract, it was open to him to direct a forfeiture of the amount of Rs. 10,101/- deposited by them towards fulfilment of the contract, a sum which both the parties had not only in the agreement for reference but in all their statements subsequently filed, throughout referred to as 'byana'. In other words, the contention is that it had been accepted by the parties that it was so, and the award cannot be upset because the arbitrator has merely directed what, according to the learned counsel, was only a legal consequence that arose from the plaintiffs' breach of the contract. Reliance is placed upon *Rustomji v. Mamul*, 1963 MPLJ 284 = (AIR 1964 Madh Pra 15); *Smt. Santa Sila Devi v. Dharendra Nath Sen*, (1964) 3 SCR 410=(AIR 1963 SC 1677); *Jivarajbhai v. Chintamanrao*, (1964) 5 SCR 480=(AIR 1965 SC 214); *Radha Wallabh v. Gopaldas*, 1965 MP LJ 492; *Bungo Steel Furniture v. Union of India*, (1967) 1 SCR 633=(AIR 1967 SC 378) and *Firm Madanlal Roshanlal v. Hukumchand Mills*, (1967) 1 SCR 105=(AIR 1967 SC 1030). for the submission that, when the parties have chosen their own arbitrator to be the judge in the disputes between them, they must accept the award as final for good or bad, and a mere error in decision on the part of the arbitrator or his failure to give reasons for his decision is no ground for setting it aside. The presumption is, that the arbitrator intended to dispose finally all the matters in difference; and the award should be held final, as it is by intent made to be so.

11. There can hardly be any quarrel with these principles which are firmly established, but there is difficulty in applying them to the facts of the present case. The question whether the deposit of Rs. 10,101/- was a part of the price or was in reality by way of earnest money depends upon the proper construction of the contract and not as to how the parties may have subsequently chosen to describe it. Their intention had to be gathered from the relevant term in regard to it, and not on their subsequent conduct. Having regard to Clause 4 of the contract, the deposit of Rs. 10,101/- made by the plaintiffs was nothing but a part of the price. Nor had they intended that the amount was liable to be forfeited, in the event of a breach, as a penalty. We are aware that parties not infrequently assess the damages at which they rate a breach of contract by one or both of them, and introduce their assessment into the terms of the contract. In this particular case, the parties had originally inserted a clause for payment of Rs. 10,101/-

as liquidated damages by the party in breach; but that clause was struck out at the time of execution of the contract. Instead, the following clause now finds embodied therein:—

"7. Both parties will pay the damage to each other if they fail to fulfil the conditions."

The term was nothing but a provision for payment of damages to the injured party for the loss that he suffers on account of a breach of contract, which arise 'naturally, according to the usual course for things', from the breach. What were the reasonable damages resulting from the breach of the contract had, nevertheless, to be ascertained and determined by the arbitrator and this he has failed to decide. We would agree with the learned counsel that if the arbitrator had stated that Rs. 10,101/- were, in his view, the amount of damages payable by the plaintiffs, the entire controversy would have rested with such adjudication, on the authorities relied upon by him, and the Court in that event would not have any jurisdiction to interfere with the award. But, unfortunately for the defendant, that is not the case here.

12. The Court has a general discretion to remit an award for the reconsideration of the arbitrator. This discretion is in general exercisable upon substantially the same grounds as will justify the setting aside of an award (Russel on Arbitration, 17th Ed., p. 308). Looking to the facts of this particular case, we do not think it either just or proper to make any such direction. The learned counsel for the appellants fears that the arbitrator might be prejudiced against the plaintiffs applying for remission and that no useful purpose would be served in remitting the award to him when there is only one conclusion to which he could come, namely, that they were in breach. That being so, it would be more proper that the award should be set aside. Clearly there is no point in remitting the award when one of the parties is apprehensive that the arbitrator might not approach the question with a fresh mind.

13. In Russel on Arbitration, 17th Ed., p. 311, after stating that in exercising its discretion as to whether to set aside or remit an award, the Court should have regard to the circumstances of the particular case, it is observed that where the arbitrator might be prejudiced against the party applying for remission, the discretion to setting aside should in preference be to remit it. In illustrating the point the learned author relies upon the dictum of Romilly, M. R. in *Re Tidswell*, (1863) 33 Beav 213 to the following effect:

"The objection is, in my opinion, one which would make it inexpedient to remit the award; because, notwithstanding the

perfect honesty and bona fides of an arbitrator, it is impossible, where an award has been set aside and sent back upon such grounds, that there should not be, in spite of himself, some disposition to favour one side and a disposition to make it appear that the objections to the award were useless and that the sending it back was productive of no good."

We would on this principle, think it advisable to set aside the award as a whole rather than remit it inasmuch as, in our view, the bad portion of the award is inseverable from the rest of it. In the circumstances, the award which is bad in toto must be avoided altogether and we, accordingly, set it aside, leaving the parties to their own remedy by way of suit.

14. For all these reasons, the appeal succeeds and is allowed with costs. The order passed by the learned Judge, dismissing the application under Section 30 of the Arbitration Act, is set aside and instead, the same is allowed, setting aside the award of the arbitrator dated 30th November 1965. Counsel's fee as per Schedule or Certificate, whichever is less.

Appeal allowed.

AIR 1970 MADHYA PRADESH 123 (V 57 C 26)

P. K. TARE AND S. P. BHARGAVA JJ.

State of Madhya Pradesh, Appellant v. Shri Tulsiram, Respondent.

Criminal Appeals Nos. 610 and 683 of 1966, D/ 18-11-1969, from order of Magistrate 1st Class, Waraseoni, D/- 1-7-1966.

(A) Prevention of Food Adulteration Act (1954), S. 13(2) — Delay in launching prosecution — Evidentiary value of certificate of Public Analyst not reduced — Accused however is prejudiced. AIR 1965 Madh Pra 180 held, partly overruled by AIR 1967 SC 970.

Where there is long delay in launching the prosecution there is denial of the valuable right given under S. 13(2) to the vendor to have the sample given to him analysed by the Director of Central Food Laboratory. The vendor in his trial, is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst, even though that report continues to be evidence in the case of the facts contained therein. AIR 1967 SC 970, Rel. on; AIR 1965 Madh Pra 180, held partly overruled. (Para 9)

(B) Prevention of Food Adulteration, Rules, 1955, R. 20 — Failure to add preservative in prescribed quantity — Conviction of accused can be challenged.

BN/BN/A539/70/GGM/C

Where the analysis by the Public Analyst is inordinately delayed and the launching of the prosecution also is inordinately delayed, prejudice to the accused being obvious, conviction cannot be based on the report of the Public Analyst. Where, however, the analysis by the Public Analyst is not inordinately delayed and the preservatives are added in the prescribed quantity, the mere fact of some delay in launching the prosecution will not entitle the accused to claim an acquittal and the report of the Public Analyst can form the basis of conviction. Where report of the Public Analyst is not unduly delayed, but there is an infirmity in the prosecution case by failure to add the prescribed quantity of preservatives to the samples, prejudice to the accused being obvious, no conviction can be based on the report of the Public Analyst. The same result will follow if in addition to insufficiency of preservatives, the analysis by the Public Analyst is inordinately delayed. *Cri. Appeal No. 495 of 1961, D/- 3-10-1966 (Madh Pra) affirming 1966 MP LJ 638, Foll. Cri. Revn. No. 431 of 1966, D/- 30-9-1969 (Madh Pra) & Cri. Revn. No. 100 of 1967, D/- 8-9-1969 (Madh Pra) & Cri. Revn. No. 591 of 1967, D/- 1-8-1969 (Madh Pra) & Cri. Revn. No. 83 of 1967, D/- 21-8-1969 (Madh Pra) & Cri. Revn. No. 438 of 1967, D/- 24-1-1968 (Madh Pra) & 1967 Cri LJ 1723 (Madh Pra) & Cri. Revn. No. 193 of 1967, D/- 5-12-1967 (Madh Pra) & AIR 1968 Guj 88 & AIR 1969 Pat 155, Referred to.*

(Para 29)

Cases Referred: Chronological Paras

- (1969) *Cri. Revn. No. 431 of 1966, D/- 30-9-1969 (Madh Pra), Ataul Haque v. State of M.P.* 14
- (1969) *Cri. Revn. No. 100 of 1967, D/- 8-9-1969 (Madh Pra), Ramsajeewan v. Commr., City of Jabalpur Corporation* 15, 16, 17
- (1969) *Cri. Revn. No. 83 of 1967, D/- 29-8-1969 (Madh Pra), Phagu v. State of M.P.* 16
- (1969) *Cri. App. No. 311 of 1966, D/- 25-8-1969 (Madh Pra) (FB), Municipal Committee, Khandwa v. Ganpat* 18
- (1969) *Cri. Revn. No. 591 of 1967, D/- 1-8-1969 (Madh Pra), Mathura v. State of M.P.* 17
- (1969) *AIR 1969 Pat 155 (V 56)= 1969 Cri LJ 638, Chairman, Jugsalai Notified Area Committee v. Mukham Sharma* 22
- (1968) *AIR 1968 Guj 88 (V 55)= 1968 Cri LJ 746, Manka Hari v. State of Gujarat* 21, 23
- (1968) *Cri. Revn. No. 438 of 1967, D/- 24-1-1968 (Madh Pra), Nandlal v. State of M.P.* 28

- (1967) *AIR 1967 SC 970 (V 54)= 1967 Cri LJ 939, Municipal Corporation, Delhi v. Ghisa Ram* 8, 11, 14, 16 to 23, 26, 27
- (1967) *1967 Cri LJ 1723=1967 MP LJ 872, State of M.P. v. Abbasbhai* 18
- (1967) *Cri. Revn. No. 198 of 1967, D/- 5-12-1967 (Madh Pra), Fateh Mohammad v. Municipal Corporation, Jabalpur* 19
- (1966) *1966 MP LJ 638, Ramdayal v. State of M.P.* 12, 13
- (1966) *Cri. Appeal No. 495 of 1964, D/- 3-10-1966 (Madh Pra), Municipal Council, Multai v. Juggan* 13
- (1965) *AIR 1965 Madh Pra 180 (V 52)=1965 (2) Cri LJ 220, Municipal Corporation, Gwalior v. Kishan Swaroop* 8, 11, 16, 19, 21
- M. V. Tamaskar, Dy. Govt. Advocate, for the State; R. P. Chopra, for Respondent.

TARE, J.— This judgment shall also govern the disposal of Criminal Appeal No. 683 of 1966 (The State of M.P. v. Kishanaji s/o Bapu). These appeals arise out of different cases unconnected with each other. But, as we happened to hear them on the same day and as they involved the same question of law, we thought it necessary to dispose them of by a common judgment. The only common thing in both the cases is that the same Food Inspector, Shri R. P. Shrivastava, had taken the samples of milk from the respective respondents on 28-5-1965 at village Manpur, where the respondents had gone to sell the milk. However, we propose to deal with the facts of each case separately.

2. The Food Inspector, Shri R. P. Shrivastava, (P.W. 1) had taken the sample of milk from Tulsiram on 28-5-1965. All formalities had been done by the Food Inspector and he put one drop of formalin for each ounce of milk in the bottles which were duly sealed in the presence of attesting witnesses. One sample bottle was sent to the Public Analyst on 28-5-1965. It is not known as to when the Public Analyst received the sample. However, he issued a report, dated 11-6-1965 (Ex. P/7), wherein he observed that milk fat was 4%, while non-fat solids were 7%. Further, he opined that the milk was adulterated indicating the presence of 22% of added water. He also stated that no change had taken place in the constitution of the sample that would interfere with the analysis. The report was actually sent by him on 11-6-1965. The Public Analyst might have conducted the test at the latest on 11-6-1965 or some time earlier, which means after 15 days of the samples being taken.

3. Thereafter, on 14-8-1965, the Food Inspector filed a complaint against Tulsiram.

ram and the respondent actually appeared on 11-9-1965. It appears that he was served on the same day and it was on that date, namely, 11-9-1965, that he could have an opportunity of making a demand for sending any of the remaining sample bottles to the Director of Central Food Laboratory for examination so as to challenge the report of the Public Analyst.

4. This case was registered as Criminal Case No. 163 of 1965 of the Court of the Magistrate, 1st Class, Waraseoni, who acquitted Tulsiram, mainly on three grounds:—

(i) That, there was delay in examination of the sample bottle by the Public Analyst;

(ii) That, there was delay in launching the prosecution, as a result of which the accused was prejudiced and he could not exercise his right as conferred by S. 13(2) of the Prevention of Food Adulteration Act, 1954;

(iii) That, as formalin had not been added upto the prescribed quantity, namely, 2 drops per ounce, the value of the report of the Public Analyst was diminished and it could not be asserted by the prosecution that the contents of the sample bottles might not have undergone some change.

5. The same Food Inspector, Shri R. P. Shrivastava, had taken the sample milk from the respondent, Kishnaji, in the connected appeal on 26-5-1965. The bottles were duly sealed after complying with all formalities. A sample bottle was despatched to the Public Analyst by the Food Inspector on 30-5-1965. The Public Analyst, as per the report, Ex. P/7, dated 11-6-1965, found that the milk fat was 4% and non-fat solids were 6.5%. The Public Analyst opined that the milk did not conform to the prescribed standard for buffalo milk and it indicated the presence of 27% of added water. A challan against Kishnaji was filed on 4-8-1965. On 7-9-1965, the accused was absent as he could not be served for want of correct address. However, the correct address was furnished and the respondent, Kishnaji, appeared in Court on 8-10-1965. That was the earliest time when Kishnaji could exercise his right under Section 13(2) of the Prevention of Food Adulteration Act, 1954. This case was registered as Criminal Case No. 157 of 1965 of the Court of the Magistrate, 1st Class, Waraseoni, and as per the judgment, dated 2-8-1966, the Magistrate acquitted the respondent on the same grounds as in the case against Tulsiram. As such, both the cases involve identical questions.

6. First, we propose to take up the question of delay in testing of the sample by the Public Analyst. In this connection, we may observe that in some types of cases where preservatives may not be

added, the delay of about a fortnight in conducting such test might prove fatal. But, where preservatives are added, it cannot be asserted by the defence that a delay of 14 or 15 days would be fatal to the prosecution case. We propose to deal with this aspect in some details a little later. But suffice it to say that although in some cases, it might have been held that a delay of a fortnight or so might prove fatal, we do not think that it would be a correct view, especially where preservatives are added to the samples. But, we do not think that the so-called delay of a fortnight in the present two cases would be fatal to the prosecution case and we negative the contention of the learned counsel for the respective respondent in each case.

7. However, in our opinion, the second delay in launching the prosecution will have a material bearing and it is an important question of law, as we find differing and conflicting views expressed on that aspect of the case, especially in this High Court itself. For that reason, we propose to discuss this question in details.

8. In *Municipal Corporation, Gwalior v. Kishan Swaroop*, AIR 1965 Madh Pra 180, to which both of us happened to be parties, we had discussed this question, wherein we had observed that the right conferred by Section 13(2) of the Prevention of Food Adulteration Act, 1954, could be exercised only after a prosecution was launched and if there was undue delay in launching the prosecution, the accused could not exercise his right as conferred by Section 13(2) of the Act by having the remaining sample bottle or bottles examined by the Director of Central Food Laboratory so as to challenge the certificate of the Public Analyst. We had also observed that on account of that fact, the evidentiary value of the certificate of the Public Analyst might be reduced. But, however, their Lordships of the Supreme Court in *Municipal Corporation of Delhi v. Ghisa Ram*, AIR 1967 SC 970 held that the evidentiary value of the certificate of the Public Analyst would not be reduced and it would continue to have the same evidentiary value. But, according to their Lordships, it may be the question of prejudice to the accused on account of the delay in launching the prosecution that might be the relevant consideration in such cases. We may usefully reproduce the observations of their Lordships to the following effect:

"It appears to us that when a valuable right is conferred by Section 13(2) of the Act on the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that that right will not be denied to him. The right is a valuable one, because the certificate of

the Director supersedes the report of the Public Analyst and is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that, for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as conclusive evidence. In a case where there is denial of this right on account of the deliberate conduct of the prosecution, we think that the vendor, in his trial, is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst, even though that report continues to be evidence in the case of the facts contained therein.

We are not to be understood as laying down that, in every case where the right of the vendor to have his sample tested by the Director of Central Food Laboratory is frustrated, the vendor cannot be convicted on the basis of the report of the Public Analyst. We consider that the principle must, however, be applied to cases where the conduct of the prosecution has resulted in the denial to the vendor of any opportunity to exercise this right. Different considerations may arise if the right gets frustrated for reasons for which the prosecution is not responsible."

9. Thus, their Lordships have clearly laid down that if prejudice to an accused could be inferred on account of the long delay in launching of the prosecution on account of the fault of the prosecution itself, whereby the accused is deprived of his valuable right of challenging the report of the Public Analyst, as conferred by Section 13(2) of the Act the conviction cannot be sustained on account of such prejudice, although the report of the Public Analyst would continue to be good evidence.

Therefore, It will have to be decided with reference to the facts of each case whether any prejudice has been caused to an accused on account of such delay. Of course, the Court can always rely on the report of the Public Analyst which continues to be good evidence. We may envisage three kinds of cases in order to ascertain whether the delay in launching of the prosecution would prejudice an accused in his trial:

(i) where there is undue delay in the sample being examined by the Public Analyst and there is also delay in launching prosecution so that the right of the accused conferred by Section 13(2) of the Act is rendered nugatory;

(ii) (a) Where there is no delay in examination of the sample by the Public Analyst, but there is undue delay in launching the prosecution so as to deprive

the accused of his right under Sec. 13(2) of the Act, but where adequate precautions are taken by adding of preservatives or by keeping the samples in a refrigerator;

(b) Where there is no delay in examination of the sample by the Public Analyst and adequate precautions are taken by adding of preservatives and by keeping the samples in refrigerator, but there is inordinate delay in launching the prosecution, with the result that the right of the accused to have the sample tested by the Director of Central Food Laboratory, stands defeated and any demand by him in that behalf would be rendered meaningless;

(iii) Whereas in the present two cases, the samples were examined by the Public Analyst without any undue delay, but there was undue delay in launching of the prosecution, coupled with the fact that preservatives were not added by the Food Inspector according to the prescribed quantity, as prescribed by Rule 20 of the Rules framed under the Prevention of Food Adulteration Rules, 1955.

It is to be noted that in the present cases, the Food Inspector had put one drop of formalin per ounce instead of the prescribed quantity of two drops per ounce.

10. As regards the question of not adding of preservatives in the prescribed quantity is concerned, the matter has been referred to a Full Bench of this Court in Municipal Committee, Khandwa v. Ganpat, Criminal Appeal No. 311 of 1966, D/- 25-8-1969 (Madh Pra). It was suggested by the learned counsel for the respondents that this case be adjourned till the decision of the Full Bench case. We might have been required to follow that course if the decision of the present case had depended on the sole question of effect due to insufficient addition of preservatives. However, we do not propose to decide the case on this basis only and, therefore, in our opinion, it is not necessary to await the decision of the Full Bench. We are mainly concerned with the delay in launching the prosecution which might cause prejudice to an accused.

11. Further, we may observe that the view as expressed by a Division Bench of this Court in AIR 1965 Madh Pra 180 (supra) was affirmed by their Lordships of the Supreme Court in AIR 1967 SC 970 (supra), so far as the question of prejudice being caused to an accused on account of the delay in launching the prosecution is concerned. But, what their Lordships did not approve of was the remark of this Court to the effect that, on account of the delay in launching the prosecution, the evidentiary value of the report of the Public Analyst would be diminished. According to their Lordships, the report of the Public Analyst

would continue to be good evidence unless it be superseded by the report of the Director of Central Food Laboratory. Their Lordships laid down that it is the question of prejudice to the accused that would be material in such cases. Therefore, it may be necessary to examine as to in what manner or under what circumstances prejudice to the accused, if any, will prove fatal to the prosecution case. On this aspect, there has been some difference of opinion in this Court.

12. In *Ramdayal v. State of M.P.*, 1966 MPLJ 638, Naik J. observed that where formalin was not added to the samples in the prescribed quantity, the conviction of the accused could not be challenged on that ground alone. In that case, the Public Analyst had been examined as a witness and his evidence did not disclose that non-mixing of formalin in the prescribed quantity affected the suitability of the sample for analysis. In that view of the matter, the conviction of the accused was upheld. However, that question being for consideration before the Full Bench, we would decline to express any opinion, but would leave the matter for consideration of the Full Bench.

13. In *Municipal Council, Multai v. Juggan*, Criminal Appeal No. 495 of 1964, D/- 3-10-1966 (Madh Pra), a Division Bench case of this Court presided over by Golvalkar and Surajbhan JJ., the view of Naik J. as expressed in 1966 MP LJ 638 (supra) was affirmed by holding that mere non-adding of preservatives in the prescribed quantity would not entitle an accused to acquittal on the ground that the report of the Public Analyst should be excluded from consideration altogether.

14. We may, further, refer to some Single Bench cases of this Court, wherein contrary views were expressed. In *Ataul Haque v. The State of M.P.*, Criminal Revn. No. 431 of 1966, D/- 30-9-1969 (Madh Pra), G. P. Singh, J. had to consider the question on the following facts: The Food Inspector had taken the samples on 19-10-1963. Each sample bottle contained 250 grams of milk. Sixteen drops of formalin were added. The report of the Public Analyst was made on 8-11-1963; while the prosecution was launched on 25-3-1965. No application was filed by the accused for exercising his right of having one of the remaining bottles examined by the Director of Central Food Laboratory under Section 13(2) of the Prevention of Food Adulteration Act, 1954. The counsel for the accused contended before the Single Bench that the prescribed quantity of formalin according to Rule 20 of the Prevention of Food Adulteration Rules, 1955, would be 20 drops and as such, 16 drops would be insufficient and, therefore, an inference should be drawn that the contents of the

sample bottles sent to the Public Analyst must have deteriorated. The learned Judge negatived that contention and held that no question had been put on behalf of the accused so as to get the matter clarified. It was also argued before the learned Judge that there being undue delay in launching the prosecution, the accused was deprived of his right to have the sample analysed by the Director of Central Food Laboratory, as per Sec. 13(2) of the Act. The learned Judge negatived that contention by relying on the Supreme Court case of AIR 1967 SC 970 (supra). The learned Judge held that there was nothing to show that the other sample bottles had become unfit for analysis at the time when the prosecution was instituted. In that view, the conviction of the accused was upheld.

15. In *Ramsajeewan v. Commr., City of Jabalpur Corporation*, Criminal Revn. No. 100 of 1967, D/- 8-9-1969 (Madh Pra), Bhawe J. had to deal with a case where the challan was filed after 8 months of the sample being taken. It is to be noted that the sample had been taken on 28-7-1964 and it had been analysed by the Public Analyst on the same day. But, however, the challan was filed on 22-3-1965, after about 8 months. Bhawe J. held that the report of the Public Analyst was good evidence and there would be no question of the contents of the sample deteriorating as the analysis has been done on the same day. Moreover, at the trial, the accused never demanded that one of the remaining sample bottles be got analysed by the Director of Central Food Laboratory. We may observe that in the case before Bhawe J., it might be argued in favour of the view expressed by the learned Judge that the question about the accused exercising his right under Section 13 (2) of the Act would be more or less of an academic nature, and if there be no circumstances so as to cause doubt on the report of the Public Analyst, it might be immaterial if the launching of the prosecution is delayed. On the other hand, there may be cases where there may be some infirmities in this behalf and it is only in those cases that the question of prejudice to an accused on account of the delay in launching the prosecution would become material.

16. We may next refer to another case decided by Bhawe, J. namely, *Phagu v. State of M. P.*, Criminal Revn No. 83 of 1967, D/- 29-8-1969 (Madh Pra). In that case, the samples were taken on 26-4-1964 and the analysis was conducted by the Public Analyst on the next day, i.e. 27-4-1964. The prosecution was launched on 18-8-1964 while the accused had received the summons sometime before 22-9-1964. The argument was advanced that as the prosecution was in-

ordinately delayed, the valuable right of the accused to get this sample tested by the Director of Central Food Laboratory was defeated and, therefore, no reliance could be placed on the report of the Public Analyst. The Division Bench case of this Court, namely, AIR 1955 Madh Pra 180 (Supra) was cited before the learned Single Judge, who relying on the Supreme Court case of AIR 1957 SC 970 (Supra) held that mere delay per se in launching the prosecution would not be sufficient to bold that the report of the Public Analyst could not be relied on. We may observe that Phagu's case, Criminal Revn. No. 63 of 1967, D/- 29-8-1969 (Madh Pra) (Supra) was more or less akin to the case of Cri. Revn. No. 100 of 1967, D/- 8-9-1969 (Madh Pra) (Supra) decided by the same learned Judge and in this case also, the question of delay in launching the prosecution might be said to be more or less of an academic nature. In fact, the samples had been analysed by the Public Analyst on the next day of the same being taken.

17. In Mathura v. State of M. P., Criminal Revn. No. 591 of 1967, D/- 1-8-1969 (Madh Pra) by Surajbhan J., the Food Inspector had taken the samples on 1-10-1965. The report of the Public Analyst was made on 19-10-1965. Formalin had been added in the prescribed quantity. The complaint, though dated 13-1-1966, was actually filed on 4-2-1966, i.e. after four months subsequent to the samples being taken. A grievance was made that the valuable right of the accused as conferred by Section 13 (2) of the Act was defeated. That contention was negatived by relying on the Supreme Court case of AIR 1967 SC 970 (Supra). We may observe that the question of delay in launching the prosecution might in the said case be said to be more or less of an academic nature, as was the situation in the two cases of Ramsajeevan, Cri. Revn. No. 100 of 1967, D/- 8-9-1969 (Madh Pra) and Fagu, Cri. Revn. No. 83 of 1967, D/- 29-8-1969 (Madh Pra) (Supra) before Bhaye, J. and it was for that reason that Surajbhan, J. held that the question of delay did not affect the evidentiary value of the report of the Public Analyst.

18. We may refer to another type of case decided by B. K. Choudhury J., namely, Nandlal v. State of M. P., Cri. Revn. No. 438 of 1967, D/- 24-1-1968 (Madh Pra). In that case, the Food Inspector had taken the samples on 10-5-1965. From the order in the case it is not known as to on what date the Public Analyst had analysed the contents. However, it is mentioned that the complaint was filed on 10-6-1966, i.e., after about 13 months of the samples being taken. The counsel for the accused made a grievance by relying on the case of State of M. P. v. Abbasbhai, 1967 MPLJ 872 = (1967 Cri LJ 1723)

that the report of the Public Analyst could not be used, as there was non-compliance with the provisions of Rr. 7 and 6 of the Prevention of Food Adulteration Rules, 1955. That contention was negatived by the learned Judge by relying on the Supreme Court case of AIR 1967 SC 970 (Supra). The order does not disclose whether there was any infirmity and whether the report of the Public Analyst could be challenged on any valid ground.

19. We may next refer to another case decided by Naik, J., namely, Fateh Mohammad v. Municipal Corporation, Jabalpur, Cri. Revn. No. 196 of 1967, D/- 5-12-1967 (Madh Pra). In that case, the Food Inspector had taken the samples on 1-2-1965. The Public Analyst had analysed the contents on that very day. The complaint was filed sometime in November, 1965 and the accused appeared in Court on 16-12-1965. As such, the prosecution was launched almost after 9 months of the samples being taken. A grievance was made that there had been inordinate delay in launching the prosecution so that the accused was deprived of his right conferred by Section 13 (2) of the Act. The Division Bench case of this Court, namely, AIR 1965 Madh Pra 160 (Supra) as also the Supreme Court case of AIR 1967 SC 970 (Supra) were cited before Naik, J. He, however, held that on account of inordinate delay in launching the prosecution, prejudice had been caused to the accused and in that view of the matter, the conviction was set aside. We may observe that the Public Analyst had analysed the samples on the same day and the question of prejudice to the accused could be said to be more or less of an academic nature. Their Lordships of the Supreme Court in AIR 1967 SC 970 (Supra) have clearly laid down, as is clear from the observations of their Lordships reproduced by us above that mere delay in launching the prosecution by itself cannot be fatal, but it becomes material where prejudice to the accused is caused in his defence. Such prejudice may be caused under different circumstances and on account of different reasons. It is not possible to enumerate them all, but by way of illustration, we have taken into consideration the three distinct types of cases, as stated by us earlier.

Thus, the ratio decidendi of the Supreme Court case AIR 1967 SC 970 (Supra) is that conviction cannot be maintained where prejudice is caused to the accused, but where no such prejudice may be inferable, the conviction can, as well, be based on the unchallenged report of the Public Analyst. Their Lordships of the Supreme Court have also observed that difficulties would arise in a case where the accused makes a demand for exercise of the right under Section 13 (2) of the Act and that right stands defeated on account

16. This brings us to a consideration of C.M.P. Nos. 14419 and 14420 of 1967. No doubt, the affidavits therein contemplate a cancellation of the winding up order, but we are prepared to treat them as applications under Section 466 for a permanent stay of the winding up order. We are not, however, prepared to stay the winding up order permanently or for a limited period, merely on the proposals put forward in these applications. The proposals are that the winding up order should be stayed and the shareholders should be permitted to raise money from third parties, pay off Jaya Jothi and Company and run the mills themselves. No affidavit has been filed from any third party who would be prepared to advance moneys to the shareholders without taking charge of the mills themselves, even if the winding up order is stayed. We shall, however, assume, for the sake of argument, that there are third parties who would be willing to advance moneys to the shareholders if the winding up order is stayed, but obviously the rate of interest they would demand will be 12 per cent or more, probably 18 per cent. We shall not be justified in allowing the shareholders to raise credit on such onerous terms unless we are satisfied that the shareholders will be able to pay off the new creditors, who will be prepared to advance moneys, merely by working the mills. On the materials placed before us so far, there could be no hope of the shareholders running the mills at a profit to the extent of being able to pay the new creditors, who might come in.

Jaya Jothi and Company state that they have themselves been running it at a loss during the last three years, the loss amounting to about rupees seven lakhs. We see no reason to disbelieve that, particularly as their learned counsel Shri G. Ramanujam submits that they are prepared to walk out of the mills, even paying some reasonable compensation for the premature termination on their part of the liability to run the mills and paying the rentals. The market conditions are such that if Jaya Jothi and Company have not been able to run the mills at a profit, the shareholders also cannot run the mills at a profit. Sri Ramamurthi Iyer appearing for the petitioners in C.M.P. Nos. 14419 and 14420 of 1967 tried to get over this by urging that the reason why Jaya Jothi and Company have not been able to make profits recently is that they are anxious to expand. Sri Ramanujam, the learned counsel for Jaya Jothi and Company, denies this, and there is no basis for this allegation. It may be remembered that when the market conditions were more favourable for running the mills in 1957, the mills were not worked properly on behalf of the shareholders. There is no reason to think that they will fare better now, when the market conditions are worse.

17. In spite of these factors we might have been inclined to consider the proposals for a stay of the winding up, further, if the shareholders had themselves come forward with a proposal to meet at least part of the liability of Jaya Jothi and Company, that is, by taking additional shares which have not yet been issued or by advancing moneys as creditors; for instance, if the shareholders come forward to take shares for Rs. 6,00,000 or advance moneys to that extent, it would show their bona fides, because they would then have a real interest in the working of the company. We adjourned the appeal for this purpose, to see whether the shareholders would come forward to advance Rs. 6,00,000 or take shares to that extent. Sri Ramamurthi Iyer has reported that the shareholders are not willing to advance any amount or take share.

18. Sri Ramamurthi Iyer strongly urges that by sanctioning the proposals in C.M.P. Nos. 14419 and 14420 of 1967 as they stand the rights of Jaya Jothi and Company are in no way prejudiced, and asks, for whose benefit the winding up order is to be continued? That is not at all the proper approach in a case of this kind. The Court cannot hand over a commercially insolvent company to the shareholders and let the shareholders loose upon the market, free to raise loans. The Court owes a duty to the public in such a matter. This is the principle which has been laid down in the cases decided so far. The cases have been collected in Buckley's Commentary on the Companies Act of England, under Sec. 256 of the Companies Act, 1948, p. 533 of the 13th Edn., 1957, and in Halsbury's Laws of England, in paragraphs 1397 and 1398, Vol. 6, and in Palmer's Companies Precedent, Part II, Chap. 12. The cases lay down that the considerations which should govern the Court in an application for stay of the winding up order are precisely the considerations which would govern the Court when it is asked to stay a receiving order in bankruptcy. These principles are discussed in some cases.

Thus, in *In re Hester*, (1889) 22 QBD 632, a receiving order was made in bankruptcy. The debtor originally wanted to appeal, but later gave up his intention, and, instead, applied to rescind the receiving order on the ground that the creditors consented to the rescission. Many of them had given receipts in full for their dues, but it was not portended that payment in full had, in fact, been made to them. No meeting of the creditors had been held but the consent had been obtained by means of applications made by the debtor to each creditor individually. The Registrar refused to rescind the receiving order. His order was upheld by Cave, J., and Charles, J. There was a further appeal to the Court of Appeal, and there also the decision of the Registrar was confirmed. It is pointed

out in all the judgments that the consent of the creditors alone will not justify the Court in annulling the adjudication or rescinding the receiving order. Cave, J., observed that it is not right to let a man, who is 'unable to pay his debts in full, loose upon the public to continue his trading without the Court having any right of vote. Lower down he observed that the consent of the creditors was not the only thing to be considered and added:

"The Court must consider the position of the debtor, the possibility of his getting over his difficulties, and the interests of the public. It is clearly contrary to their interests that a man who is insolvent should be allowed to go on trading. In fact, it is an offence under the Act for a trader to continue trading after he knows that he is insolvent."

Lower down he states:

"We should not be doing our duty to the community if we were to sanction the rescission of the receiving order. To my mind, this man is hopelessly insolvent. Without any estimate, even by himself, much less by any competent person, of his present position — his assets and liabilities — he asks us to take for granted that, if he is allowed to go on, he will be able to pay his creditors in full. I am perfectly certain that he will not. He will probably succeed in very much enlarging the area of his indebtedness, but I am pretty certain he will not diminish it."

18-A. In the Court of Appeal, Lord Esher, M.R., stated (p. 639):

"Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to is for the benefit of the creditors as a whole. The Court has gone still further, and, I think rightly so, and has said that under the present Bankruptcy Act it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conclusive or detrimental to commercial morality and to the interests of the public at large; and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger. The Court has said this before, and I adhere to it now."

Fry, L.J., observed (at p. 641):

"We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country."

19. The above decision was followed in *In re Flatau*, (1893) 2 QB 219.

20. In *In re Izod*, (1893) 1 QB 241, the above decisions were explained. It was stated that the above decisions did not mean that the receiving order could be

rescinded only if all the creditors had been paid in full. In that case the creditors themselves felt that it would be more profitable for them to receive immediate cash payment of 10 shillings in the pound than to have the affairs of the debtor wound up in bankruptcy. The debtor's father accordingly paid to all the creditors 10 sh. in the pound and the creditors had released the debtor therefrom. The Official Receiver did not make any objection. The Registrar rescinded the receiving order. The Registrar's order was upheld by two of the learned Judges, Rigby, L.J., differing. It will be noted that in that case the creditors had accepted satisfaction of their debts, and the case is entirely distinguishable.

21. In *In re South Barrule Slate Quarry Co.*, (1869) 8 Eq 688, the winding up order was stayed under a scheme by which the shareholders made further payments, in respect of their shares, which sufficed to pay off the existing debts of the company and there was sufficient money in the hands of the liquidator to meet the current charges. Only one shareholder objected to the scheme. The learned Vice-Chancellor held that one could not stand in the way of wishes of the fellow shareholders and he was given an option to retire from the company upon the company computing the value of his present interest. The case is clearly distinguishable from the present case.

22. In *In re Stephen Walters and Sons*, 1928 WN 236, the Court sanctioned a scheme of arrangement with the creditors and shareholders which involved reduction, reorganisation and increase of the company's capital and stay of the winding up. The facts are not fully stated, and evidently, the facts were such as to satisfy the Court that the winding up order should be stayed.

23. The principles laid down in England were reiterated in the matter of *E. I. Cotton Mills*, AIR 1949 Cal 69.

24. No case has been brought to our notice, and we have not been able to find any, where in a case analogous to the present, the Court stayed the winding up order. On the contrary, the principles laid down in the decided cases forbid us from staying the winding up order either permanently or for a limited period, on the terms actually put forward before us so far. We need not add that even if we dismiss the appeal now, it will not preclude the shareholders from making an application under Section 466 later with a proper proposal. The only difference will be that the application will have to be made to the company Judge, and not to this appellate Court, after the disposal of the appeal.

25. We accordingly dismiss O.S.A. No. 63 of 1959 with liberty to the shareholders to put forward a proper scheme of reconstruction and apply for the staying of the winding up order under Section 466 before

the Company Judge. C.M.P. Nos. 14419 and 14420 of 1967 are dismissed. The petitioners in C.M.P. Nos. 14419 and 14420 of 1967 will bear their own costs. The costs of the appellant in O.S.A. No. 68 of 1959 will come out of the company's funds.

26. A cheque for the costs of the appellant (Rs. 500) (five hundred rupees) may be paid by the Official Liquidator in the name of the counsel for the appellant Sri V. Balasubramanyam.

Order accordingly.

AIR 1970 MADRAS 211 (V 57 C 55)
SPECIAL BENCH

M. ANANTANARAYANAN, C. J.,
RAMAKRISHNAN AND NATESAN, JJ.

J. Chandrasekharan, Petitioner v. G. Rosaline Pushpamoni and another, Respondents.

M. C. No. 12 of 1966, D/- 10-2-1969.

Divorce Act (1869), S. 10 — Pregnancy per alium prior to marriage — Not ground for dissolution of marriage.

The conception or pregnancy of the wife through another person prior to the actual date of marriage is not a ground for dissolution of marriage under Section 10 of the Act. (Para 2)

C. Natarajan and C. N. Sivakumar, for Petitioner; R. Vedantam and R. Janardhana Rao (Amicus curiae), for Respondents.

M. ANANTANARAYANAN, C. J.: This is a reference under Sections 10 and 17 of the Indian Divorce Act by the learned District Judge, South Arcot, for confirmation of the decree declaring the marriage between the parties (the petitioner and the first respondent) to be null and void. In the petition itself, the two grounds upon which dissolution of the marriage was sought under the provisions of the Indian Divorce Act IV of 1869 are set forth in paras 5, 6 and 7. The first ground is the somewhat extraordinary one that the marriage was performed on 26-4-1965 according to Christian rites, that on 4-12-1965 the first respondent gave birth to a female child in the Government Hospital at Ulundurpet, that this child, a fully matured infant was born after about 212 days of the marriage, that the normal period of gestation is 270 days, and that, hence, this child must have been conceived by the wife prior to the marriage. The husband affirmed that he had no sexual relation with the wife prior to the date of the marriage, that he taxed his wife with having conceived through another prior to the marriage, and that the wife confessed that she was previously in illicit relationship with the second respondent, husband of her paternal aunt. Since the wife fraudulently suppressed the fact of pregnancy through another (pregnancy

per alium) prior to the marriage, this is one ground of the dissolution sought for. The other ground is that, even subsequent to the marriage, there was illicit relationship and adultery between the first respondent and the second respondent.

2. Apart from the fact that conception or pregnancy through another prior to the actual date of marriage, is not a ground for dissolution of marriage under Section 10 of Act IV of 1869, when the evidence is scrutinised, it is at once seen that proof of this ground has miserably failed. It is undoubtedly true that the evidence of Dr. Saroja (P. W. 1) proves that on 4-12-1965 at 6-50 A. M. the first respondent was delivered of a female child, in the maternity ward of the hospital. But, first of all, though the normal period of gestation is 270 days, there are lesser periods even for full-term births, which have actually occurred, as is clear from the passage in Modi's Text Book on Jurisprudence, to which our attention has been drawn by learned counsel acting as amicus curiae. In other words, this is a case in which it is impossible to draw any definite inference that the wife conceived the baby, necessarily prior to the actual date of marriage. Again, and even granting this, the conception could have been due to the husband himself, and we have only his bare denial of that fact or possibility. Most significantly, there is a very important circumstance appearing in the evidence, from which this ground of the fraudulent suppression of a pre-marital conception by the wife, through a person other than her husband, will have to be totally excluded as a ground for dissolution of the marriage or divorce. This is the very specific evidence of Dr. Saroja (P. W. 1) to the effect that "I know the petitioner as her husband. He was present in the hospital at the time of delivery." This, in our view, renders it altogether unacceptable that we should act on this alleged ground for divorce or dissolution of the marriage; in any event, the husband was fully aware of the pregnancy, and had apparently condoned the conception, or, even more probably, the conception could have been after the marriage itself.

3. With regard to the other alleged ground, namely, adultery with a relative, the evidence is thoroughly inconclusive and unsatisfactory. In the addresses given in the petition, the address of the first respondent relates to a different village altogether from the village of the second respondent. Considering the close relationship between the parties, it is not at all unnatural that the first respondent should have paid a visit to the second respondent, whether during the subsistence of the marriage, or after the petitioner and the respondent had ceased to live together. The evidence of the petitioner is to the effect that respondent 1, when taxed by him with the pre-

marital pregnancy admitted an illicit relationship between herself and respondent 2. He adds "She is now living with respondent 2 as his wife". This is not corroborated, in any real sense. P. W. 3 merely states that respondent 1 had illicit intimacy with respondent 2, the husband of her paternal aunt, prior to the marriage, and that she is having illicit intimacy thereafter also. Since the two would appear to be living in different villages at the time of the institution of this proceeding, this appears to be sheer conjecture on the part of this witness. It does not appear to be based upon any personal knowledge and he does not say so. This evidence is totally unacceptable and too vague for basing any inference or conclusion.

4. Under these circumstances, and even though the respondents have failed to contest the proceeding, we must decline to accept the evidence on the available record. The petition has necessarily to be dismissed. There is no doubt the hardship that the marriage has broken down and that the petitioner and the first respondent are not now living together, and that it may be possible that the first respondent is living with the second respondent on terms of illicit intimacy even now. If that is the fact, we reserve a right to the husband to institute a fresh petition for divorce on that ground, after adducing relevant and tangible evidence, in corroboration of such averments as he may choose to make in a petition of that character. Subject to this reservation, the reference itself has to be dismissed, as totally excluding a basis for a relief of either dissolution of marriage or divorce, under the circumstances. No costs. Petition dismissed.

AIR 1970 MADRAS 212 (V 57 C 56) FULL BENCH

K. VEERASWAMI, C. J., RAMA-
PRASADA RAO AND
GOKULAKRISHNAN, JJ.

The Joint Registrar of Co-operative Societies, Madras and others, Appellants v. P. S. Rajagopal Naidu and others, Respondents.

Writ Appeals Nos. 296 and 297 of 1969, D/- 8-10-1969, from judgment of Alagiriswami, J., in W. P. No. 1744 of 1969.

(A) Civil P. C. (1908), Pre. — Interpretation of statutes — Title of an Act — Use of, in interpreting other provisions of the Act.

Though not conclusive, the title of an Act is one of the numerous sources from which assistance may be obtained in the ascertainment of the legislative intent of an enactment. If, there is some ambiguity in the application of a particular

section of the Act which is penal in character, to a particular set of material and facts, the title provides ample and singular assistance to interpret the particular section in harmony with and in conformity to the other allied provisions therein. (Para 4)

(B) Co-operative Societies — Madras Co-operative Societies Act (53 of 1961), S. 72 — Supersession of Committee — Subjective satisfaction of Registrar necessary — Inquiry and inspection of society essential.

The condition precedent to the exercise of jurisdiction by the Registrar under S. 72 is to secure an audit memorandum or a report of inspection or inquiry, so that he may be provided with the necessary material to act thereon. In its absence the order of supersession will undoubtedly be tainted with the absence of a jurisdictional basis. (Para 8)

No Tribunal subject to the jurisdiction of the High Court can on its own volition finally decide on the question of the existence or extent of its jurisdiction, to pass orders which are punitive in nature and above all to set at naught a committee of management of a co-operative society, elected by its general body of members. If, therefore, the purport of Ss. 64, 65, 66 and 67 is fully appreciated and correctly understood, it appears that before the Registrar can take action which would result in the imposition of a penalty, he should not only give an opportunity to the delinquent member, officer, committee or society, but he should also be armed with the related reports under Secs. 64, 65 or 66. This appears to be a mandatory provision from which there is no escape. (Para 6)

Sec. 72 ought not to be read and interpreted in the abstract de hors the intent and purport envisaged in the prior sections, which form part and parcel of the same chapter. When two or more sections appearing together and in the same context are susceptible of analogous meaning, they are to be understood in their cognate sense. Each section and the action contemplated therein lend colour to the other section and it is on such cumulative understanding of the sections and their application, that the tribunal empowered to brand a committee as inefficacious, should act and act judiciously as well after giving an effective opportunity to the committee to rectify the defects. (Para 11)

(C) Co-operative Societies — Madras Co-operative Societies Act (53 of 1961), S. 72 — Supersession of committee — Committee functioning could be superseded though the irregularities were committed by members of earlier committee. W. A. No. 113 of 1969 (Mad), Overruled.

The Registrar of Co-operative Societies has jurisdiction to take action under Section 72 against the committee which at or about the time of the action was functioning notwithstanding the fact that the charges imputed or defects noticed or irregularities complained of were those attributable to or referable to the administration, management and conduct of an earlier committee, and notwithstanding also the fact that the committee against whom the show cause notice is issued consists of persons wholly or partially different from those constituted the earlier committee or committees. W. A. No. 113 of 1969 (Mad), Overruled.

(Para 15)

Cases Referred: Chronological Paras (1969) W. A. No. 113 of 1969

(Mad) 1. 2. 3. 13

The Advocate General assisted by the Govt. Pleader, for Appellants; D. Muniakanniah for R. D. Indrasenan and N. Rajendran, for Respondents.

RAMAPRASADA RAO, J.:— These writ appeals are directed against the common judgment in W. P. Nos. 1744 and 1951 of 1969 rendered by Alagiriswami J. In the first instance it came up before a Division Bench consisting of my Lord, the Chief Justice and Gokulakrishnan J. The Division Bench felt it desirable to place the matter in question arising in these appeals before a Full Bench and observed: "S. 72 of the Madras Co-operative Societies Act 1961 calls for interpretation. A Division Bench of this Court, in W. A. No. 113 of 1969 (Mad), has taken a particular view of the scope and effect of it, with which, prima facie, with due respect, we do not find ourselves in agreement. The question is one of importance and will affect all the Co-operative Societies in the State. We consider, therefore, that the matter should be placed before a Full Bench for decision."

The subject having been set once again for hearing before us, we are called upon in the main to consider the scope and content of S. 72 of the Madras Co-operative Societies Act, 1961, hereinafter referred to as the Act.

2. A few relevant facts touching upon the matter in issue may be noticed before the scheme of the Act, its purpose and intentment are considered. On 4-1-1969, the Joint Registrar of Co-operative Societies issued a notice of supersession, purporting to supersede, under S. 72 of the Act, the committee in charge of a co-operative society by name The North Arcot District Co-operative Supply and Marketing Society Ltd., Vellore. In the said notice certain charges were framed and it was sought to be made out that the Society was not functioning properly for some time past and the Committee, in management of the affairs of the Society was called upon to explain why it should

not be superseded. The Committee showed cause by submitting its due explanation to as many as ten charges framed against it. The Joint Registrar was of the view that the committee of the Society was not functioning properly and failed to discharge its duties and responsibilities. The Committee explained that many of the charges which relate to deficits in the main society or its associates, reflect on the day-to-day administration of the society, which is mainly in the hands of a paid whole-time secretary of the rank of a Deputy Registrar of Co-operative Societies in the service of the Co-operative Department of the Government of Tamil Nadu and the other members of the staff, that no irregularity was brought to its notice by the Secretary or any member of the staff, that if there was any commission or omission at all, it was attributable to the chief executive officer of the Society and that in the absence of proof of lack of good faith or the presence of an oblique purpose in the minds of the committee as a whole, the order of supersession without a fuller enquiry is illegal. Notwithstanding the explanation of the Committee and the note of dissent of the Vellore Co-operative Central Bank Ltd., which was the financing bank of the Society, the Joint Registrar, with a view to set right the affairs of the Society and to safeguard the interests of the shareholders and the creditors of the Society and to place the Society on a satisfactory basis, dissolved the committee. Appeals by the President and the members of the committee to the Registrar of Co-operative Societies under S. 96(2) of the Act were unsuccessful. Two writ petitions were filed, one by the President and the other by a director of the Society, to quash the impugned order of the Joint Registrar which ultimately found favour with the Appellate authority as well. When the Registrar of Co-operative Societies considered and heard the appeals, the ratio in W. A. No. 113 of 1969 (Mad) was ruling. In applying the principle therein, however, he, according to Alagiriswami J., misapplied the same.

The learned Judge gave certain findings which we reproduce more for completion of the relevant facts attendant upon these appeals:—

"Even so, it appears to me, that in the case of this committee, whatever else might have been said, the charges, if analysed from the point of view set forth by the Bench, would show that at worst the Committee has not been as active as it might have been. But after all the Committee consists of non-official members; they are not whole time servants of the Society; they have their own private affairs to attend to; they have necessarily to depend upon a paid whole-time secretary and other members of the staff. The

paid secretary during most of the times seems to have been a Deputy Registrar. It was their duty to have kept the registers in proper order. It was their duty to have inspected and found deficiency in stock and brought it to the notice of the Committee. With regard to a number of matters with which the Committee is charged, it could be seen that all of them relate to matters for which the paid permanent staff are primarily responsible. The Committee can only supervise and cannot be engaged in day-to-day management of the affairs of the Society or even in matters like maintenance of registers or maintenance of accounts. It was the duty of the paid staff to have brought them to the notice of the committee. The Joint Registrar as well as the Registrar have failed to appreciate the scope of the duties of the Board of Directors and the permanent staff. There is no allegation or proof that the Board of Directors have either acted mala fide or have benefited themselves Considering all the charges and the explanations, it appears to me that both the Registrar and the Joint Registrar have failed to keep clear in their minds the distinction between the duties and responsibilities of the committee and the paid permanent staff Undoubtedly there is no material whatsoever to hold that the committee in this case has wilfully disobeyed or wilfully failed to comply with the lawful order or directions of the Registrar under the Act or the rules. The committee cannot by any stand be said to have been recalcitrant or lethargic. So the only question that arises is whether the committee was not functioning properly. The committee pointed out that the defects pointed out related only to day-to-day working and business of the Society and that was purely administrative in character, that the paid staffs are in charge of the day-to-day administration of the Societies and that it is the secretary, who is the chief executive authority of the society I do not see that opportunity was given to the committee to set right the irregularities I am not satisfied that even taking into account a few minor charges, which may be held to be proved, they are of such a character that they could justify the drastic penalty of supersession..... On the whole I am satisfied that there was no justification for the action taken by the Joint Registrar in this case to supersede the committee

3. One thing however which is conspicuous is that Alagiriswami, J. was, as he expressed himself, bound by the decision of the Division Bench of this Court in W. A. No. 113 of 1969 (Mad), the scope of which we shall presently consider. Before we notice the ratio of the Bench, certain general observations regarding

the essence of co-operation and its process, as also the scheme of the Act, are necessary.

4. In a socialistic pattern of society, democratic process is the vehicle of action and if such a means is to be outwitted by the individualistic opinion of the Registrar of Co-operative Societies on a priori considerations and insufficient material, then it would be the very negation of co-operation, which is the essence of organised liberty. The title of the Act, though not conclusive, is one of the numerous sources from which assistance may be obtained in the ascertainment of the legislative intent of an enactment. Even so is the "Co-operative Societies Act".... If, therefore, as we will presently point out, there is some ambiguity in the application of a particular section of the Act, which is penal in character to a particular set of material and facts, the title provides ample and singular assistance to interpret the particular section in harmony with and in conformity, to the other allied provisions therein. It is in this light that the democratic process envisaged and adumbrated fully in the Act should not lightly be displaced by an arbitrary dispensation if the jurisdictional facts to placate the former are not made available to the hierarchy of tribunals constituted under the Act to act judicially.

5. At this stage it is convenient to notice the provisions of the statute, to appreciate the nature, colour and scope of the jurisdiction of such statutory tribunals like the Joint Registrar of Co-operative Societies and the Registrar of Co-operative Societies, particularly while deciding to supersede an elected body like the committee of a co-operative society functioning under the Act.

6. Sec. 2(2) defines a 'committee' as to mean "the governing body of a registered society to whom the management of its affairs is entrusted". Sec. 2(5) explains a "member" as "a person joining in the application for the registration of a society and a person admitted to membership after registration..... By Sec. 2(8) an 'officer' includes a president, vice-president, chairman, vice-chairman, secretary, assistant secretary, treasurer, member of committee, and any other person empowered under the rules or the by-laws to give directions in regard to the business of the society". Sec. 2(10) defines 'Registrar' as 'a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act, and includes a person on whom all or any of the powers of a Registrar under this Act have been conferred under Sec. 3". Section 4 provides for registration of a society under the Act, which has as its object the promotion of the economic interests of its members in accordance with

co-operative principles.....". A 'financing Bank' means "a registered society which has as its principal object the lending of money to other registered societies". Sec. 27 provides for the constitution of a committee. "The general body of a registered society shall constitute a committee in accordance with the by-laws and entrust the management of the affairs of the registered society to such committee." The proviso thereto provides for the constitution of such committee in case the society is registered after the commencement of the Act. Sec. 27(3)(a) says that "the terms of office of an elected member of a committee constituted under the Act shall be three years" and it also provides for the retirement of one-third of the members elected to the committee at the end of each year. The committee may also consist of a non-official member nominated either by the Registrar or the financing bank. Any casual vacancy in the office of a member of the committee shall be filled in such manner as may be specified in the rules or by-laws. Sec. 28 prescribes the disqualifications for membership of committee. Inter alia it provides that any member who has been removed from the office of the member of the committee of the registered society is not eligible for being elected or appointed as a member of a Committee. Sec. 28(4) prescribes another kind of disqualification for being elected or appointed as a member of the committee. It is:—

"No member of a committee against whom an order under sub-sec. (1) of S. 71 has been passed shall be eligible for election or appointment as a member of the committee for a period of three years from the date of such order." Sec. 28(5) (a) reads:—

"No member of a committee which has been superseded shall be eligible for election or appointment to the committee for a period of three years from the date of expiry of the period of supersession". Even so S. 28 (5) (b) provides—

"No member of a committee in respect of which proceedings for supersession under S. 72 are pending shall be eligible for election or appointment to the committee till the termination of those proceedings."

Sec. 28-A which has been inserted by the Madras Amending Act VIII of 1966 is an important provision and has to be reproduced. It reads as under:—

"1. Where in the course of an audit under Sec. 64 or an enquiry under S. 65 or an inspection under Sec. 66 or Sec. 67, it appears that a person who is, or was, a member of a committee has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society or of gross or persistent negligence in connec-

tion with the conduct and management of, or of gross mismanagement of, the affairs of the society, or of misfeasance or default in carrying out his obligations and functions under the law, the Registrar may, without prejudice to any other action that may be taken against such member, by order in writing, remove such person from the office of member of committee if he holds such office, or disqualify him from holding in future the office of a member of the committee, if he has ceased to hold such office.

2. No person shall be removed or disqualified under sub-sec. (1) without being given an opportunity of making his representations. A copy of the order removing or disqualifying him shall be communicated to him."

7. Section 31 provides a mandate and reads that the registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal with various powers enumerated therein, attached to it. Chapter VIII of the Act deals with audit, inquiry, inspection, surcharge and supersession. The accounts of a society shall be audited once at least in every year at the instance of the Registrar (Sec. 64(1)). Sec. 64(2) indicates the nature of the audit to be done under Sec. 64(1) and such audit shall include an examination of overdue debts, if any, the verification of the cash balance and securities and a valuation of the assets and liabilities of the society. For the successful examination of the accounts and for a proper audit as above, the Registrar may, under Sec. 64(5), by order in writing direct any officer of the society to take such action as may be specified in the order to remedy within such time as may be specified therein the defects, if any, disclosed as a result of the audit. The procedure for conducting the audit is prescribed in Rule 54 and it provides for the submission of an audit memorandum by the person examining the accounts. The audit memorandum, according to the above rule, is self-instructive and shall contain full particulars of all transactions which appear to be contrary to the provisions of the Act, all sums which ought to have been but have not been brought into the accounts by the society, any material impropriety or irregularity in the expenditure, or in the realisation of moneys due to the society, and other instructive particulars mentioned therein.

S. 65 gives the discretion to the Registrar to hold an enquiry into the constitution, working and financial condition of a registered society. Such an enquiry can be undertaken under the said section, on an application for the purpose by a majority of the committee or of not less than one-third of the members or on the

request of the Collector. The person authorised by the Registrar to so enquire has several powers set out in Sec. 65(2). Such powers include the seizure of books, summoning of persons to give evidence, call for a general meeting or a meeting of the committee at such places to be decided by him either by himself or through any of the officers of the society and in the end, the enquiry officer is obliged to communicate the result of the inquiry in certain cases to the Government and in all cases to the financing bank to which the society is affiliated and lastly to the society concerned. Sec. 65(4) is yet another power of the Registrar who may, by order in writing, direct any officer of the Society or its financing bank to take such action as may be specified in the order to remedy, within such time as may be specified therein, the defects, if any, disclosed as a result of the inquiry. One other special power vested in the Registrar under S. 66 is that the Registrar may, of his own motion, or on the application of a creditor of a registered society, inspect or cause the inspection of the books of the society under certain circumstances. The financing Bank also has the right to inspect the books of any registered society which is indebted to it. Sec. 66(3) provides that the Registrar, after such inspection, may, by order in writing, direct any officer of the society to take such action as may be specified in the order to remedy within such time as may be specified therein the defects, if any, disclosed as a result of the inspection. Sec. 70 provides for suspension of a paid officer or servant of a registered society who in the course of an audit under Sec. 64 or an enquiry under Section 65 or an inspection under Sec. 66 or Sec. 67 has been found to have committed or has been otherwise responsible for misappropriation, breach of trust or other offence, in relation to the society. Such an order of suspension shall be obeyed by the committee of the society.

Section 71 provides for the surcharging of any person who is or was entrusted with the organisation or management of the society or any past or present officer or servant of the society who has misappropriated or fraudulently retained any money or any other property or been guilty of breach of trust in relation to the society or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has made unauthorised payments contrary to the Act, by-laws and directions. The Registrar can act under this section on his own motion or on the application of the committee, liquidator or any creditor or contributory and inquire into the conduct of the person concerned and direct him to reconstitute the moneys or properties found to have been misappropriated by him

Any such inquiry shall not be held after the expiry of six years from the date of any act or omission referred to in this sub-section. An opportunity to the alleged delinquent officer should be given to enable him to make his representations.

Lastly comes Section 72 which provides for the supersession of the committee. Section 72(1) (a) reads as follows:

"If, in the opinion of the Registrar, the committee of any registered society is not functioning properly or wilfully disobeys or wilfully fails to comply with any lawful order or direction issued by the Registrar under this Act or the rules, he may, after giving the committee an opportunity of making its representations, by order in writing, dissolve the committee and appoint either a person (hereinafter referred to as the special officer) or a committee of two or more persons (hereinafter referred to as the managing committee) to manage the affairs of the society for a specified period not exceeding two years."

The Registrar on appointing a special officer may also appoint an advisory board to assist him. The remuneration of the special officer shall also be fixed by him. Before taking any action under sub-sec. (1) of S. 72 in respect of any registered society, the Registrar shall consult the financing bank to which the society is indebted. It is thus seen that a committee can be superseded in case it is not functioning properly or wilfully disobeys or wilfully fails to comply with any lawful order or direction issued by the Registrar under this Act or the rules. One other section can also be usefully referred to, Sec. 85 appearing in Ch. XI dealing with winding up and cancellation of registration of registered societies, provides for the winding up of registered societies as under:

"(1) If the Registrar, after an enquiry has been held under S. 65 or an inspection has been made under S. 66 or S. 67, or on receipt of an application made by not less than three-fourths of the members of a registered society, is of opinion that the society ought to be wound up, he may, after giving the society an opportunity of making its representations, by order in writing direct it to be wound up. A copy of the order shall forthwith be communicated to the society by registered post."

Thus, even the winding up of a registered society by the Registrar could be undertaken only after an enquiry has been held under S. 65 or an inspection has been made under S. 66 or S. 67 or at the request of not less three-fourths, of the members of the registered society. Here also, the society has to be given an opportunity to make its representations to the contrary. S. 85(2) provides for the

other circumstances in which a society could be wound up. Sec. 101 is a penal section which provides for punishment of the committee of a society, an officer of a society, an officer employed, paid servant or any member of a society who furnishes false information or disobeys summons or other lawful order, requisition or direction issued under the provisions of the Act.

8. From the scheme of the Act and the primordial purpose and intentment of the Act it appears that the Registrar of Co-operative Societies is constituted as a vigilant sentinel to look to the proper working and functioning of Co-operative Societies created and registered under the Act, and though certain powers are vested in him in relation to such supervisory jurisdiction vested in him, yet such powers though *prima facie* exercisable on his subjective satisfaction, they have to pass muster objectively as well and should conform reasonably with the reality of the situation. A Committee of management, in so far as a co-operative society is concerned, is the sole body to which is entrusted the affairs of the said society. A "member of the committee" is deemed to be an officer of the society the primary object of which is to advance the economic interests on co-operative principles. A committee is an elected body of which one-third of the members constituting the said committee shall retire once in three years. In fact, there is an interdict on persons against whom action is taken under Sec. 71 or 72 from being and continuing to be a member of the committee. It is, however, important to note that when the Registrar of Co-operative Societies or any officer authorised in that behalf by the statute intends taking any action against a member of the society or a member of the committee or against the society as a whole, it appears from the scheme of the statutory provisions that an audit under S. 64 or an enquiry under S. 65 or an inspection under S. 66 is a necessary concomitance and the report or material obtained on such audit, enquiry or inspection form as it were the foundation of bedrock for the supervening action, whatever the nature of such action may be, which is to be undertaken by the Registrar of Co-operative Societies. It is unlikely that the Registrar could be said to be armed with the necessary material, hypothesis and equipment to penalise a member, a member of the committee or the society, on inchoate information obtained by him from some source other than the statutory prescribed channels such as audit, enquiry or inspection. In fact, a registered society is a body corporate with perpetual succession and a common seal.

Analogically therefore, it follows that a body constituted for the purpose of ad-

ministering such a society should also be deemed and held to be a continuous body though by various events specified in the statute there may be a change in the personnel of such management. Secs. 64, 65 and 66, which are the statutory procedural stems which interdict the apparently arbitrary course of action which a Registrar could undertake to interfere with the affairs of a society, its members or officers, provide a sufficient halo to tighten up such indiscriminate and unguided exercise of the powers by the Registrar, when it becomes necessary. In each of those sections, it is incumbent on the Registrar to give an opportunity to the member concerned, officer concerned or the society concerned to rectify the defects. If this much is clear and unambiguous, the intention of the Legislature whose purpose is to advance co-operation and suppress bureaucracy, then it cannot be lightly predicated that if the Registrar forms an opinion aliunde and otherwise than on an audit report, inquiry report or inspection report, the jurisdictional fact which has to be found by the Registrar before he attempts to exercise his statutory powers under the Act is available to him.

In our view, and under the scheme of the Act, the condition precedent to the exercise of jurisdiction by the Registrar under one or the other of the sections considered above and in particular Section 72 is to secure an audit memorandum or a report of inspection or inquiry, so that he may be provided with the necessary material to act thereon. Unless such a fact finding authority has provided the Registrar with the hypothesis to act and ultimately supersede an elected body, the impugned order of supersession will undoubtedly be tainted with the absence of a jurisdictional basis. Whether such a basis exists, is subject to review by this Court in exercise of its jurisdiction under Art. 226 of the Constitution of India.

9. No Tribunal subject to the jurisdiction of the High Court can on its own volition finally decide on the question of the existence or extent of its jurisdiction to pass orders which are punitive in nature and above all to set at naught a committee of management of a co-operative society, elected by its general body of members. If, therefore, the purport of Sections 64, 65, 66 and 67 is fully appreciated and correctly understood, it appears to us that before the Registrar can take action which would result in the imposition of a penalty, he should not only give an opportunity to the delinquent member, officer, committee or society, but he should also be armed with the related reports under Sections 64, 65 or 66. This appears to be a mandatory provision from which there is no escape.

10. From the nature of the charges framed in these proceedings before us it appears to us that the Registrar has avoided the prescribed legislative channel of procedure which he is obliged to adopt before he takes action under Section 72 of the Act. By way of illustration we could consider some of the charges mentioned and dealt with by the Registrar. The Registrar is of the view that several deficits were noticed in the stocks of the society or its associates as pointed out in the audit report. But it is not clear whether any action was taken under S. 64 (5) to remedy that defect. Even as surmised by the Registrar, if the working of the society was irregular it is not understandable as to why an enquiry was not held under Section 65. Section 65 provides ample plenary authority to the Registrar to set right matters and indeed under Section 65 (4) an opportunity has to be given to the Society as a whole or its financing bank to remedy such defects, if any, disclosed as a result of the enquiry. It does not appear that any such enquiry as contemplated under Section 65 was undertaken. The right of inspection contemplated in Section 66 is yet again a prerequisite before the Registrar could finally supersede a committee. No such statutory inspection has been done, nor was it stated before us that any such inspection was undertaken. The charges, no doubt, relate to certain discrepancies during the years 1964 and 1965. It is not disputed that there has been a change in the personnel of the committee year after year due to the operation of Section 27 (3) of the Act. Though this reconstitution of the committee may not by itself matter as would be indicated by us later, yet in such circumstances where there is an annual change by necessity, in the body constituting the committee, it becomes all the more necessary for the Registrar to equip himself with the audit, inquiry, or inspection report before a final decision can be arrived at under Section 72 of the Act. As already stated, even in the case wherein the Registrar is of the opinion that the society ought to be wound up, an enquiry under Section 65 and an inspection under Section 66 or 67 are pre-eminently needed. Thus, if the Registrar cannot take action against a member for unsatisfactory working and the financial condition of a registered society without an enquiry under Section 65 and if the Registrar cannot take suo motu action without giving an opportunity to the erring member, officer or society to remedy the defects found and noticed in the course of the audit, enquiry and inspection and when a member or officer cannot even be surcharged on the ground of misappropriation or fraudulent retention of moneys or deliberate causance of any deficiency in the assets of the society without such ac-

tion being preceded by the procedure contemplated in Sections 64, 65, 66 or 67, then it appears to us that even under Sec. 72 of the Act, which enables the Registrar to supersede a committee in management of the affairs of the society he cannot unilaterally act and base his penal action solely on his subjective satisfaction.

11. This leads on to the question as to what is opinion or subjective satisfaction and its relative impact on supersession of a committee or management of a co-operative Society. "Supersession" means to make the existing things inefficacious by exercise of superior power. Such a power if vested in a statutory tribunal, it should exercise it in a judicious spirit and primarily to render substantial justice. The decision should be arrived at by such a tribunal which is ordinarily characterised as one vested with quasi-judicial functions in a spirit and with a high sense of responsibility in order to mete out justice ultimately. We have in the analysis undertaken by us as above, sought to explain the fascicule of the sections which lend support to the irresistible conclusion that Section 72 ought not to be read and interpreted in the abstract de hors the intent and purport envisaged in the prior sections, which form part and parcel of the same chapter. When two or more sections appearing together and in the same context are susceptible of analogous meaning, they are to be understood in their cognate sense. Each section and the action contemplated therein lend colour to the other section and it is on such cumulative understanding of the sections and their application, that the tribunal empowered, to brand a committee as inefficacious, should act and act judiciously as well after giving an effective opportunity to the committee to rectify the defects. Alagiriswami, J. rightly found that no such opportunity was given to the committee to set right the irregularities and that there was no justification for the action taken by the Joint Registrar to supersede the committee. Apart from the view of the learned Judge that the defects in the main are attributable to the executive staff of the society which includes a Government official of the rank of a Deputy Registrar of Co-operative Societies, we are unable to uphold the impugned order on the ground that the Registrar failed to secure the necessary facts and material which could vest him with the necessary jurisdiction to act under Section 72 of the Act.

12. The section, however, speaks of the opinion of the Registrar which is essentially subjective in nature. It is to be remembered, however, that the result of the action taken under Section 72 would make a statutory functionary dormant. In such circumstances it is to be considered whether mere and bare subjective information

of the Registrar can prevail and no standard of objectivity is any more required for the exercise of such power. Section 72 contemplates that the initial hypothesis necessary to enable the Registrar to act under it is that the society is not functioning properly. We agree with Alagiriswami, J., that there is absolutely no material whatsoever to hold that the committee in this case wilfully disobeyed or wilfully failed to comply with the lawful order or directions of the Registrar under the Act or the rules. This is yet another limb of Section 72 which vests in the Registrar the jurisdiction to act and supersede. Under Section 65, an enquiry can be directed by the Registrar into the working and financial condition of a registered society. Ordinarily it could be expected that if the working or the functioning of the society is not proper, then only an inquiry would be directed. If, therefore, the language in Section 65 (1) and Sec. 72 (1) (a) have to be reconciled and harmoniously interpreted, it appears to us that no order as to supersession can be made without an enquiry or inspection as contemplated earlier. It is in this respect that the subjective opinion which is the guide line provided in Section 72 is intermixed with certain objective standards as well which have to be placed in the forefront before a decision is arrived at. It can only be then said that the superior power vested in the Registrar under Section 72 to render dormant an elected body has been rightly exercised by him without violating the principles of natural justice and having foremost in his mind his duty to render substantial justice. No doubt, it is an accepted principle of law that, where a statute provides a particular course of action and makes it dependent upon the subjective satisfaction of a tribunal created by the Act, then the decision arrived at by the said tribunal, if it does not violate the principles of natural justice and is bona fide prima facie, then the Court cannot substitute its judgment as if it were a Court of appeal over the said tribunal. In the instant case, however, not only the principles of natural justice have been violated, but the Registrar assumed jurisdiction without the hypothesis essential for him to deal with the circumstances of this case and such exercise of power by a quasi-judicial tribunal has to be set at naught as its acceptance would be to encourage arbitrariness and throw overboard principles of natural justice. Under these circumstances, we agree, though for a different reason, with Alagiriswami, J.

13. Now it has to be considered whether the acceptance of the ratio in W. A. No. 113 of 1969 (Mad) by Alagiriswami, J., which also formed another course of his reasoning for allowing of the writ petitions is correct. In fact, the reference to

this Full Bench has been necessitated because the learned Judges who constituted the Division Bench in the first instance took prima facie a view contrary to that expressed in W. A. No. 113 of 1969 (Mad) which will hereafter be referred to as writ appeal.

14. In the writ appeal, Anantanarayanan C. J. and Natesan J., who constituted the Bench, agreed with the contention of the Registrar of Co-operative Societies that the committee under the Act being the governing body of the society statutorily formed, is a permanent body, a legal entity with continuous existence notwithstanding the changes in its personnel. Speaking for the Bench, Natesan, J., in the writ appeal, observed—

"True the Committee as such is not made under the Act a body corporate with perpetual succession and a common seal. But that does not affect the determination of the question we are now called upon to decide But the crux of the matter is that no period is fixed for the life of the Committee, and its continued existence is secured in the provisions as to its constitution. We are clearly of the view that for initiation of proceedings under Section 72, there can be no question of previous committee and present committee. Action can be taken under the section against the governing body of the Bank as a legal entity having continuous existence, notwithstanding the annual retirement of one-third of the members of the Committee and re-election in their place".

To the above dicta, there can be no exception. As a matter of fact, we have noticed in this judgment the various provisions of the Act and the causes which might effect a change in the personnel of the committee; but nevertheless it is seen that the continuity of the committee is maintained for all purposes and it is not possible to uphold the view that the committee had to be truncated according to the physical personnel constituting it from time to time, and thus truncated, there is a snap in the chain of continuity of such a committee and, therefore, it should be deemed to be non-permanent.

15. In the writ appeal, however, an opinion has been expressed that as the committee acts only through its members who enter into and exit therefrom from time to time, any act of omission or commission on which the charges of supersession are to be based must be related to the committee as constituted when supersession is proposed. According to the learned Judges, there must be some nexus between the act complained of and the personnel constituting the committee and finally the learned Judges observed that the virus infecting the society should be

found in the committee when it is proposed to dissolve it. They were also of the view that the section in reality provides for action against the committee composed of recalcitrant members and lethargic committees that could not be activated. Said the Division Bench:—

"Before any opportunity is given to the members of the governing body so constituted to set right matters, and before they have had time to take steps in that regard, is this body to be superseded under Section 72 of the Act solely for the acts of their predecessors? It may be that the Registrar would not be so. In our view, Section 72 does not contemplate action in such a case, to supersede the committee in the circumstances would be abuse of powers Equally, though the committee is an entity by itself, the Registrar can look to the realities behind the legal facade to ascertain the causes for the deterioration in the affairs of the society"

It would thus appear from the latter portion of the ratio in the writ appeal that unless there is a link between the act and the person or persons constituting the committee then only the necessary hypothesis is available to the Registrar to act under S. 72 and ultimately supersede the committee. With respect to the learned Judges who decided the writ appeal, we are unable to agree that such is the foundation for the exercise of jurisdiction by the Registrar under Section 72 of the Act. Once it is not disputed, as it is indisputable, that the committee as a statutory body is a permanent and a continuous one, then it cannot be said that any change in the personnel of the committee would effect a consequential change, in any manner whatsoever, in the statutory body as such. If such a limited scope and interpretation is to be given to such a statutory functionary, then it would cease to be a permanent body. Once it is conceded that the body is a legal entity with continuous existence, to say that the acts of commission and omission of the previous committee cannot be mechanically attributed to the succeeding committee unless there is a link between the act and the person or persons constituting the committee would be to whittle down the pronouncement made that the body is a permanent and a continuous one. Indeed such a wedging into its legal character for any purpose is irreconcilable. "Once permanent, always permanent" can have no exception. We are unable, with respect, to accept the reasoning that as the committee acts through human beings, it is essential that the impugned acts or the substance of the charges must be brought home to one or the other of the members of the committee physically constituting it.

Subject to the other limitations provided for in the Act itself, it is open to the

Registrar to take such action as indicated in the first part of our judgment to call upon the committee functioning for the time being and on behalf of the society to explain and show cause why it should not be superseded. The latter portion of the decision in the writ appeal creates, in our opinion, a limitation which cannot be supported by the very language and intent of the various provisions of the Co-operative Societies Act. We are, therefore, unable, with respect, to agree with the observations made by the learned Judges in the writ appeal and excerpted above. We hold that all other circumstances, data and material being available or made available to the Registrar of Co-operative Societies in the manner indicated by us, he would be within his jurisdiction to take action under Section 72 against the committee which at or about the time of the action was functioning as committee of management of the society notwithstanding the fact that the charges imputed or defects noticed or irregularities complained of were those attributable to or referable to the administration, management and conduct of an earlier committee and notwithstanding also the fact that the committee against whom the show cause notice is issued consists of persons wholly or partially different from those constituted the earlier committee or committees.

16. In the result, however, the writ appeals are dismissed, but in the circumstances, there will be no order, as to costs.
Petitions dismissed.

AIR 1970 MADRAS 220 (V 57 C 57)

KRISHNASWAMY REDDY, J.

A. S. S. Ahmed Sahib, Petitioner v. Commissioner of Police, Madras and another, Respondents.

Criminal Revn. Case No. 508 of 1968. (Cri. Revn. Petn. No. 502 of 1968). D/- 20-12-1968.

Criminal P. C. (1898), S. 523 (1) — Person entitled to possession — Determination of — Test is not mere possession of property at time of seizure but as to who is entitled to lawful possession.

What is required is not the proof of the offence in respect of which the property is seized but whether the property was seized in respect of an alleged offence or under suspicious circumstances. Once the property is seized under the circumstances mentioned in the said provision, irrespective of the fact whether the investigation by the police disclosed an offence or not, the Court has to dispose the property. While doing so, it has got absolute discretion to pass an order as it thinks fit

DM/AN/B563/69/RSK/W

respecting the disposal of such property. But, if it orders delivery of the property, then it has to deliver it to the person entitled to the possession thereof.

(Para 10)

Normally, in cases where the offence is not made out, the property should be delivered to the person from whom it is seized or taken. But it will depend upon the circumstances of each case. In such cases, the actual possession of the property at the time it was seized may be a relevant factor but not conclusive to determine the entitlement of such possession. The words used in Section 523 (1), Criminal P. C. are 'the person entitled to the possession of the property'. These words cannot be equated with actual possession. Nor can they be equated with the expression 'the person from whom the property is seized or taken'. A person may be in unlawful possession at the time it was seized though he has not committed the offence, and in that circumstance, it cannot be said that he is entitled to possession. It must be a lawful possession. The expression 'entitled to possession' is the sine qua non for the delivery of property under Sec. 523, Criminal P. C. 1966 Cri LJ 233 (Raj). Rel. on; AIR 1933 Mad 434 (2) & AIR 1936 Bom 171 & AIR 1952 All 470 & AIR 1939 Mad 905 & AIR 1941 Mad 416 & AIR 1968 Manipur 29, Disting.

(Para 10)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Manipur 29 (V 55) = 1968 Cri LJ 191, K. J. Singh v. C. Tomu Devi. 16
- (1966) 1966 Cri LJ 233 = ILR (1964) 14 Raj 728, Mohan Singh v. State. 18
- (1952) AIR 1952 All 470 (V 39) = 1952 Cri LJ 856, Purshottamdas v. State. 13
- (1941) AIR 1941 Mad 416 (V 28) = 1941 Mad WN Cri 20 = 42 Cri LJ 635, Thimma Reddi v. Rami Reddi. 15
- (1939) AIR 1939 Mad 905 (V 26) = 1939 Mad WN 739 (2), Paidi Subbayya v. Emperor. 14
- (1936) AIR 1936 Bom 171 (V 23) = 37 Cri LJ 573, Lakshmi Chand v. Gopikishan. 12
- (1933) AIR 1933 Mad 434 (2) (V 20) ILR 56 Mad 654 = 34 Cri LJ 586, Karuppanan v. Guruswami. 11
- Mohab Ali, for Petitioner; C. K. Venkatarasimham and N. S. Sivan, for Respondent No. 2; Calvin Jacob, for Public Prosecutor, for the State.

ORDER:— This petition has been filed by the petitioner to set aside the order of the Commissioner of Police and Presidency Magistrate, Madras City directing the return of a conch to the second respondent herein under Section 523, Criminal P. C. The facts of the case are these: The

second respondent Amir Mohideen gave a complaint to the Sub-Inspector of Police, North Beach Police station that the petitioner committed theft of a conch belonging to him. On that complaint the Sub Inspector of Police investigated the matter and examined both the petitioner and the second respondent and ultimately referred the complaint to the first respondent as a mistake of fact. Later the revision petitioner filed a petition under Sec. 523, Criminal P. C. before the Commissioner of Police and Presidency Magistrate for the return of the conch. The Commissioner of Police ordered the return of the conch to the second respondent after having considered the facts as disclosed in the course of investigation, though the conch had been seized from Sultan Ibrahim to whom the petitioner was alleged to have entrusted the same.

2. Enquiry by the Commissioner of Police disclosed the following facts. According to the revision petitioner the conch was pledged by the second respondent Amir Mohideen with him as security for the amount borrowed from him and the same was kept by him with Sultan Ibrahim for safe custody. But in his statement before the Commissioner of Police the petitioner stated that towards the middle of 1966, the second respondent sold the conch to him for Rs. 4000 for cash and, as he found later that the price paid by him was exorbitant, he asked the second respondent to dispose of the conch and gave the conch to him for the said purpose. Thereafter the second respondent did not return the conch, nor sold it and paid the value to him. The petitioner wrote several letters to the second respondent and for a long time he did not hear from him. After some time having come to know that the second respondent had come to Madras, he questioned him and asked him about the conch. According to the petitioner, the second respondent told him that the petitioner could keep the conch with him and that he would collect Rs. 4000 and pay and take back the conch from him. After this the petitioner sent for Sultan Ibrahim and handed over the conch and three days later the second respondent met him and discussed about the conch and as there was certain misunderstanding between them the second respondent gave a complaint against him. Sultan Ibrahim was examined. According to him on or about 20th or 25th November 1967, he was sent for by the petitioner and at that time the second respondent was also with the petitioner and that the petitioner told him that there was a dispute between him and the second respondent and that he would give the conch for safe custody to him and that if later it was settled between them he could return the conch to the second respondent. He stated that he had

the conch with him and it was seized by the police from him.

3. The case of the second respondent is that he bought the conch from Annamalai Chettiar in 1967 and that he wanted to sell the conch. He contacted the petitioner who was dealing in conches and known to him for some years and offered the conch for sale at the petitioner's place of business at No. 31 Adam Sahib Street and the petitioner took it from him and handed it over to Sultan Ibrahim who walked away with it and when he questioned about the same the petitioner did not give any proper reply. He further stated that thereupon his uncle and Kattuva Mohideen interfered in the matter and questioned the petitioner and the petitioner promised to return the conch that night itself, and when his uncle and Kattuva Mohideen went to him in the night, the petitioner was not there and since then he could not be got at and therefore, he gave a complaint to the Sub-Inspector of Police.

4. The Sub Inspector of Police stated in the course of investigation that it was disclosed that the conch was purchased from one Annamalai Chettiar and the second respondent offered it for sale to the revision petitioner and the revision petitioner, took the conch from the second respondent and handed it over to Sultan Ibrahim. He further stated that he thought in the circumstances, though the conch was taken away from the second respondent, the criminal intention on the part of the petitioner to commit theft was not made out and therefore, referred the case as mistake of fact.

5. The Commissioner of Police found that the conch belonged to the second respondent as it has been proved by the receipt produced by him that he purchased the conch from one Annamalai Chettiar. He also found that the records of investigation showed attempts made by the second respondent in disposing of the conch in 1967. One Abbas who was examined by the investigating officer corroborated the version of the second respondent that the second respondent offered the conch for sale to the petitioner and the petitioner took it and handed over to Sultan Ibrahim.

6. The Commissioner of Police also found that the case of the petitioner that the conch belonged to him cannot be true in view of the prevaricating versions given by him. At one time the petitioner stated that the second respondent pledged the conch with him. At another time he stated that he purchased the conch from the second respondent and that he handed over the conch to the second respondent for selling the same in the open market and hand over the price of the conch to him.

7. The Commissioner of Police rejected the case of the petitioner. The Com-

missioner of Police further found that, though normally the conch should be returned to the person from whom it was seized, namely, Sultan Ibrahim in this case, in the particular circumstances of this case it has been fully established that the conch belonged to the second respondent and was in his possession, that it was taken away by the petitioner and handed over to Sultan Ibrahim, and that the second respondent was entitled to possession of the conch; and he therefore ordered the conch to be returned to him.

8. The learned counsel for the petitioner contended that the Commissioner of Police erred in returning the conch to the second respondent when the police had referred the case as mistake of fact and that he should have returned the same to the petitioner though it was seized from Sultan Ibrahim to whom he entrusted it. He further contended that the Commissioner of Police ought not to have enquired into this matter, but he should have followed the general rule in cases where the offences are not made out, to return the property to the person from whom it is seized. To appreciate the contention of the learned counsel for the petitioner, it may be necessary to consider the requirements to be complied with as provided under Section 523 (1), Criminal P. C., which is as follows:

"(1) The seizure by any police officer of property taken under Section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence shall be forthwith reported to a Magistrate who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property."

9. It is clear from this provision (1) (a) that the seizure of property may be in respect of the circumstances mentioned under Section 51 or (b) in respect of the alleged or suspected offence of theft or (c) found under circumstances which create suspicion of the commission of any offence; (2) that the Magistrate has got wide discretion in respect of the disposal of such property or the delivery of such property, and (3) that in case of delivery, such property should be delivered to the person entitled to the possession.

10. To act under this provision, what is required is not the proof of the offence, in respect of which the property is seized, but whether the property was seized in respect of an alleged offence or under suspicious circumstances. Once the property is seized under the circumstances, mentioned in the said provision, irrespective of the fact whether the investigation by

the police disclosed an offence or not, the Court has to dispose of the property. While doing so, it has got absolute discretion to pass an order as it thinks fit respecting the disposal of such property. But, if it orders delivery of the property, then it has to deliver it to the person entitled to the possession thereof. In such a case, it has to satisfy itself from the records and materials available before it that the person to whom the delivery is ordered is entitled to possession. If materials are not sufficient, it can make an enquiry into the matter by giving opportunity to the claimants before passing an order. In doing so, the Court should confine itself only to find out as to who is entitled to possession of the property but not, the title of ownership thereof. Normally, in cases where the offence is not made out, the property should be delivered to the person from whom it is seized or taken. But it will depend upon the circumstances of each case. In such cases, the actual possession of the property at the time it was seized may be a relevant factor but not conclusive to determine the entitlement of such possession. The words used in Section 523 (1), Criminal P. C., are 'the person entitled to the possession of the property'. These words cannot be equated with actual possession. Nor can they be equated with the expression "the person from whom the property is seized or taken". A person may be in unlawful possession at the time it was seized though he has not committed the offence, and in that circumstance, it cannot be said that he is entitled to possession. It must be a lawful possession. The test, therefore, is not the mere possession of property at the time of seizure, but as to who is entitled to lawful possession. The expression 'entitled to possession' is the sine qua non for the delivery of property under Section 523, Criminal P. C.

11. In *Karuppanan v. Guruswami*, ILR 56 Mad 654 = (AIR 1933 Mad 434) it was held that where the person accused of theft is acquitted and claims as his own the property seized from him, it should be restored to him in the absence of special reasons to the contrary. This decision has reiterated the normal rule of restoring the property to the person from whom it is seized where the offence is not made out. The facts of that case clearly disclose that the accused who was acquitted was a bona fide purchaser of bulls alleged to have been the subject-matter of theft.

12. In *Lakshmichand v. Gopikishan*, AIR 1936 Bom 171 it was held by a Division Bench that where it is not shown that the person from whom the property was seized, had committed the offence in relation to that property, the Magistrate should hold that the person from whom the property is seized is entitled to pos-

session of that property. The facts of that case are that the police seized the property and charged the applicant with stealing it. After investigation they referred to the Magistrate that there was no sufficient evidence against the applicant to file a charge-sheet. The Magistrate returned the property to its owner. While doing so, he relied upon the presumption arising under Section 114 of the Evidence Act that the applicant must have known that the property was stolen. The Division Bench held that the Magistrate was in error to have invoked the presumption under Section 114 in respect of the disposal of the property which would have been sufficient for a conviction and if that were so, the Magistrate should have tried and convicted him. I do not think that this decision has any bearing on the facts of this case.

13. In *Purushottamdas v. State*, AIR 1952 All 470, it was held that a person entitled to possession is one from whose possession the property was seized and who is not found to have committed any offence such as would render his possession unlawful and it was further held that the criminal Court under Section 523, Criminal P. C. is not concerned with the ownership of the property. Even in this decision, what is emphasised is that the possession at the time of seizure must be lawful. The principle enunciated in this decision clearly indicates that the restoration of the property to the person from whom it was seized will not apply if such a possession is found to be unlawful.

14. In *Paidi Subbayya v. Emperor*, 1939 Mad WN 739 (2) = (AIR 1939 Mad 905) *Lakshmana Rao, J.* held in a two sentence order that 'the property seized from the fifth accused has to be returned to him'. The facts of that case are that the property was seized from the fifth accused on a complaint given by one B to the police of theft of some articles belonging to him. The police investigated the case and found that the property belonged to the joint family of the complainant and the fifth accused. The complaint was ultimately dismissed as one of civil nature and the property, at the suggestion of the police, was ordered to be returned to the complainant. Taking into consideration the facts of the case, the possession of the property by the fifth accused at the time of seizure cannot be said to be unlawful as he also had interest in the property.

15. In *Thimma Reddi v. Rami Reddi*, 1941 Mad WN Cri 20 = (AIR 1941 Mad 416) distinguishing the former case, it was held that the Magistrate in disposing of the property, has a discretion to pass orders with regard to the disposal of property on a referred charge-sheet submitted by the police that an offence under

Section 411, I. P. C. is not made out in restoring the property to the complainant though the property was recovered from the accused.

16. In *K. J. Singh v. C. Tomu Devi*, AIR 1968 Manipur 29, it was held by the Judicial Commissioner that when once the Magistrate ascertains the person, from whose possession the property was seized and whose possession was not unlawful, then the Magistrate must hold him to be entitled to the possession of the same. This decision again emphasises the fact that the property can be restored to the person from whom it was seized provided that the possession at the time of seizure was lawful.

17. The above decisions do not help the petitioner on the facts of this case.

18. It is significant to note the decision reported in *Mohan Singh v. State*, 1966 Cri LJ 233 (Raj). I respectfully agree with the observations made therein, which are as follows—

"No doubt he can pass an order for the disposal of the property without an enquiry if the person entitled to the possession of it can be ascertained on a consideration of the materials appearing from the police record. The fact that the property was recovered from the possession of a particular person during investigation may be very relevant and a weighty consideration in determining the question as to who should be considered entitled to possession, but it cannot always and necessarily be conclusive. The 'person entitled to possession' in the section should not be equated with the expression 'the person from whose possession the property was taken'. Therefore even when it is ascertainable that the property was recovered from the possession of a certain person, the jurisdiction of the Magistrate to direct an enquiry to ascertain the person entitled to possession thereof cannot be barred."

19. It is clear from the findings of the Commissioner of Police that the possession of Sultan Ibrahim on behalf of the revision petitioner at the time of seizure was not lawful though the offence under which the property was seized was not made out. The petitioner has made prevaricating versions in respect of his possession. At one stage, he stated that the second respondent pledged the conch with him and at another stage, he stated that he sold it to him. The Commissioner of Police also rightly found that the conch was taken away by the petitioner unlawfully from the second respondent and handed it over to Sultan Ibrahim. In those circumstances, it cannot be said that the possession of conch by Sultan Ibrahim on behalf of the petitioner was lawful. On the other hand, it appears to be unlawful.

20. In the result I find that the order of the Commissioner of Police and Presi-

dency Magistrate, Madras City is right and it is confirmed.

21. The revision petition is dismissed.
Petition dismissed.

AIR 1970 MADRAS 221 (V 57 C 58)

ISMAIL, J.

Ramanujam Press represented by its Partner K. Ramanujam, Petitioners v. The Regional Provident Fund Commissioner Madras, Respondent.

Writ Petn. No. 33 of 1967. D/- 19-6-1969.

(A) Employees' Provident Funds Act (1952), S. 1 (3) (a)—Employees' Provident Funds Scheme (1952), Cl. 26—S. 1 (3) (a) — Expression "in which 20 or more persons are employed" — Meaning of — Employment of 20 or more persons even for a period of one day in a year is sufficient to attract the provisions of the Act — Meaning of the section is not controlled by Cl. 26 of the Scheme.

The expression "in which 20 or more persons are employed" occurring in S. 1 (3)(a) does not denote continuity of employment of all 20 persons and so even if for a period of one day in a year 20 or more persons are employed in an establishment that will be sufficient to attract the provisions of the Act. AIR 1964 Mad 371, Rel. on. (Para 4)

It cannot be said that Cl. 26 of the Scheme controls the interpretation of the meaning of S. 1(3)(a) and hence the Act will have no application to the establishment where 20 or more persons are not employed in that establishment who had put in at least one year's service or had worked for not less than 240 days in a year. Clause 26 of the Scheme does not deal with the applicability of the Act to a particular factory but deals with the eligibility and the requirement of an employee to become a member of the fund. The stage at which clause 26 of the Scheme comes into operation or play is obviously subsequent to the stage at which the Act becomes applicable to the factory. Consequently either from the language of clause 26 of the Scheme or from the setting in which that clause occurs in the scheme, there is no scope for that clause controlling the obvious and clear meaning of S. 1(3)(a) of the Act. (Para 5)

(B) Employees' Provident Funds Act (1952), S. 5—Employees' Provident Funds Scheme, Cl. 39 — Administrative charges — Communication sent to employer stating that provisions of the Act and scheme are applicable to his establishment from the date the establishment was found em-

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employing 22 persons during inspection — Administrative charges can be collected from the employer even for the period earlier to the date of communication, from the date when the scheme became applicable to the establishment. AIR 1967 Mad 129, Rel. on. (Paras 3 & 6)

(C) 'Employees' Provident Funds Act (1952), S. 7-A — Provisions of the Act and scheme applied to an establishment — Commissioner by communication asking the Collector to collect certain amount from employer by way of contribution and administrative charges — Employer not given opportunity to represent his case before determining the amount mentioned in the communication — The communication cannot stand being in violation of sub-section (3) of S. 7-A.

(Para 7)

Cases Referred: 'Chronological' Paras (1967) AIR 1967 Mad 129 (V 54) =

ILR (1967) 2 Mad 606, R. P. F. Commr., Madras v. K. R. Subbaier Tape Factory

(1964) AIR 1964 Mad 371 (V 51) = 1964-1 Lab LJ 706, East India Industries (P.) Ltd. v. Regional Provident Fund Commr.

V. Krishnan, for Petitioner; S. Ramasubramania for Central Govt. Standing Counsel, for Respondent.

ORDER:—Ramanujam Press is owned by a partnership. The establishment of the press was found employing 22 persons during inspection by the officers of the respondent on 31-7-1964. On the basis of this inspection report, the respondent herein sent a communication dated 29-11-1965 to the petitioner herein stating that the provisions of the Employees' Provident Funds Act 1952 and the Scheme framed thereunder applied to the petitioners' establishment from 1-8-1964 and asked the petitioner to comply with the requirements of the provisions of the Act as well as the Scheme. The petitioner put forward the contention that the Act was not applicable to the petitioner's establishment since in the petitioner's establishment there were no 20 employees who have put in at least one year's service and have worked for not less than 240 days. Since the contention of the petitioner was not accepted by the respondent, the petitioner made representations to the Central Government under S. 19-A of the Act. The Central Government by its communication dated 21-4-1966 came to the conclusion that the Act applied to the petitioner's establishment.

2. Thereafter by a communication dated 15-12-1966 the respondent addressed the Collector of Madras to collect a sum of Rs. 224-75 by way of contributions and a sum of Rs. 85-75 by way of administrative charges from the petitioner herein under the provisions of the

Revenue Recovery Act. It is at this stage the petitioner has come to this Court and filed the present writ petition under Art. 226 of the Constitution of India praying for the issue of a writ of certiorari to quash the communication of the respondent dated 29-11-1965 stating that the Act applied to the petitioner's establishment with effect from 1-8-1964 and the communication dated 15-12-1966 addressed to the Collector requesting him to recover the arrears of contribution and administrative charges under Revenue Recovery Act and copy marked to the petitioner.

3. The contentions of the learned counsel for the petitioner in support of this writ petition are three-fold. The first contention is that the provisions of the Act have no application to the petitioner's establishment since 20 or more persons were not employed in that establishment who had put in at least one year's service or had worked for not less than 240 days in a year; (2) the Administrative charges for a period earlier to the date of communication, namely, 29-11-1965 should not be collected; (3) the communication dated 15-12-1966 addressed to the Collector of Madras was in contravention of sub-sec. (3) of S. 7-A of the Act in that no opportunity was given to the petitioner before determining the quantum of the amount payable by the petitioner.

4. I shall now deal with these three contentions seriatim. As far as the first contention is concerned, it is really concluded by a Bench decision of this Court against the petitioner. In East India Industries (P.) Ltd. v. Regional Provident Fund Commr., 1964-1 Lab LJ 706 = (AIR 1964 Mad 371), a Bench of this Court came to the conclusion that if for a period of one day in a year 20 or more persons were employed in the establishment that will be sufficient to attract the provisions of the Act. The learned Judges declined to accept the contention that the use of the expression "in which 20 or more persons are employed" occurring in S. 1(3)(a) of the Act denotes a continuity of employment of all the 20 persons and therefore the fact that 20 or more persons were employed only for a part of the period or some of the days in the year will not be sufficient to attract the applicability of the Act. This Bench decision of this Court is binding on me and therefore on the strength of this decision I must reject the first contention of the learned counsel for the petitioner.

5. However, Mr. Krishnan, the learned counsel sought to distinguish this decision by pointing out that in that decision the learned Judges did not consider the scope of Clause 26 of the Employees' Provident Funds Scheme, Clause 26 of the Scheme is as follows:—

"1(a) Every employee employed in or in connection with the work of a factory or

other establishment to which this Scheme applies, other than an excluded employee shall be entitled and required to become a member of the Fund from the beginning of the month following that in which the paragraph comes into force in such factory or other establishment, if on the date of such coming into force he has completed one year's continuous service or has actually worked for not less than 240 days during a period of twelve months or less in that factory or other establishment or in any other factory or other establishment to which the Act applies under the same employer, or partly in one and partly in the other."

However the crucial statutory provision to consider is not clause 26 of the Scheme but it is S. 1(3) (a) of the Act. That provision is: "Subject to the provisions contained in Sec. 16, it applies— (a) to every establishment which is a factory engaged in any industry specified in Sch. I and in which twenty or more persons are employed. This section has nothing whatever to do with the duration of employment of the 20 or more persons and all that it refers to is a factual employment of 20 or more persons in a factory. The only aspect that has to be considered is whether clause 26 of the Scheme throws any light on S. 1(3)(a) of the Act so that S. 1(3)(a) of the Act may be considered or interpreted as contended for by the learned counsel for the petitioner. In the first place, the language of S. 1(3)(a) of the Act is clear and unambiguous and is not capable of the interpretation contended for by the learned counsel. In the second place there is no inconsistency between the interpretation found favour with the Bench of this Court of S. 1(3)(a) and Clause 26 of the Scheme. Clause 26 of the Scheme does not deal with the applicability of the Act to a particular factory but deals with the eligibility and the requirement of an employee to become a member of the Fund. The stage at which clause 26 of the Scheme comes into operation or play is obviously subsequent to the stage at which the Act becomes applicable to the factory. Consequently either from the language of Clause 26 of the Scheme or from the setting in which that clause occurs in the Scheme, there is no scope for that clause controlling the obvious and clear meaning of S. 1(3)(a) of the Act. Therefore I do not have the slightest hesitation in rejecting the contention of the learned counsel that clause 26 of the Scheme in any way controls the meaning of Section 1(3)(a) of the Act, as interpreted by the Bench decision of this Court already referred to. Therefore I reject the first contention of the learned counsel.

6. As far as the second contention is concerned, that also has been decided against the petitioner by a Bench deci-

sion of this Court in *R. P. F. Commr., Madras v. K. R. Subbaier Tape Factory* AIR 1967 Mad 129. In view of this Bench decision which is binding on me this contention also fails.

7. On the other hand the third contention of the learned counsel for the petitioner is well founded. Sec. 7-A(1) of the Act states that the Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner or any Regional Provident Fund Commissioner may, by order, determine the amount due from any employer under any provision of this Act or of the Scheme and for this purpose may conduct such inquiry as he may deem necessary. Sub-sec. (3) of this section provides that no order determining the amount due from any employer shall be made under sub-sec. (1) unless the employer is given a reasonable opportunity of representing his case. It is admitted by the learned counsel for the respondent that no opportunity to represent the case of the petitioner before determining the amount mentioned in the communication dated 15-12-1966 was given to the petitioner. Consequently there has been a clear violation of sub-sec. (3) of Sec. 7-A of the Act. Therefore the communication dated 15-12-1966 of the respondent addressed to the Collector of Madras requesting him to collect the arrears of contribution and administrative charges under the provisions of the Revenue Recovery Act cannot stand.

8. Under these circumstances, this writ petition is allowed to this extent, that the communication of the respondent dated 15-12-1966 addressed to the Collector of Madras requesting him to collect arrears of contribution of Rs. 2224-75 and administrative charges of Rs. 85-75 from the petitioner under the provisions of the Revenue Recovery Act is quashed. In other respects this writ petition will stand dismissed. There will be an order as to costs.

Order accordingly.

AIR 1970 MADRAS 226 (V 57 C 59)
RAMAMURTI, J.

S. Arunachalam Asari (died) and others.
Appellants v. Sivan Perumal Asari and another, Respondents.

Second App. No. 1196 of 1964, D/- 7-8-1968, against decree of Sub Court Tuticorin in A. S. No. 5 of 1963.

(A) Civil P. C. (1908), S. 100 — Finding of fact based on evidence — Binding on second appellate court.

The findings of fact reached by lower appellate Court have to be accepted as final in view of the provisions of S. 100

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Where the lower appellate Court had adequate material and evidence to reach the conclusion it did, the fact that the second appellate Court may take a different view on the evidence is no ground for interference by the second appellate Court. (Para 2)

(B) Transfer of Property Act (1882), S. 55(3) and S. 3— Demand of title deeds — Rights of purchaser — Title deeds with prior unregistered mortgagee— Purchaser not making demand — Purchaser is guilty of gross negligence — Cannot be said to be without notice of prior mortgage.

A person, who purchases the property, ought to insist upon the handing over of the title deeds by the vendor and should not lightly accept any explanation given by the vendor for his not immediately handing over the title deeds or his oral promise that the title deeds would be handed over later on. (Para 3)

A first mortgaged the property and handed over the title deeds to the mortgagee. He sold the same property to the vendee before the mortgage deed was registered. The vendee did not insist on the title deeds being handed over to him at the time of sale.

Held the vendee was guilty of gross negligence in not having insisted upon the handing over of the title deeds to him at the time of the sale deed. The fact that the encumbrance certificate which he obtained did not disclose the mortgage (as it was unregistered at that date) was not sufficient to hold that he was a bona fide transferee in good faith without knowledge of the prior mortgage. If he had demanded the title deeds at the time of sale he would have come to know that the deeds were handed over to the mortgagee. The vendee therefore could not be said to be a bona fide transferee in good faith without the knowledge of the mortgage. (Para 3)

(C) Transfer of Property Act (1882), S. 48 — Unregistered mortgage followed by registered sale — Subsequent registration of prior mortgage deed within time allowed by registration law — Mortgage operates from date of execution under S. 47 of Registration Act — Mortgagee gets priority over the subsequent sale under S. 48, T. P. Act — S. 49, Registration Act, does not apply — (Registration Act (1908), Ss. 47 and 49).

'A' executed a mortgage on 5-12-1953. The deed was registered on 3-7-1954 (within time allowed by registration law). On 28-12-1953 'A' sold the same property to B by a registered sale deed.

Held (i) that the mortgage registered on 3-7-1954 took effect from the date of its execution, i.e. 5-12-1953;

(ii) On the rule of priority founded in law and justice and embodied in S. 48 of the Transfer of Property Act the later

executed transfer by sale in favour of the vendee would be subject to the rights of the previously created mortgage.

(Para 5)

(iii) That the rights of priority have to be determined by the combined operation of S. 48 of the Transfer of Property Act and Ss. 47 and 49 of the Registration Act and not on consideration of S. 49, Registration Act, in isolation. S. 49 of the Registration Act would cease to apply the moment the document is registered and the rights of parties would be determined only on S. 47 of the Registration Act and S. 48 of the Transfer of Property Act. The fact that a subsequent transferee is a bona fide transferee is not a ground by itself for postponing the rights of a prior transferee. AIR 1961 SC 1747, Dist., AIR 1960 Mad 396 & AIR 1946 Mad 140 & (1963) 2 Andh WR 267 & AIR 1965 SC 430, Rel. on. (Paras 6, 10)

(iv) S. 48 of the Transfer of Property Act is founded on an important principle that no man can convey a better title than he has. If a person has already effected a transfer he cannot derogate from his grant and deal with the property free from the rights created under the earlier transaction. The section does not contain any protection or reservation in favour of a subsequent transferee who has no knowledge of the prior transfer.

(Para 6)

(D) Transfer of Property Act (1882), Ss. 48, 78 — Principle underlying S. 78 — Applies to sales also — Prior mortgagee guilty of fraud, etc. — Will be postponed after subsequent vendee.

The principle embodied in S. 78 T. P. Act, will apply to transactions of sales also and if a prior mortgagee is guilty of fraud or misrepresentation or gross negligence as a result of which a subsequent purchaser is induced to enter into a transaction with the owner of the property as though there was no prior transfer, the prior mortgagee will be postponed after the subsequent purchaser.

(Paras 7, 10)

(E) Registration Act (1908), S. 23 — Registration of document — Delay till the last date of limitation — Does not amount to negligence of transferee.

Where a man does what the law of the Court permits him to do, it cannot amount to gross negligence. AIR 1933 Cal 398, Rel. on. (Para 7)

A mortgagee allowed the registration of his mortgage deed to be delayed but got it registered within the time allowed by the law:

Held that the mortgagee was not guilty of gross negligence merely because he took his own time to get the document registered within the time allowed by the Statute. By that conduct of waiting he could not be said to be facilitating the

owner of the property to commit fraud.

(Para 10)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 430 (V 52)=

1964-2 Mad LJ (SC) 162, K. H.

Nathan v. Maruti 9

(1963) 1963-2 Andh WR 267=ILR

(1965) Andh Pra 16, Jagannatha

Rao v. Raghavarao 8

(1961) AIR 1961 SC 1747 (V 48)=

1963-1 SCJ 646, Ram Saranlal v.

Mt. Domini Kuer 6, 8

(1960) AIR 1960 Mad 396 (V 47)=

ILR (1960) Mad 508, Ramaswami

Pillai v. Ramaswami Naicker 8

(1946) AIR 1946 Mad 140 (V 33)=

1945-1 Mad LJ 425, Duraiswami

Reddi v. Angappa Reddi 8

(1933) AIR 1933 Cal 398 (V 20)=

ILR 60 Cal 225, Surendranath

Ghosh v. Haridas Biswas 7

(1911) 16 Cal WN 612=15 Cal LJ 61,

Jadunandan Prosad Singh v. Koer

Kallayan Singh 7

D. Ramaswami Iyengar and R. Krishna-

machari, for Appellants; V. Shanmugham,

for Respondents.

JUDGMENT:— The plaintiff is the

appellant in this second appeal which

arises out of a suit filed by him to enforce

the mortgage, Ex. A-4, executed by the

first defendant in favour of the plaintiff

for a sum of Rs. 700 on 5-12-1953. The

second defendant claimed rights under a

sale deed, Ex. B-4, executed by the first

defendant on 28-12-1953, for a sum of

Rs. 1000. The plaintiff's mortgage was

registered on 3-7-1954. The first defend-

ant remained ex parte and the second

defendant alone resisted the suit on the

ground that the mortgage in favour of the

plaintiff is a sham and nominal document

fraudulently brought into existence ante-

dating it after the sale deed Ex. B-4. In

favour of the second defendant. He fur-

ther contended that when he purchased

the property from the first defendant, he

purchased it in good faith for valuable

consideration and without knowledge that

the first defendant had already executed

a mortgage deed, Ex. A-4, which was

registered on 3-7-1954. The trial Court

dismissed the plaintiff's suit holding that

the mortgage, Ex. A-4, in favour of the

plaintiff was a sham and nominal docu-

ment and that it was brought into exist-

ence ante-dating the same with a view to

defeat the rights of the second defendant.

It also held that the second defendant

purchased the property without any

knowledge of the rights of the plaintiff

under the alleged mortgage, Ex. A-4. But

on appeal, by the plaintiff, the lower ap-

pellate Court came to a contrary conclu-

sion and held that the mortgage, Ex. A-4,

was not an ante-dated transaction, out it

was a perfectly bona fide and genuine

transaction. But, on the other point, it

Court that the second defendant purchas-

ed the property without the knowledge

of the mortgage in favour of the plaintiff

and therefore the mortgage would not be

enforceable against the property purchas-

ed by the second defendant. Hence this

appeal by the defeated plaintiff.

2. Mr. Shanmugham, learned counsel

for the second defendant, drew

my attention to several suspicious fea-

tures in the case and the discrepancies in

the evidence adverted to by the trial

Court in support of its conclusion that

the mortgage, Ex. A-4, is not a genuine

document transaction, but that it was

ante-dated and brought into existence as

a result of collusion between the plaintiff

and the first defendant who are near rela-

tions, having married sisters. Learned

counsel also relied upon the notices which

passed between the parties and laid con-

siderable stress that when the first defen-

dant in his reply notice, Ex. A-5, stated

that sufficient money was reserved with

the second defendant to discharge the

mortgage debt due to the plaintiff, the

plaintiff did not pursue the second defen-

dant and waited for nearly eight years to

demand payment of the amount. While

I see some force in the points raised by

Mr. Shanmugham, the findings of fact

reached by the lower appellate Court

have to be accepted as final in view of

the provisions of S. 100, C.P.C. The lower

appellate Court did have adequate mate-

rials and evidence to reach the conclusion

it did, and even assuming that this Court

may take a different view on the evidence

it is not a ground for interference in

second appeal. The result is that the

mortgage in favour of the plaintiff is a

perfectly true and bona fide transaction

and the mortgage deed, Ex. A-4, was exe-

cuted on 5-12-1953, 23 days prior to the

sale deed in favour of the second defen-

dant

3. Even so, it is urged on behalf of the

second defendant that on the concurrent

findings of the courts below that the

second defendant is a bona fide purchaser

without knowledge of the mortgage, Ex.

A-4, (at that time it was not registered),

the mortgage though registered subse-

quently, would not be enforceable against

the property purchased by the second

defendant. I am unable to agree with

the view of the courts below that the

second defendant had no knowledge of

the mortgage, Ex. A-4. The title deeds

are now produced by the plaintiff, this

case being that as soon as the mortgage

deed, Ex. A-4, was executed, the title

deeds were handed over by the first

defendant to the plaintiff. On the find-

ing, that the mortgage deed, Ex. A-4, is a

perfectly genuine and bona fide transac-

tion, it has to be accepted that the title

deeds too were handed over to the plain-

tiff on the date of Ex. A-4. The second

defendant is guilty of gross negligence in not having insisted upon the handing over of the title deeds to her at the time of the sale deed, Ex. B-4. The fact that she applied for an encumbrance certificate and obtained one which did not disclose the mortgage, Ex. A-4 (as it had not been registered at that time), is not sufficient to hold that the second defendant is a bona fide transferee in good faith and without knowledge of the prior mortgage, Ex. A-4. A person who purchases the property ought to insist upon the handing over of the title deeds by the vendor and should not lightly accept any explanation given by the vendor for his not immediately handing over the title deeds, or his oral promise that the title deeds would be handed over later on. The fact that the title deeds were not handed over to the second defendant is a powerful circumstance which should have excited the suspicion of the second defendant and if she had pursued the matter, she would have certainly come to know that the title deeds were handed over to the plaintiff, when Ex. A-4 mortgage was executed by the first defendant. I am clearly of the view that on the facts of the instant case, the second defendant cannot claim to be a bona fide transferee and in good faith as he is guilty of gross negligence in not having insisted upon the handing over of the title deeds to her at the time of her sale deed, Ex. B-4.

4. Even assuming that the second defendant was not aware of the plaintiff's mortgage, it would make no difference because, though the mortgage deed was registered on 3-7-1954, it will take effect from the date of execution (5-12-1953) in view of the specific provision to that effect in Sec. 47 of the Registration Act.

5. Sri D. Ramaswami Iyengar, learned counsel for the appellant, invited my attention to some of the decisions arising under S. 47 of the Registration Act. In all those cases, it was held that the prior transferee will be entitled to enforce his right of priority even if the subsequent transferee had no knowledge of the prior transaction in view of S. 47 of the Registration Act read with S. 48 of the Transfer of Property Act. S. 48 of the Transfer of Property Act embodies the well-established rule of priority founded on law and justice that if a person purports to create by transfer at different times, rights over the same immoveable property and such rights cannot all co-exist or be exercised to their full extent together, each later created transfer shall be subject to rights previously created. By reason of Sec. 47 of the Registration Act, the plaintiff's mortgage, Ex. A-4, took effect and became operative on a date earlier than the second defendant's sale, Ex. B-4, and under S. 48 of the Transfer

of Property Act, Ex. B-4 must necessarily yield to Ex. A-4.

6. The argument of Mr. Shanmugham on behalf of the respondent, (second defendant) is that under the provisions of the Transfer of Property Act and Registration Act, a mortgage for a sum of Rs. 700 will become valid and create rights over the property in question only if the deed of mortgage is registered and not otherwise and that so long as the mortgage deed had not been registered, the mortgage cannot be said to have taken effect in any manner so as to affect the title of the mortgagor with the result that before the deed of mortgage was registered, the owner of the property would be absolutely free to create rights over the property and that the rule of priority embodied in S. 48 of the Transfer of Property Act, will have no application where the subsequent or second transaction is completed by the execution of a deed and also duly registered before the registration of the first deed of transfer. In other words, his contention is that the rule of priority in Sec. 48 of the Transfer of Property Act would not apply in cases where the first transaction is not registered, as required by law and in the meanwhile the second transaction comes into existence. In support of his contention he placed reliance upon some of the observations of the decision of the Supreme Court in *Ramsaranlal v. Mt. Dominikuer*, 1963-1 SCJ 646 = (AIR 1961 SC 1747) in which it was held that with regard to the right of pre-emption, the crucial date is not the date when the sale deed is executed, but when the sale became effective after registration. That decision is easily distinguishable and the principle underlying that decision has no application to the situation in the instant case.

It is true that under S. 49 of the Registration Act, unless the document is registered it shall not affect the immoveable property concerned nor could the document be received in evidence. The question is not what will be the consequence if the document is not registered at all, but the crucial point is when once the document is registered, from what date it takes effect and becomes operative? The right of priority will have to be determined by the combined operation of S. 48 of the Transfer of Property Act and Ss. 47 and 49 of the Registration Act. Any undue emphasis upon S. 49 of the Registration Act in isolation would render nugatory and useless the equally important provisions in S. 47 of the Registration Act and S. 48 of the Transfer of Property Act. Once the document is registered, Sec. 49 of the Registration Act has no relevance and the document takes effect from the date of its execution by reason of S. 47 of the Registration Act with the result that the rights of priority

of the successive transferees will necessarily have to be determined in accordance with the rule embodied in S. 48 of the Transfer of Property Act.

The acceptance of the argument that till the registration, the first transaction does not exist in the eye of law for any purpose whatsoever so as to leave the property as absolutely free property in the hands of the owner would result in serious injustice besides absurd and anomalous consequences. Suppose a prior transferee had advanced the entire consideration and waits merely, for considerations of convenience to register the document within the time fixed under the statute, it will be open to the vendor to deal with the property in derogation of the prior transaction and the second purchaser will get priority even though he is informed by the first purchaser that the first sale had been executed, the full price thereunder had been paid and that all that remained was merely the registration of the sale deed within the time provided by the statute. This will be the result if the argument of the respondent is accepted. It will be noticed that this extreme argument founded upon Sec. 49 of the Registration Act has nothing to do with the question whether a second transferee is a bona fide transferee or a purchaser with knowledge. The contention is purely a legal one based upon the provision in S. 49 of the Registration Act that unless the document is registered, the transaction shall not affect any immoveable property or will be received as evidence of any transaction affecting such property. I am not prepared to accept this argument which completely renders nugatory and useless the other equally important provisions of the Registration Act and the Transfer of Property Act. S. 49 of the Registration Act would cease to apply the moment the document is registered and as regards the rights of parties, we are thrown back only upon Sec. 47 of the Registration Act and S. 48 of the Transfer of Property Act. Sec. 48 of the Transfer of Property Act is founded upon the equally important principle that no man can convey a better title than what he has. If a person has already effected a transfer, he cannot derogate from his grant and deal with the property free from the rights created under the earlier transaction. His prior title as absolute and free owner is curtailed or diminished by rights already created under the earlier transaction. Sec. 48 of the Transfer of Property Act is absolute in its terms and does not contain any protection or reservation in favour of a subsequent transferee who has no knowledge of the prior transfer. Knowledge or no knowledge, a subsequent transferee cannot claim any priority as against an earlier transferee.

Whenever the Legislature desires to protect the rights of a transferee in good faith for consideration specific provision to that effect is made—vide for instance, S. 27 of the Specific Relief Act, 1877 and Ss. 38 to 41 of the Transfer of Property Act. In all other cases, the well-settled rule that a man cannot derogate from his grant will have to be applied.

7. Instances may arise when the right of priority embodied in Sec. 48 of the Transfer of Property Act may not avail in cases where the prior transferee is guilty of fraud and misrepresentation or gross negligence as a result of which the subsequent transferee is induced to enter into a transaction with the owner of the property as though there is no other prior transfer. S. 78 of the Transfer of Property Act contains a provision where the rights of a prior mortgagee are postponed in favour of the second mortgagee when the prior mortgagee is guilty of fraud, misrepresentation or gross negligence. Though this Sec. 78 in terms applies only to mortgages, the principle underlying it would apply to transactions like sales also. The condition for the postponement of priority is that a prior transferee must be guilty of fraud, misrepresentation or gross negligence. The question immediately arises where the prior transferee could be said to be guilty of gross negligence because he waits, during the period allowed by law, for the registration of the document, thereby giving opportunities to the owner to deal with the property and create rights in favour of third parties. The argument on behalf of the respondent (second defendant) is that as between two innocent parties, the prior transferee and the subsequent transferee, the former should bear the consequences of his having delayed the registration of the document and thereby facilitated or enabled the owner to enter into a subsequent transaction. In other words, the first transferee should suffer for the fraud or the over-reaching on the part of the owner which was only due to the fact that the document was not registered and the subsequent transferee could not discover the encumbrance even if he had obtained an encumbrance certificate. It is this aspect which came up for direct decision in *Surendranath Ghosh v. Haridas Biswas*, ILR 60 Cal 225 = (AIR 1933 Cal 398). In that case, the subsequent transferee was found to be a bona fide transferee without knowledge of the prior transaction. This identical argument that on account of the delay in the registration of the first transaction the first mortgagee had held out to the world that the property would be free from any encumbrance and so induced the subsequent mortgagee to advance moneys and this enabled the mortgagor to commit fraud and that in such circumstances, the

rights of priority of the first mortgagee will be postponed, because, by the delay in the registration, he has facilitated this fraud was not accepted. It was held that when the statute gives four or eight months time, as the case may be, for registration, the mortgagee cannot be held to be guilty of negligence in taking his own time for registration provided it is within the time limit. It is sufficient to refer to the following observations at pages 231 and 232—

"In my view, when a mortgage is registered within the period of four months allowed by S. 23 of the Registration Act it is prima facie registered within a reasonable time. Where a prior mortgagee has done nothing towards inducing a subsequent mortgagee to advance money, but has simply availed himself of the time given to him by the law for registering his mortgage, he cannot be said to be guilty of 'gross negligence' within the meaning of S. 78 of the Transfer of Property Act. Sec. 47 of the Registration Act lays down that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration and, in my view, where a mortgage is prior in date and has been validly registered within the time allowed by the law, it cannot be postponed to a subsequent mortgage merely because the prior mortgagee had omitted to get his mortgage registered until after the execution of a subsequent mortgage. There is no special hardship on the subsequent 'encumbrancer', because, as in this country documents do not take effect from the date of registration every person who acquires property takes it subject to the risk that there may be a prior title created within the preceding four months or in some instances even eight months (Ss. 23 and 24 of the Registration Act). See *Jadunandan Prosad Singh v. Deo Narain Singh*, 1911-16 Cal WN 612, 617".

8. Reference may next be made to a decision of this Court in *Duraiswami Reddi v. Angappa Reddi*, 1945-1 Mad LJ 425=(AIR 1946 Mad 140) in which too it was held that the prior transferee would be entitled to enforce his rights though his document is registered later and even if the subsequent transferee entered into the transaction bona fide without knowledge of the first transaction. It was held that this result was implicit and was a direct consequence of the combined operation of S. 47 of the Registration Act and S. 48 of the Transfer of Property Act. It is also observed that the right of priority of the first transferee would be postponed only if the later transferee establishes any infirmative circumstance like fraud, estoppel or gross negligence. Refer-

ence may be made to the following observations at page 426—

"Such a plea, if allowed, would lead to much fraud. If a later document registered earlier is to prevail over an earlier document registered later it would always be easy for the vendor and the later purchaser to enter into a transaction within the time given for registration of the earlier document and get the new deed registered immediately and thus defeat the purchaser under the earlier deed."

This decision was followed in a later decision of this Court in *Ramaswami Pillai v. Ramaswami Naicker*, AIR 1960 Mad 396, as well as in the Bench decision of the Andhra Pradesh High Court in *Jagannatha Rao v. Raghavarao*, 1963-2 Andh WR 267. In the latter case, the decision of the Supreme Court referred to earlier, 1963-1 SCJ 646=(AIR 1961 SC 1747), was referred to and distinguished.

9. My attention was also drawn to a recent decision of the Supreme Court in *K. H. Nathan v. Maruthi Rao*, 1964-2 Mad LJ (SC) 162=(AIR 1965 SC 430) in which also it was held that the mortgage deed became effective and operative from the 5th July 1947, when the mortgage was registered and would prevail over a transfer which took place between the date of execution and registration of the earlier transaction. It is true that in that decision nothing was stated as to what would be the position if the subsequent transferee happens to be a bona fide transferee without knowledge of the earlier transaction.

10. From the foregoing it will be seen that the prior transferee will get priority, the moment his deed of transfer is registered. This right of priority is the direct consequence of S. 47 of the Registration Act, and S. 48 of the Transfer of Property Act. The fact that a subsequent transferee is a bona fide transferee is not a ground by itself for postponing the rights of a prior transferee. The normal rule is that no man can derogate from his own grant, and whenever the Legislature wanted to protect the rights of a subsequent transferee in good faith and for consideration specific provision has been enacted. In all other cases, the right of priority embodied in S. 48 of the Transfer of Property Act would apply. The right of priority of the prior transferee will be postponed only if he is guilty of any fraud, misrepresentation or gross negligence. The prior transferee cannot be said to be guilty of any negligence merely because he takes his own time to get the document registered, within the time allowed by the statute. By that conduct of waiting which the statute permits him, he could not be said to be facilitating the owner of the property to commit fraud. What a man does, what

the law of the land permits him to do, cannot amount to gross negligence. A subsequent transferee, must necessarily take the risk of the owner having entered into a prior transaction concerning the property and that transaction remaining unregistered but being completed by registration subsequent to the second transaction. That is an inevitable risk which the subsequent transferee must take, by reason of the specific provision in S. 47 of the Registration Act. In the instant case, there is no question of the plaintiff being guilty of any gross negligence and his rights of priority will have to be recognised under Sec. 48 of the Transfer of Property Act.

11. For all these reasons, the second appeal is allowed and the plaintiff's suit decreed. There shall be a preliminary decree as prayed for in favour of the plaintiff. Three months time for redemption. The plaintiff will be entitled to his costs in the trial Court. The parties will bear their own costs both in the lower appellate Court and in this Court. Leave refused.

Appeal allowed

AIR 1970 MADRAS 232 (V 57 C 60)

ALAGIRISWAMI J.

M. Varuvel Nadar, Plaintiff-Appellant
v. A. Varuvel Nadar, Defendant-Respondent

Second Appeal No. 1558 of 1964. D/- 24-10-1968.

Civil P. C. (1908), S. 11:— Partition suit—Co-defendants—Plaint clearly recognizing co-defendant M's right to suit properties and; therefore, co-defendant remaining ex parte—Another suit, filed at same time by other co-defendant claiming share in property recognized as of M in plaint without impleading M, also tried together—Held, 'M' who was not aware of contentions raised by co-defendant and who therefore had no opportunity to contest that claim could not be said to be prevented by principle of res judicata in contesting that claim in fresh suit—Defendant in partition suit could not be deemed as a rule to be aware of possibility that other co-defendants would claim partition of their share whenever partition suit is instituted. AIR 1922 Mad. 452 & AIR 1923 Mad 630; Foll.; AIR 1916 Pat 126, Rel. on; AIR 1947 Mad 170; Disting. AIR 1943 Cal 76, Rel.; AIR 1941 Pat 83, Dissent from—(Hindu Law—Partition suit). (Paras 2, 4).

Cases Referred: Chronological Paras (1947) AIR 1947 Mad. 170 (V 34)=

1946-2 Mad LJ 321, Ramamani v.

Basavayya

(1943) AIR 1943 Cal 76 (V 30)=
ILR (1942) 2 Cal 299; Chandu Lal
v. Bibi Khateemmonessa.

(1941) AIR 1941 Pat 83 (V 28)=ILR
19 Pat 669; Harihar Prasad v.
Narsingh Prasad.

(1928) AIR 1928 Mad. 630 (V 15)=
1928 Mad WN 321, Gopala v.
Gopalakrishna

(1922) AIR 1922 Mad. 452 (V 9)=16
Mad LW 981, K. Ramaswami Iyer
v. Thumhayasami

(1916) AIR 1916 Pat 126 (V 3)=39
Ind Cas 259, Latif Hussain v. Bas-
deo Singh

(1843) 3 Hare. 627=15 LJ Ch 441,
Cottingham v. Earl of Shrews-
bury

P: S. Sarangpani Iyengar, for Appel-
lant; T: R. Ramchandran, for Respondent.

JUDGMENT:— The plaintiff is the appellant. He is a purchaser of the suit properties from P.W. 2, who had purchased them from one Mariamma, the daughter of one, Devasabayam. This Devasabayam had four brothers, Mariaputhali, Chanthanakurisu, Mariandran and Anthonimuthu. The defendant is the son of Anthonimuthu. Chanthanakurisu also had a son called Anthonimuthu, who had two sons, Siluvastian and Chanthanakurisu. Devasabayam, Chanthanakurisu and Anthonimuthu were admittedly entitled to 1/3rd share each in their family properties, as Mariaputhali and Mariandran seem to have died without any issues. Devasabayam sold to his brother Anthonimuthu, a 1/4th share in suit items 3 to 6. Therefore, he still had with him a 1/3rd share in items 1 and 2 and a 1/12th share in items 3 to 6. It is this which Mariamma sold to P.W. 2, and P.W. 2 sold to the plaintiff, Chanthanakurisu's grandsons, Siluvastian and Chanthanakurisu, filed O.S. No. 98 of 1956, for partition and possession of their 1/3rd share. To this suit all the members of the family were parties including Mariamma. Mariamma was ex parte in the suit. Though there was some dispute as to whether she had been served with summons in that suit, both the courts below have held that she had been served with summons and we can proceed on the footing that she had been served with summons and had chosen to remain ex parte. At the same time the present defendant filed O.S. No. 68 of 1956 in which only Siluvastian and Chanthanakurisu, the grandsons of Chanthanakurisu were the defendants. Mariamma was not a party to that suit. Both the suits were tried together and the defendant got a decree for a 2/3rd share in all the items and not merely a 1/3rd share in items 1 and 2 and 7/12th share in items 3 to 6 as he should have, because Anthonimuthu had purchased only a 1/4th share in items

3 to 6. Taking these into consideration the trial Court decreed the plaintiff's suit. But the lower appellate Court has taken the view that the decree in the suit was res judicata in respect of the present suit, and has allowed the appeal and dismissed the plaintiff's suit. The question, therefore, is whether the decision in the previous suit O.S. No. 98 of 1956 is res judicata in this suit as held by the lower appellate Court.

2. I am clearly of opinion that the conclusion of the lower appellate Court on this point is wrong. The question as to the scope of the principle of res judicata as between the co-defendants has been decided by this Court in *K. Ramasami Iyer v. Thumbayasami*, AIR 1922 Mad 452 (FB). In that case the learned Chief Justice delivering the judgment of the Full Bench refers with approval to the rule laid down by Vice-Chancellor Wigram in the leading case of *Cottingham v. Earl of Shrewsbury* (1843) 3 Hare 627; 15 LJ Ch 441 which is as follows:—

"If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

The effect of this decision was considered by a later decision of a Bench of this Court in *Gopala v. Gopalakrishna*, AIR 1928 Mad 630. In that case A filed a suit against P, a tenant, for possession and rent and joined B and C as co-defendants. In the plaint A admitted that the property belonged to A, B and C. B contested that C had no interest in the property. C remained ex parte. The suit was decreed and possession also decreed in favour of A and B in two equal shares. Later on C sued A and B for partition, ascertainment, and delivery of one-third share in the property. The defence was that the decision in the previous suit was res judicata. It was held that the suit was not so barred. In discussing this question Srinivasa Ayyangar, J. referred to the Full Bench decision of this Court and then proceeded to observe as follows: (at page 632)

"It follows from the rule accurately stated as above, that before there can be any adjudication between co-defendants operating as res judicata a conflict must have arisen between them. Such a conflict might no doubt arise in one of two ways. It might arise as the direct result of the manner in which the plaintiff has set out his case in the plaint. It might also arise as between the defendants

themselves in the course of pleadings in answer to the plaintiff's case.

Again in the latter class of cases the determination of the conflict as between co-defendants might or might not be necessary for the determination of the plaintiff's claim. The rule obviously seems to be that it is only when the determination of the question as between co-defendants is necessary for the determination of the plaintiff's claim that the decision as between co-defendants would operate as res judicata. Otherwise, that is to say, if such determination as between co-defendants were not necessary for the decision of the plaintiff's case, it is clear that such decision would not operate as res judicata for the simple reason that it is on a question which, to adopt the language employed in Section 11, Civil Procedure Code, is though substantially, not directly in issue. It would thus be clear that whenever the contest between co-defendants is not indicated and included in the plaintiff's action itself, then it follows that for the purpose of a decision operating as res judicata as between co-defendants there must have been actually a conflict or issue raised as between them and that such conflict or issue must have been necessary for the determination of the plaintiff's case or claim.....

From these considerations it is clear that as the plaintiff in this case was under no obligation to appear in the previous suit having regard to the suit as laid and as no issue was raised as between co-defendants, the rule of res judicata cannot apply".

Jackson, J. observed as follows:—

"No mystery attaches to the principle of res judicata. If a matter has been directly and substantially in issue in a former suit between the same parties, and has been finally decided, that decision will be treated as final in a subsequent trial, with due regard to the competence of the Courts. If a plaintiff raises an issue in his plaint, and a defendant runs away from it by remaining ex parte, that defendant gives up his case, and the Court will finally decide it against him. But if, apart from the plaint which has been served upon such defendant, new matter is brought in, either by way of amending the plaint or by way of written statements from other defendants, the defendant, who has remained ex parte, cannot be said to be running away from issues of which he has never heard. It would be odd to say that such matter had been directly and substantially in issue between the parties, when it is perfectly obvious as a matter of fact that between these parties it has never been in issue at all. The contrary position can only be established by assuming that a party once he is given notice of a suit must keep himself informed of every subsequent development even

though the plaintiff apprised him of nothing that he need contest. No case, and certainly no rule of procedure, has ever laid such a duty upon parties, and were this the law, it would follow as a natural corollary that every party must be served with every written statement and every amendment of the plaint."

Now applying this principle let us see how the matter stands in this case. In O. S. No. 98 of 1956 the plaintiff was claiming his 1/3rd share. In paragraph 8 of the plaint he had stated that excluding any of the properties out of Devasahayam's 1/3rd share conveyed by him to Anthonimuthu the rest had devolved on his daughter Mariamma. He then went on to say, excluding the plaintiff's share the balance of 2/3rd belongs to the defendants. It is therefore, clear that Mariamma's claim to the present suit properties was specifically recognised in the plaint itself. Apparently, in that case the present defendant claimed that he was entitled to the whole of 2/3rds. The judgment in O. S. No. 98 of 1956 proceeds to state as follows:—

"This suit and O. S. No. 68 of 1956 are tried together and heard together. Plaint items 1 to 6 in this suit are also items 1 to 6 in that suit. It is found in that suit that the 2nd defendant in this case is entitled to 2/3rd of the plaint items 1 to 6 and that the plaintiffs in this suit are entitled to 1/3rd of those items and not 1/4th as contended by these defendants."

Paragraph 6 is as follows:—

"It is found in the connected case that the plaintiffs in this suit are entitled to 1/3rd of the plaint items 1 to 6 and that the plaintiff therein who is 2nd defendant in the case is entitled to 2/3rd share in these items."

Paragraph 10 ultimately concludes as follows:—

"In view of my finding on issues 1 to 6, I find that plaintiffs are entitled to a decree for partition of 1/3rd share in the plaint A items 1 to 9 only
..... I therefore, pass a preliminary decree (a) for partition of the plaintiff's 1/3rd share in Items 1 to 9 of A schedule....."

The other clauses are not relevant. Notwithstanding this the final decree that was passed in this case allotted a 1/3rd share to the plaintiffs in O. S. No. 98 of 1956 and 2/3rds share to the 2nd defendant in that suit, that is the present defendant. It would be seen that this case exactly fits in with the principle laid down in AIR 1928 Mad 630. The plaint clearly recognised Mariamma's right to the suit properties. There was, therefore, no reason for her to appear and contest. She was not running away from any question that arose out of the pleadings in the plaint.

Merely because the present 2nd defendant chose to claim 2/3rds share in all properties, of which Mariamma could not have been aware and that question was purported to be decided in an indirect way, it cannot be said that Mariamma's claim to the suit properties would be barred by res judicata and consequently the plaintiff's claim also would not be barred by res judicata. The plaintiff in the words of Jackson, J. did not apprise Mariamma of anything that she need contest.

3. On behalf of the respondents reliance is placed upon the decision in Harihar Prasad v. Narsingh Prasad, AIR 1941 Pat 83. It is urged that a suit for partition is different from other suits, that in a suit for partition each defendant is also a plaintiff if he claims his own share and that therefore, the claim by the present defendant as 2nd defendant in O. S. No. 98 of 1956 when it was decided in his favour would be res judicata as against his co-defendant, that is Mariamma. The relevant passage in the report is found at page 87 of the report. It is as follows:—

"It must be remembered that a partition suit may be one of two kinds, namely a suit for imperfect partition or a suit for perfect partition. Order 20, Rule 18, Civil P. C. expressly empowers a Court in a proper case to pass a decree for perfect partition of the property

The rule undoubtedly gives the Court in a proper case power to separate not only the plaintiff's share but also the shares of other defendants interested in the property. In practice defendants in a partition suit frequently ask that their share should be partitioned, and the present defendants first party in the partition suit made such a prayer. If the Court is asked by defendants as well as the plaintiff in a partition suit to separate their shares, the Court will do so; and in order to do so, it must ascertain the respective shares of the parties. In such a case each of the defendants stands in very much the same position as the plaintiff. He is a defendant vis-a-vis the plaintiff in the suit, but he is also a plaintiff vis-a-vis the plaintiff and his co-defendants in so far as he asks for the ascertainment of his share and the granting of a patti proportionate to it. In this respect a partition suit differs very materially from an ordinary title or money suit. This distinction has been noticed by Courts in India in a number of cases

Where defendants in a partition suit pray for a partition of their share, then before such relief can be given to them their share must be ascertained. In such a case there is obviously a conflict of interest between the defendants and between that particular defendant and the plaintiff. A defendant who asks for partition of his share is entitled to such relief, and when a decree is drawn up he can

take steps to enforce such a decree in much the same manner as if he was a plaintiff."

It is this passage that is relied upon on behalf of the respondent. The Bench referred to the Madras decision in AIR 1928 Mad 630 and particularly to the observation of Jackson, J. extracted above, and then observed as follows: (at page 89)

"It is to be observed that a decision on the claim of the co-defendant in this case was unnecessary to grant the plaintiff relief. The original suit was not one for partition, and it therefore, differs very materially from the case now before the Court. As I have stated earlier, in a partition suit each defendant interested in the property can himself claim partition, and if he does so the Court must first ascertain his share and then grant partition of that share. In ascertaining the share of the defendant who claims partition, the Court must adjudicate on the rights of the various defendants. A defendant in a partition suit must be deemed to be aware of such a possibility whenever a partition suit is instituted. In such a case, if the defendant does not appear, he cannot afterwards challenge the decision as to the shares of the various parties arrived at in that partition suit."

4. There was an earlier Bench decision of the same Court in *Latif Hussain v. Basdeo Singh*, 39 Ind Cas 259 = (AIR 1916 Pat 126). That was a case where in a partition suit one of the defendants, T. filed written statement stating that the extent of her proprietary share was correctly stated in the plaint and that she too desired partition; three months later the other defendants put in a written statement contesting the suit on various grounds, and incidentally claiming that in addition to their proprietary share as stated in the plaint they held a one-anna mokurari right under T. There was nothing to show that this claim to a mokurari was brought to the notice of T., who was not contesting the partition suit. An issue was framed on the subject of the mokurari but was subsequently expunged. The effect of the final decree for partition, however, was to give the contesting defendants possession of the one anna they claimed under the mokurari. In a subsequent suit it was held that the question of mokurari was not res judicata between the representatives of T. and the other defendants to the partition suit, inasmuch as (1) the question was not raised in that suit except as between the plaintiff in that suit and the contesting defendants, there being nothing to show that T. was cognisant of the claim; (2) the preliminary judgment in the partition suit stated that the issue as to the mokurari claim was expunged; (3) the question was not expressly decided; and it could not be held that a decision

might and ought to have been obtained in the partition suit by T.

It will be noticed that this decision also fits in with the facts of this case. In discussing the question the Bench stated as follows: (at page 262 (of Ind Cas) = (at p. 128 of AIR Pat).

"..... the question was not raised in that suit at all except between Yakub Hussain who was seeking partition in that suit and the present defendants, for the present defendants did not put in their claim to the mokurari in that partition suit until three months after Musammat Tamizan (T) and her daughters had put in their written statement saying that they did not contest (the defendants have failed to make out the Musammat Tamizan was aware of the claim of mokurari made in their subsequent written statement)." This earlier decision of the same Court was not noticed by the learned Judges, who decided the later case in AIR 1941 Pat 83 nor did they seek to distinguish it. The principle laid down by the earlier Patna decision and the decision in AIR 1928 Mad 630 accord with common sense and requirements of justice. A defendant, who was not aware of the contentions raised by his co-defendant and who, therefore, had no opportunity to contest that claim cannot be said to be barred by res judicata by reason of the decision rendered behind his back. I think it is too much to say, as the learned Judges in AIR 1941 Pat 83 did that a defendant in a partition suit must be deemed to be aware of such a possibility whenever a partition suit is instituted. It is in contemplation of such a contingency that Jackson, J. stated that no case, and certainly no rule of procedure, has ever laid a duty on parties to keep themselves informed of every subsequent development, even though the plaint apprised them of nothing that they need contest. As a matter of fact, in AIR 1941 Pat 83 actually the decision itself proceeds on the footing that there was a conflict of interests between co-defendants in the earlier suit and there was an express decision against the contesting defendants. I am therefore, satisfied that in this case there is no question of the earlier judgment operating as res judicata.

5. I may also refer to the decision in *Chandù Lal v. Bibi Khatemonnessa*, AIR 1943 Cal 76 where it was held as follows:

"Where the plaint itself in a prior suit did not raise any conflict between the co-defendants and a defendant did not appear, but a co-defendant appeared and claimed an interest conflicting with the interest of the absentee defendant, the decision, if any, on the point cannot operate as res judicata unless the absentee defendant gets notice of the conflict. In such circumstances the matter

cannot be said to have been heard and finally decided so as to bind the parties. If however, the pleadings on record, no matter whether the co-defendants pleaded anything, inter se or not, should raise the conflict of interest as between the different sets of the defendants, the requisite condition that there must be a conflict of interest between the defendants concerned shall be satisfied."

In this case the pleadings on record did not raise any conflict of interest between the different sets of defendants. This decision was also in a partition suit and supports the contention of the appellants. I should mention at this stage that the respondents also relied upon a decision of Somayya, J. in Ramamani, v. Basavayya, (1946) 2 Mad LJ 321 = (AIR 1947 Mad 170). In that case it was observed as follows:—

"In a partition action the sharers are both the plaintiffs and the defendants, and each defendant sharer is also in the position of a plaintiff. Where one of the defendants in fact applies for a decree in respect of his share, and the alienees are arrayed as co-defendants, the decision operates as res judicata and cannot again be re-opened in a subsequent suit between the particular defendant whose share was the subject of decision and the alienee-defendants."

To this observation no objection could be taken. In that case there was a conflict between the contesting defendant and the contesting alienee-defendants and a decision had been given. Naturally in a subsequent litigation the earlier decision is res judicata. That was not a case where one of the defendants was absent and the decision in respect of a contention raised by a co-defendant as a consequence of which a decision was given against the absentee defendant was claimed to be res judicata. However, the learned Judge referred to the decision in AIR 1941 Pat 83 which really was not necessary for the decision of the case before him. The earlier decision of the Patna High Court was apparently not brought to his notice. In any case the decision of Somayya, J. in (1946) 2 Mad LJ 321 = (AIR 1947 Mad 170) does not support the contention of the respondents. The result is that the lower appellate Court having decided the case only on the question of res judicata and not having considered the other questions that arise in this case, the second appeal will have to be allowed and the lower appellate Court directed to restore A. S. No. 311 of 1963 to its file and dispose of it on the other questions that arise in the appeal. The appellant will get a refund of the court-fee paid in this case. Costs of the appellant in the second appeal will abide and be provided for in the

fresh decree to be passed by the lower appellate Court.

6. No leave.

Appeal allowed.

AIR 1970 MADRAS 236 (V 57 C 61)

ALAGIRISWAMI, J.

The Vanguard Insurance Co. Ltd., Madras, Appellant v. Chinnammal and others, Respondents.

A: A. O. No. 182 of 1966, D/- 6-12-1968; against order of Dist. J. Tiruchirapalli, in M. A. C. T. O. P. No. 28 of 1964.

Motor Vehicles Act (1939); S: 95:— Words: "contract of employment"— Meaning.

Though on a superficial view of Sec. 95 it might appear that the words "contract of employment" found therein would cover only a contract of employment with the owner of the insured vehicle, it would cover not only such persons but also persons who are on the vehicle in pursuance of a contract of employment with the owner of the goods carried in it. What is necessary is that for sufficient practical or business reasons, the person must be on the vehicle in pursuance of a contract of employment. If he is such a person, any injury caused to him would also be covered by the section. AIR 1967 Punj 486 (FB), Rel. on. (Para 2)

Cases Referred: Chronological; Paras-
(1967) 1967 ACJ 65 (Madh. Pra).
South India Insurance Co. Ltd. v. Heerabai 2
(1967) AIR 1967 Punj 486 (V 54) = 1967 ACJ 158 (FB). Oriental Fire and General Insurance Co. Ltd. v. Gurdev Kaur 2
(1967) 1967 ACJ 82 (Punj). Parkash Vati v. Delhi Dayal Bagh Dairy Ltd. 2
(1966) 1966 ACJ 284 (Bom). K. N. P. Patel v. K. L. Kasar 2
(1937) 1937 AC 773 (= 106 LJ KB) 460. Izzard v. Universal Insurance Co. 2

N. Venkatarama-Iyer, for Appellant; P. Ananthakrishna Nair, for Respondents.

JUDGMENT:— This appeal is against the judgment of the Motor Accidents Claims Tribunal, Tiruchirapalli, awarding compensation to the dependants of the deceased Murugan. He was travelling in a lorry belonging to the insured and insured by the appellant insurer. The Tribunal has found that Murugan died as a result of the rash and negligent driving of the insured vehicle by the employee of the insured. On behalf of the insurer which was added as a party to the proceedings before the Tribunal, two objections were taken. One was that the insurance policy did not cover a case of

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this kind, that it was intended to cover any accident or injury caused to an employee of the insured and not to the employee of any other person, that as in this case the deceased Murugan was the employee not of the insured, but of the person whose goods were carried in the insured vehicle, the policy does not cover the liability for an accident caused to Murugan. The second contention was that the insured vehicle was being driven contrary to the conditions of the permit relating to that vehicle and therefore the insurer was not liable. As regards the second objection, the Tribunal has pointed out that there is nothing on evidence to show that the insured vehicle was being used contrary to the conditions of the permit relating to the insured vehicle. The mere fact that the insured had issued a notice to the owner of the vehicle to produce the permit, and that it was not so produced cannot be held to establish that the permit, if produced, would show that the vehicle was not to be used in places like the one where the accident occurred. In addition the Tribunal has also pointed out that the form prescribed for a public carrier permit found at page 172 of the Madras Road Traffic Code, 1940, Volume II, mentions that a public carrier permit can be given either for specified routes or specified areas and the driver of the vehicle says that the entire State of Madras is the area for which public carrier permit has been granted to the vehicle. Therefore, the Tribunal was undoubtedly right in holding that there is no substance in the second contention of the insurance company.

2. As regards the first contention, I must refer to a decision of a Full Bench of the Punjab High Court in 1967 ACJ 168 = (AIR 1967 Punj 486 FB), *Oriental Fire and General Insurance Co., Ltd. v. Gurdev Kaur*. The Bench referring to the decision in *Izzard v. Universal Insurance Co. Ltd.*, 1937 AC 773 has pointed out that the contention that the contract of employment should be construed in the Act as subject to the implied limitation that it should be with the person insured by the policy cannot be accepted and that such a departure from the clear language used cannot be justified; that the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons; and there is no sufficient ground for holding that this criterion should be limited to employees of the insured person. The Bench also referred to similar decisions of a Bench of the same Court in *Parkash Vati v. Delhi Dayal Bagh Dairy Ltd.*, 1967 ACJ 82, as well as of the Madhya Pradesh High Court in page 65

of the same volume (1967 ACJ) and in *K. N. P. Patel v. K. L. Kasar*, 1966 ACJ 284 (Bom).

Thus, though on a superficial view of the section, it might appear that the words "contract of employment" found in Section 95 of the Motor Vehicles Act would cover only a contract of employment with the owner of the insured vehicle, there is a preponderance of authority in favour of the other view that it would cover not only such persons but also persons who are on the vehicle in pursuance of a contract of employment with the owner of the goods carried in it. What is necessary is that for sufficient practical or business reasons, the person must be on the vehicle in pursuance of a contract of employment. If he is such a person, any injury caused to him would also be covered by the section.

3. The appeal is, therefore, dismissed as without substance. The appellant will pay the costs of the respondents.

Appeal dismissed.

AIR 1970 MADRAS 237 (V 57 C 62)

FULL BENCH

K. VEERASWAMI, C. J., NATESAN, AND SOMASUNDARAM, JJ.

Muthuraj Koilpillai, Petitioner v. Esther Victoria Kannammal, Respondent.

Matrimonial Case No. 8 of 1968, D/- 3-11-1969.

Divorce Act (1869), Ss. 18 and 19 — "Impotency", meaning of — "Disability arising from mental or moral causes is sufficient — Due to wife's mental disease the husband could not at the time of marriage and on the date he instituted suit, have sexual intercourse with the wife — Decree declaring marriage as null and void, held, could be granted.

Impotency is not necessarily to be confined to the physical inability of one or the other of the spouse to have sexual intercourse. It may, cover also such a condition, either of the mind or of the physical condition of the person, which renders normal sexual intercourse impracticable so as to reach its completion. The basis of the Court's interference is not the structural defect, but the impracticability of consummation. Disability arising from mental or moral causes is sufficient, such as, hysteria. AIR 1954 Mad 316 (FB) & AIR 1943 Nag 185 (FB), Rel. on.

(Paras 8, 10)

Therefore, where the wife was not in a position to discharge her marital obligations to her husband and the evidence on record indicated that the husband could not at the time of the marriage and on the date he instituted the suit have sexual in-

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tercourse with the wife the reason being the latter's hysteria or mental depression:

Held, that the disability could justifiably be brought under the head of impotency in law and a decree declaring the marriage as null and void could be granted.

(Paras 9 to 11)

Cases Referred: Chronological Paras

(1967) AIR 1967 Mad 242 (V 54) =

(1967) 1 Mad LJ 152 (FB), Jayaraj v. Seeniammal 3

(1954) AIR 1954 Mad 316 (V 41) =

1LR (1954) Mad 15 (FB), K. Balavendram v. S. Harry 8

(1943) AIR 1943 Nag 185 (V 30) =

1LR (1943) Nag 474 (FB), Kishore Sahu v. Snehrabha Sahu 10

(1865) 1 P and D 31 = 35 LJ P & M 10, T. v. M. 10

(1845) 163 ER 1039 = 1 Rob Ecc 279, D-E v. A-G 8

R. Rangaswami, K. R. Subramanian Iyer, A. Sarojini Bai, for Petitioner; L. Balamukund Das, Amicus Curiae, for Respondent.

K. VEERASWAMI, C. J.:— This matter comes before us on a reference under Section 20 of the Indian Divorce Act. The District Judge of Tirunelveli has declared the marriage between the plaintiff and the defendant as null and void and granted a decree of divorce subject to confirmation by this Court.

2. The plaintiff and the defendant were married on 5-6-1958 in St. Michael's Church, Polnaickenpatti, Tuticorin, according to Christian rites. There can be no dispute about this. According to the plaintiff, on the very night of the marriage, it was found that the defendant could not have sexual intercourse with him as she was pushing him aside and finally jumped out of bed. He would say that this was due to insanity and at the time of the marriage he did not know about it. The next day the defendant was removed by her mother to her place for treatment and bringing her back. But the defendant never came back. It appears the defendant was working as a midwife for some time in the Primary Health Centre, Thiruvengampet. But we find that she was discharged from service with effect from 28-6-1958, as she was suffering from manic depressive psychosis. The proceedings of discharge from service were issued by the District Medical Officer, Ramana-thapuram. The record does show that after the marriage the defendant left her husband and never returned to him thereafter. The plaint was preceded by a notice issued by or on behalf of the defendant in which it was alleged that the plaintiff had deserted her and that he was liable to pay her maintenance at a certain rate. In the plaint, while setting out the facts which we have mentioned, the plaintiff asserted that in view of her continued suffering

from manic depressive psychosis, she was not in a position to perform the duties of marriage and that she was unfit for married life, though she is an educated girl having studied upto School final. He also stated that since the marriage had not been consummated because of the defect, the marriage was null and void. That there was no collusion or connivance was averred.

3. The District Judge in view of Jayaraj v. Seeniammal, AIR 1967 Mad 242, took coercive steps to secure the presence of the defendant to give evidence in Court. When she was arrested and brought before Court, she gave evidence. In the light of her evidence and on the other materials available the District Judge found that the defendant was suffering from the disease abovementioned and that she was unfit to discharge her marital obligations to her husband. He, therefore, declared the marriage to be null and void.

4. We have carefully considered the matter and are of opinion that the District Judge was right in granting a decree, though we think it should be sustained on a different reasoning. Since the marriage was on 5-6-1958, and the discharge of the defendant from service was with effect from 28-6-1958, there is every probability that the defendant at the time of her marriage did suffer from manic depressive psychosis. In her evidence, which appears to be cogent as far as we can see she was able to remember her marriage according to Christian rites at Tuticorin and the fact that she never had sexual intercourse with her husband. She admitted that till then she had no desire to have sexual intercourse, though she wanted to have marital life. She was able to recall what precisely she was suffering from and mentioned the disease to be manic depressive psychosis. She claimed that she was all right at the time of her giving testimony and invited that she might be sent to a doctor for examination. This examination was done by Dr. P. R. Azeezullah on 27-1-1968. The doctor was the District Medical Officer, Tirunelveli, at the time. The certificate says—

"I am to state that Smt. Esther Victoria Kannammal was admitted as in-patient in the Government Headquarters Hospital, Palayamkottal, on 18-1-1968 for observation and discharged on 27-1-1968. During the period of observation, she has been noticed to be morose mostly, answers questions some time correctly and some time irrelevantly. When questioned how long she has been in the Hospital she is not able to say. But she says that she had been here for two or three days. She is not able to say why she is in the Hospital and has no idea regarding the fact that she was sent by Court. She has a vacant

look. She seems to be unmindful of the environment and time. She is suffering from mental depression."

This shows that the defendant's mental powers were so impaired as to make her unaware of even the time and surroundings and to have a vacant look. The mother of the plaintiff who gave evidence stated that on the day of the marriage her daughter-in-law was not amenable to sexual intercourse with her son and it was reported to her that the defendant was insane because her behaviour appeared to be that of a person with insanity. She also stated that on the very next day of the marriage the defendant's parents came and took her away.

5. The doctor, who had given the certificate we mentioned, in his evidence in court was clearly of opinion that the defendant was not in a position to discharge her marital obligations to her husband.

6. S. 18 of the Indian Divorce Act enables a husband or wife to present a petition praying that his or her marriage may be declared null and void and the grounds on which such a declaration can be obtained are specified in S. 19. The first and the third grounds have relevance here, the former being that the respondent was impotent at the time of the marriage and at the time of the institution of the suit and the latter is that either party was a lunatic or idiot at the time of the marriage. The question is, which ground is made out in this case. The learned District Judge has not specified whether it was the one or the other ground that prompted him to grant the declaration. All that he stated was that the defendant was not in a position to discharge her marital obligations to her husband. That reasoning is hardly sufficient to sustain the declaration which he granted.

7. This is not a case of idiocy at the time of the marriage. That is clear from the evidence, particularly, of the defendant herself. She was undoubtedly in a position to appreciate some of the questions at least put to her and answer them as far as she could. A reading of her evidence shows that there was nothing so serious with her mental faculties as to regard them as bordering on idiocy. Lunacy is a large term and includes several degrees of the mind. We are very doubtful whether, having regard to the defendant's mental capacity, as we have mentioned above, she can be rightly termed as a lunatic. No doubt, she had a vacant look and was not in a position to appreciate her surroundings or time. It would appear from the certificate given by the doctor and his evidence put together that she had lucid intervals. But one thing seems to be clear from the evi-

dence on record, and that is that she was not in a position to discharge her marital obligations to her husband. While no declaration, as we think, can be given on the ground that the defendant was a lunatic or idiot at the time of the marriage, the question is whether the declaration granted by the District Judge can be supported on the ground of impotency both at the time of the marriage and at the time of the institution of the suit. The evidence of the plaintiff's mother, which we see no reason to reject, is positive that on the very day of the marriage she knew that the defendant was unfit to discharge her marital obligations due to her behaviour of running away from the bed and also from the fact that the defendant's parents, who were apparently aware of her deficiency, came the very next day and took her away.

There is also this fact that, according to the statement of the District Medical Officer, at the time of the defendant's discharge from service, she was suffering from manic depressive psychosis. This disease as described by the Medical Dictionary and Health Guide by Dr. F. A. Edwards and A. W. Durham is:

"A mental disorder in which excitement and depression may alternate over a period of weeks, months, or even years can render a person unfit for employment, but given a little consideration, mild cases are employable. Severe cases may have suicidal tendencies."

This definition of the disease does not enable us by itself to conclude that the defendant was suffering from impotency. But the other facts seem to tend towards that effect. What happened on the first day of her marriage and her position since then, her own admission in the evidence that she was unable to fulfil her marital obligations to her husband and the medical examination immediately thereafter as a result of which the doctor gave the opinion that she was not in a position to discharge her marital obligations all these taken together show that she was suffering from such a mental depression which, though not amounted to lunacy, bordered on impotency.

8. Impotency is not necessarily to be confined to the physical inability of one or the other of the spouse to have sexual intercourse. It may, in our opinion, cover also such a condition, either of the mind or of the physical condition of the person, which renders normal sexual intercourse impracticable so as to reach its completion.

In *K. Balavendram v. S. Harry*, AIR 1954 Mad 316 (FB), Rajamannar C. J. who spoke for the Bench, observed:—

"Impotency has been understood by Judges in England in matrimonial cases as meaning incapacity to consummate the

marriage, that is to say, incapacity to have sexual intercourse, which undeniably is one of the objects of marriage. The question is, what does 'sexual intercourse' mean? We cannot do better than refer to what has been considered to be the leading decision on this topic, namely, *D-E v. A-G*, 1845-163 ER 1039. In that case, the husband prayed for a declaration of nullity of his marriage with the respondent who was married to him on the ground that carnal consummation was impossible by reason of malformation of his wife's sexual organ."

Dr. Lushington dealt with the point and stated, as extracted in the citation under consideration:

"Every one was agreed that in order to constitute the marriage bond between two persons, there must be power, present or to come, of sexual intercourse..... sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; yet, I cannot go to the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that legally speaking, it is no intercourse at all If there be a reasonable probability that the lady can be made capable of a 'vera copula' of the natural sort of coitus, though without power of conception I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect and unnatural coitus, I would pronounce the marriage void."

The case *Rajamannar C. J.* was considering left the learned Judges with no doubt that the marriage could not be consummated in the ordinary and normal way on account of an abnormality on the respondent.

9. Now, in this case, there is no such outward physical disability. On account of her mental disease it was impossible for the plaintiff to have intercourse with the defendant both at the time of the marriage and also at the time he instituted the suit. That, we think, may justifiably be brought under the head of impotency in law.

10. Rayden on Divorce, 9th Edn. at page 112, says:—

"The presence of a physical structural defect is not essential. The statement by Lord Penzance to the contrary in *T v. M*, 1865—LR 1 P and D 31, is no longer law The basis of the court's interference is not the structural defect, but the impracticability of consummation". The learned author goes on to point out that disability arising from mental or moral causes is sufficient, such as hyste-

ria. We are inclined to accept this view as valid in order to bring the case under the ground of impotency. This view receives support as well from *Kishore Sahu v. Snehprabha Sahu*, AIR 1943 Nag 185 (FB). There it was held that incapacity in the woman for sexual intercourse need not be physical and that it may be due as well to mental or physical causes. It was further pointed out that all that was required was an invincible repugnance to the act of intercourse either generally or with the particular man. The evidence on record in this case shows that the plaintiff could not at the time of the marriage and on the date he instituted the suit have sexual intercourse with the defendant, the reason being the latter's hysteria or mental depression.

11. On that view, we confirm the declaration that the marriage of the plaintiff and the defendant was null and void.
Decree confirmed.

AIR 1970 MADRAS 240 (V 57 C 63).
PALANISWAMY, J.

A. George Cornelius, Petitioner v. Elizabeth Dopli Samadnam, Respondent.

O. M. S. No. 6 of 1968, D/- 4-8-1969

Divorce Act (1869), ss. 7 and 10 — Petition for divorce on ground that respondent was not heard of for more than seven years — Petition not maintainable.

The words "subject to the provisions contained in this Act" occurring in Section 7 cannot be ignored and the Court cannot adopt all the provisions that have been made in English Matrimonial Causes Act, from time to time, while applying the provisions of the Act, thereby enabling the husband or wife to ask for divorce on a ground not provided for in Sec. 10. Hence a petition for divorce on the ground that the respondent (wife) was not heard of for more than seven years and should be presumed to be dead is not maintainable. (Para 4)

Cases Referred: Chronological Paras
(1930) AIR 1930 Mad 154 (V 17) =

58 Mad LJ 29, Iswarayya v.

Ishwarayya

(1923) AIR 1923 Bom 321 (V 10) =

ILR 47 Bom 843, Wilkinson v.

Wilkinson

J. S. Athanasius, for Petitioner.

JUDGMENT:— This suit filed by the husband under Section 10 of the Indian Divorce Act, 1869 (Act IV of 1869) herein after referred to as the Act raises an important question about the scope of Section 7 of the Act. The petitioner married the respondent on 16th September 1935. He has alleged that after the marriage they lived together for some time when

the respondent gave birth to three children, that all the three children are married, that in or about May 1952 when the couple were living at Bhuvanagiri the respondent deserted the petitioner against his will and without reasonable cause and went away, that the enquiries made by the petitioner about the respondent proved futile and that inasmuch as the respondent's whereabouts are not known from 1952, it should be presumed that she is dead. The petitioner prays that a decree for dissolution of the marriage may, therefore be granted. The respondent could not be served in person and service was effected by substituted service.

2. The question for consideration is whether upon the presumption which the petitioner wants to draw as regards the death of the respondent, dissolution of the marriage can be decreed under Sec. 10 of the Act. Section 10, which provides for dissolution of marriage, consists of two parts. The first part deals with a case where a husband can present a petition for dissolution while the second part deals with the case where a wife can present a petition for dissolution. So far as this case is concerned, it is necessary to note only the first part which runs thus:—

"Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery."

According to the above provision, the husband is entitled to present a petition for dissolution of the marriage only on one ground, namely, that the wife has, since the solemnization of the marriage, been guilty of adultery. Mr. Athanasius, appearing for the petitioner, contended that by virtue of Section 7 of the Act this Court is to act on principles of English Divorce Court, that under Section 16 (1) of the English 'Matrimonial Causes Act, 1950, which provides for the dissolution of marriage, if the husband or wife can be presumed to be dead on the ground of not being heard of for more than seven years, this Court can grant decree for divorce. Section 7 of the Act reads thus:

"Subject to the provisions contained in this Act, the High Court and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts; are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief:

Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion

at the time of the occurrence of the facts on which the claim to relief is founded." Though this Act was passed in the year 1869 and has been amended several times, no additional ground for dissolution of marriage was provided in Section 10 in any of those amendments. Contrast with this position, some enactments made by the Indian Legislature for dissolution of marriage may be adverted to. Section 27 (h) of the Special Marriage Act, 1954, provides for a decree for dissolution on the ground that the respondent has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive. To the same effect is Section 13(1) (vii) of the Hindu Marriage Act, 1955, providing for a decree for dissolution if the husband or the wife is not heard of for a decree for dissolution if the husband or the wife is not heard of for the above said period.

3. The question, under these circumstances, is whether in enacting Section 7 of the Act, the Indian Legislature intended that, though no express provision on the ground that the husband or wife can be presumed to be dead, on the ground that he or she is not heard of for seven years and more, the principles of the English Matrimonial Causes Act, under which there is no doubt a provision for dissolution on the above ground, can be imported into Section 7 and a decree can be granted accordingly. Mr. Athanasius, appearing for the petitioner, conceded that he was unable to find any decided case in support of the position which he contends for. Section 7, as its wording indicates, is merely a residuary section, intended to provide for any matter which, by inadvertence or otherwise, is not expressly provided in the Act. But in interpreting the section, the opening words "Subject to the provisions contained in this Act" should not be ignored. Where there is express provision for any particular matter, the Courts must strictly comply with and give effect to each provision. Section 7 cannot cut down or supply any form of relief not provided by the Act. In *Iswarayya v. Iswarayya*, AIR 1930 Mad 154 it was held that Courts in India cannot grant a decree for jactitation of marriage.

In *Wilkinson v. Wilkinson*, ILR 47 Bom 843=(AIR 1923 Bom 321) a note of warning is given against the danger of reading into Section 7 an intention on the part of the Legislature to adopt whatever tests the Court of Divorce in England might from time to time lay down. If such an intention were to be adopted, then it would be necessary to omit the words "subject to the provisions of the Act." If it had been the intention, it was not difficult for the Legislature to say in express

words that the provisions of the Act must be read subject to the rules and principles applied from time to time by the Matrimonial Courts in England. In AIR 1930 Mad 154, already referred to, the expression "principles and rules" occurring in Section 7 was construed and it was laid down that the principles and rules to be applied must be subject to the provisions of the Act and must not be allowed to run counter to the Act. It is pointed out that those words mean principles and rules.

- (i) of evidence;
- (ii) of law;
- (iii) of interpretation of practice; and
- (iv) of procedure.

4. Up to January 1, 1933, the ground for judicial dissolution of marriage in England were adultery or certain unnatural practices. By the Matrimonial Causes Act, 1937, and the Matrimonial Causes Act, 1950 several new grounds for divorce were added so as to enable the husband as well as the wife to sue for divorce. But the Indian Legislature, though it has amended the Act in question several times, has not thought it necessary to make suitable amendments in the Act to give effect to the modification made in English Law. In these circumstances, I am of the view that the words "subject to the provisions contained in this Act" occurring in Section 7 cannot be ignored and we cannot adopt all the provisions that have been made in English Matrimonial Causes Act, from time to time, while applying the provisions of the Act, thereby enabling the husband or wife to ask for divorce, on a ground not provided for in Section 30. For the foregoing reasons, I am of the opinion that this petition for divorce on the ground that the respondent is not heard of for more than seven years and should be presumed to be dead, is not maintainable.

5. The position is no doubt anomalous. Whereas persons seeking relief under the Special Marriage Act, 1954 or the Hindu Marriage Act, 1955, have among other grounds the right to ask for divorce on the ground that the other party to the marriage is not heard of for seven years or more, and should be presumed to be dead, persons seeking divorce under the Act in question are not entitled to urge that ground for no obvious reason. It is for the Legislature to consider whether the Act should not be suitably amended so that the law may be uniform.

6. The petitioner is given leave to amend the petition suitably for such relief as he may be advised to ask.

Leave to amend petition given.

AIR 1970 MADRAS 242 (V 57 C 64)

VENKATARAMAN J.

Meenakshi Ammal, Petitioner v. Somasundara Nadar, Respondent.

Criminal Revn. Case No. 1117 of 1967 (Cri. Revn. Petn. No. 1103 of 1967). D/-21-11-1969, from order of Dist. Magistrate, Ramanathapuram at Devakottai, D/-14-7-1967.

(A) Criminal Procedure Code (1898), S. 488 (6) — Application under — Ex parte order — Procedure for service of summons under Ss. 68 to 71 not followed — Good ground to set aside ex parte orders — But ex parte order not invalid — Application to set aside the order — Bar of limitation of three months applies. 1963 Mad LJ (Cri) 597 & AIR 1963 Mys 239, Dissented.

While the fact that the procedure prescribed for service of summons under Sections 68 to 71, Criminal P. C. has not been followed on prior occasion may be a good ground to set aside an ex parte order under S. 488, Criminal P. C. the mere non-observance of the proper procedure would not make the ex parte order invalid and entirely liable to be ignored so as to say that the bar of limitation of three months for an application to set aside that order would not apply at all. 1963 Mad LJ (Cri) 597 & AIR 1963 Mys 239, Dissented.

(Para 4)

(B) Limitation Act (1963), S. 5 — Starting point of limitation — Date of order — Means date of knowledge of that order. — Quære — Whether the above rule applies to orders under enactments other than under Land Acquisition Act.

(Para 5)

(C) Limitation Act (1963), S. 5 — Application under S. 483, Criminal P. C. — Summons sent by registered post — Endorsement on notice that it was refused by the husband — Later service by affixture to the house of the husband attempted — Notice returned — Endorsement that there was no such residence and husband doing business at other places — No attempt to serve notice at those places — Order on application passed ex parte — Application by husband to set aside ex parte order — Application beyond three months from the date of the order — Period of limitation could be extended under S. 5.

An application was made under Section 483. It was proved that the notice sent by registered post bore an endorsement that it was refused by the husband and later service of notice by affixture to the house was attempted but it was returned with an endorsement that there was no such residence and the husband was doing business at Dindigul and Karakudy but there was no attempt to serve notice on him at those places. The

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husband made an application to set aside the ex parte order beyond 3 months from the date of the order and prayed for extension of the period of limitation:

Held the husband had made a good case for the extension of the period of limitation under Section 5 of the Limitation Act. (Paras 2, 5)

Cases Referred: Chronological Paras

(1963) 1963 Mad LJ (Cri) 597 = 1962

Ker LT 526, Raghavan Unnithan

v. Vijayamma

(1963) AIR 1963 Mys 239 (V 50) =

1964 Mad LJ (Cri) 110, State v.

Bhimrao

(1961) AIR 1961 SC 1500 (V 48) =

(1962) 1 SCR 676, Harishchandra

v. Dy. Land Acquisition Officer

(1950) AIR 1950 Mad 153 (V 37) =

1950 Mad WN 221 (2), A. S.

Govindan v. Jayammal

Devarajan, for Petitioner.

ORDER:— On 7th November 1960, Meenakshi Ammal, the petitioner herein, obtained an ex parte order of maintenance against her husband Somasundarama Nadar under the proviso to Section 488 (6), Criminal P. C. directing the husband to pay her maintenance at the rate of Rs. 50 per month. She filed a petition in 1966 for enforcement of that order, and collected a sum of Rs. 600 on 14-1-1967. Thereupon on 16-1-1967 the husband filed a petition M. P. No. 37 of 1967 to set aside the ex parte order. He also filed M. P. 38 of 1967 under Section 5 of the Limitation Act 1963 since the application for setting aside the ex parte order had normally to be filed within three months from 7-11-1960, the date of the order. The wife filed M. P. 139 of 1967 by way of objection to M. P. 37 and 38 of 1967.

2. The learned District Magistrate passed an order on 14-7-1967 setting aside the ex parte order dated 7-11-1960 on the ground that the procedure relating to the service of summons had not been observed by the Magistrate before he passed the order dated 7-11-1960. Briefly speaking, he pointed out that there was an endorsement that notice sent by registered post was refused by the husband. Later service by affixture to the residence of the husband was attempted. The notice was returned with an endorsement that there was no such residence and that the husband was doing business in Dindigul and Karaikudi. But no attempt was made to serve summons on him at those places. The proviso to Section 488 (6), Criminal P. C. says:—

"Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case ex parte. Any orders so made may be set aside for good cause shown on application made within three months from the date thereof".

3. The learned District Magistrate expressed the view that the above facts furnished good ground for setting aside the ex parte order. The learned District Magistrate pointed out that, even though the husband filed the petition more than three months after 7-11-1960 the bar of limitation would not apply because the order dated 7-11-1960 had not been validly passed. The learned District Magistrate followed the decision of the Kerala High Court in Raghavan Unnithan v. Vijayamma, 1963 Mad LJ Cri 597 and that of the Mysore High Court in the State v. Bhimrao, 1964 Mad LJ Cri 110 = (AIR 1963 Mys 239). In this view he considered it unnecessary to consider the application under Section 5 of the Limitation Act. Against the said order the wife has filed the present revision petition. The husband allowed this revision petition to proceed ex parte.

4. As at present advised and with great respect to the learned Judges of the Kerala High Court, and Mysore High Court, I am not inclined to accept their view. It seems to me that while the fact that the procedure prescribed for service of summons in Sections 68 to 71, Criminal P. C. has not been followed on the prior occasion, may be a good ground for allowing the application to set aside the ex parte order, the mere non-observance of the proper procedure would not make the ex parte order invalid and entirely liable to be ignored so as to say that the bar of limitation of three months would not apply at all. But the present case can be disposed of otherwise.

5. In the first place, the question arises whether the period of three months for the application to set aside the ex parte order is absolute. There is no doubt a decision of Somasundaram, J. in A. S. Govindan v. Jayammal, 1950 Mad WN (Civil) 221 (2) = (AIR 1950 Mad 153) that the period is absolute even though the husband may not have knowledge of the order within three months. That sounds rather inequitable to the husband and on that question it has to be considered whether the decision of Somasundaram, J. can be good law after the decision of their Lordships of the Supreme Court in Harishchandra v. Dy. Land Acquisition Officer, AIR 1961 SC 1500. That case is, no doubt, one under the Land Acquisition Act. But the principle laid down by their Lordships in the case that where the period of limitation is prescribed from the date of order, it means that the period should be counted from the date of knowledge of the order, actual or constructive, would seem to be applicable to all enactments. It is however, unnecessary for the purpose of this case to give my decided opinion because on the facts of this case, I think that the husband has made a good case for extension of the period of limitation under

Section 5 of the Limitation Act of 1963. I accept the finding of the learned District Magistrate on that point and allow the application under Section 5 of the Limitation Act. On the merits I do not see any reason for interfering with the opinion of the learned Magistrate that the husband had shown good cause to set aside the ex parte order. One significant fact is that, though the ex parte order was passed on 7-11-1960, the first collection was made from the husband only in January 1967. In this view, the revision petition is dismissed. The learned Magistrate will dispose of M. P. 35 of 1960 expeditiously.

Revision petition dismissed.

AIR 1970 MADRAS 244 (V 57 C 65)

PALANISWAMY, J.

Veerammal, Appellant v. Krishnan, Respondent.

Second Appeal No. 794 of 1965, D/- 24-3-1969, from decree of Sub. J., Chingleput, in A. S. No. 324 of 1963.

Transfer of Property Act (1882), S. 91(a) — Suit filed on prior mortgage without impleading puisne mortgagee — Execution of the decree obtained — Purchaser is entitled to redeem the puisne mortgagee.

A purchaser in execution of a decree obtained on a prior mortgage in a suit to which the puisne usufructuary mortgagee is not a party is entitled to redeem the puisne mortgage. (Para 10)

It cannot be said that all that the purchaser in such a suit acquires is only the right of the mortgagee and he continues to be a mortgagee qua the puisne mortgagee, and that as such, such a purchaser is not entitled to redeem the puisne mortgagee under the well-recognised principle 'redeem up and foreclose down.' The auction purchaser in execution of the prior mortgage decree occupies a dual capacity, that is, the capacity of the first mortgagee as well as the owner of the equity of redemption. In his first capacity he can use this first mortgage as a shield against the second mortgagee. In the second capacity he can redeem the subsequent mortgages. To acquire that right of redemption the consent of the subsequent mortgagee is not necessary. If a mortgagor can assign his equity of redemption, and for such an assignment the consent of the puisne mortgagee is not necessary, then there is no good reason why such an assignment cannot take place by process of Court in execution of a money decree or any other decree. All that the law safeguards in favour of the puisne mortgagee is that his right as a puisne mortgagee shall not be affected (1) to redeem the prior mortgage and to sell the pro-

perty for the amount due on both the mortgages or (2) to sell the property subject to the first mortgage. Case law discussed. (Para 5)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Mad 418 (V 54) =
1967-2 Mad LJ 233, Shanmugam v. Sivan Pillai 8, 9
(1962) AIR 1962 Punj 402 (V 49) =
ILR (1962) 2 Punj 227, Rattan Chand v. M/s. Prite Shah 5
(1953) AIR 1953 Bom 405 (V 40) =
ILR (1954) Bom 10, Nagu v. Gopal 4
(1952) AIR 1952 Pat 321 (V 39) =
ILR 27 Pat 526, Abdul Gafoor v. Sagun Choudhary 3
(1948) AIR 1948 Mad 412 (V 35) =
1948-1 Mad LJ 284, Murugappa v. Marudachalam 2
(1931) AIR 1931 All 466 (V 18) =
1931 All LJ 729 (FB), Ram Sanehi Lal v. Janki Prasad 5
(1925) AIR 1925 All 804 (V 12) =
ILR 47 All 751, Rambaran Chaube v. Bhagwati 9
(1922) AIR 1922 PC 11 (V 9) =
48 Ind App 465, Sukhi v. Ghulam Saifdar Khan 3
(1922) AIR 1922 All 135 (V 9) =
ILR 44 All 462, Parasuram Singh v. Pandhohi 9
(1921) AIR 1921 Mad 648 (V 8) =
1921 Mad WN 603, Sarvothama Rao v. Raja Rao Sahib 5, 9
(1911) 21 Mad LJ 213 = 9 Mad LT 431 (FB), Mulla Veetil v. Achuthan Nair 3, 6
(1903) ILR 30 Cal 599 = 7 Cal WN 766 (FB), Debendra Narain v. Ramtaran 2
(1903) ILR 26 Mad 637, Goverdhana Doss v. Veerasami Chetti 7
V. Somasundaram and P. Devadass, for Appellant; V. Vedantachari and T. Rangaswami Iyengar, for Respondent.

JUDGMENT:— The point that arises for consideration in this appeal filed by the third defendant is whether a purchaser in execution of a decree obtained on a prior mortgage in a suit to which the subsequent mortgagee is not a party is entitled to redeem the subsequent mortgage. Defendants 1 and 2, the owners of the suit property, had executed a simple mortgage over the suit property in favour of one Pakkirisami Pandithan and subsequently executed a usufructuary mortgage in favour of the third defendant, the appellant herein, under a document dated 7-6-1953. Pakkirisami Pandithan sued on his mortgage in O. S. 257 of 1957 on the file of the District Munsif of Trivellore. Impleading defendants 1 and 2 alone and without impleading the 3rd defendant, the subsequent mortgagee, and obtained a decree and brought the hypotheca to sale. The plaintiff purchased the suit property in Court auction and took possession in

execution of the sale certificate. The third defendant applied for and obtained redelivery on the strength of his usufructuary mortgage. Thereupon, the plaintiff instituted the suit for redemption of the usufructuary mortgage and recovery of possession. The third defendant contended that inasmuch as he was not impleaded as a party in the suit instituted by the prior mortgagee, his rights as a puisne mortgagee were not affected and that as such the plaintiff was not entitled to redeem him. The trial Court accepted this defence and dismissed the suit. But in the appeal filed by the plaintiff, the lower appellate Court reversed the judgment of the trial Court and found that the plaintiff was entitled to redeem the usufructuary mortgage and accordingly granted the usual preliminary decree for redemption. It is against this decision that the 3rd defendant has preferred this appeal.

2. Section 91 of the Transfer of Property Act enumerates the persons who may sue for redemption. Clause (a) of that section, which alone is relevant in this case, says that any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same, is entitled to redeem. The simple question in this case is whether the purchaser of the hypotheca in a suit brought on the prior mortgage without impleading the puisne mortgagee is a person having an interest in the property mortgaged or in or upon the right to redeem the same. In considering this question, it is necessary to know what exactly is the right which such a Court auction purchaser purchases. That he gets all the rights of the prior mortgagee is undisputed. Inasmuch as the mortgagor is also a party to such a suit and inasmuch as the sale takes place in his presence, it should be taken that the right, title and interest which he had in the property including his right in the equity of redemption should also be taken to pass to the auction purchaser. When a second mortgage is created by the mortgagor, what is really mortgaged by the mortgagor to the second mortgagee is the equity of redemption. After such a second mortgage is executed, the equity of redemption vests both in the mortgagor and in the puisne mortgagee. That is the reason why under O. 34, R. 1, Civil P. C., a puisne mortgagee is considered to be a necessary party to the suit filed on the prior mortgage, whereas in a suit by a puisne mortgagee the prior mortgagee is not a necessary party. If the mortgagor and the puisne mortgagee are impleaded in the suit filed on the prior mortgage, the whole of the equity of redemption is properly represented and the decree in such a suit would be binding upon the puisne mortgagee; but if the

puisne mortgagee is not impleaded as a party and if the decree ends in a sale his right as a puisne mortgagee to redeem the prior mortgage is not affected. Vide *Murugappa v. Marudachalam*, AIR 1948 Mad 412. Not only the puisne mortgagee has the right to redeem the prior mortgage but also has the right to sue for sale subject of course to the first mortgage—vide *Debendra Narain v. Ramtaran*, (1903) ILR 30 Cal 599 (FB). The puisne mortgagee may redeem the prior mortgage even though a suit to enforce the puisne mortgage is barred by limitation, because limitation for a suit for redemption is 30 years under Art. 61 (a) of the Limitation Act, 1963, corresponding to 60 years under Art. 148 of the Limitation Act, 1908, while limitation for a suit to enforce a mortgage is 12 years under Art. 62 of the Limitation Act of 1963 corresponding to Art. 132 of the Act of 1908.

3. One of the questions that arose for consideration before the Full Bench in *Mulla Veetil v. Achuthan Nair*, (1911) 21 Mad LJ 213, was what exactly does the auction purchaser at an execution sale in a suit filed on the prior mortgage without impleading the subsequent mortgagee acquire. After an exhaustive review of the case law, the Full Bench held that the purchaser in such a suit, whether he is the first mortgagee himself or a stranger, does not acquire the rights of the mortgagor, as on the date of the first mortgage, but only those rights that subsist in him at the date of the suit (on the date of the suit instituted on the prior mortgage, the mortgagor had a part of the right to redeem the puisne mortgagee). The Privy Council has recognised the principle in *Sukhi v. Ghulam Saffdar Khan*, AIR 1922 PC 11 at p. 13, that the purchaser in execution of the decree obtained on the prior mortgage acquires the rights of the prior mortgagee and the equity of redemption of the mortgagor. In *Abdul Gafoor v. Sagun Choudhary*, AIR 1952 Pat 321, the same principle is reiterated.

4. Mr. Somasundaram appearing for the appellant, third defendant, contended that all that the purchaser in a suit of the kind referred to above acquires is only the right of the mortgagee and he continues to be a mortgagee qua the puisne mortgagee, and that as such, such a purchaser is not entitled to redeem the puisne mortgagee under the well recognised principle 'redeem up and foreclose down'. In support of this argument he cited *Nagu v. Gopal*, AIR 1953 Bom 405. The headnote in that case, which is misleading, no doubt tends to support the above contention. But the facts of the case show that the puisne mortgagee sued on his mortgage first and purchased the property in Court auction in execution of his decree and thereafter the prior mortgagee instituted a suit on his mortgage without impleading

the puisne mortgagee and bought the property in Court sale. The question arose who among them was entitled to redeem the order. It would be seen from the above facts that on the date of the sale in execution of the prior mortgage decree, the mortgagor had no subsisting title inasmuch as his right, title and interest had already been sold in execution of the decree obtained on the puisne mortgage. It is on account of that reason that the Court held that despite the auction sale in execution of the prior mortgage decree the prior mortgagee purchaser continued only to be a mortgagee and that the right of the puisne mortgagee to redeem the prior mortgage subsisted in spite of the sale held in execution of the prior mortgage decree.

5. The auction purchaser in execution of the prior mortgage decree occupies a dual capacity, that is, the capacity of the first mortgagee as well as the owner of the equity of redemption. In his first capacity he can use the first mortgage as a shield against the second mortgagee. In the second capacity he can redeem the subsequent mortgages. To acquire that right of redemption the consent of the subsequent mortgagee is not necessary. A mortgagor can assign his equity of redemption, and for such an assignment, the consent of the puisne mortgagee is not necessary. If such an assignment can be made by private negotiation, there is no good reason why such an assignment cannot take place by process of Court in execution of a money decree or any other decree. All that the law safeguards in favour of the puisne mortgagee is that his right as a puisne mortgagee shall not be affected (1) to redeem the prior mortgage and to sell the property for the amount due on both the mortgages or (2) to sell the property subject to the first mortgage. A Bench of this Court has laid down in *Sarvothama Rao v. Raja Rao Sahib*, 1921 Mad WN 603 = (AIR 1921 Mad 648) that a prior mortgagee who is also the purchaser of the equity of redemption can redeem the puisne mortgagee even without his consent and that the purchaser, who is also the puisne mortgagee, is entitled to redeem the puisne mortgagee. See in this connection the decision of the Punjab High Court in *Rattan Chand v. M/s. Prite Shah*, AIR 1962 Punj 402 at p. 407, and also the Full Bench decision of the Allahabad High Court in *Ramsanehi Lal v. Janki Prasad*, AIR 1931 All 466.

6. Mr. Somasundaram appearing for the appellant, referred to the Full Bench decision in (1911) 21 Mad LJ 213, already referred to, in support of his contention that this being in substance a suit for possession, the plaintiff is not entitled to that relief. In that Full Bench case, the first mortgagee was the purchaser of the hypotheca in execution of the decree ob-

tained on his mortgage without impleading the puisne usufructuary mortgagee. After obtaining the sale certificate the purchaser-mortgagee straightway sued for possession of the property or in the alternative for recovery of the money due to him under the prior mortgage. It was held that the suit was not maintainable. But the facts of the instant case are different. The plaintiff has not sued for possession only, but has prayed for redemption of the usufructuary mortgage and for recovery of possession. It is not correct to contend that the suit is in essence for possession. The primary relief is redemption of the usufructuary mortgage and once redemption is granted, possession automatically follows and therefore, the suit is in essence one for redemption.

7. It is next contended for the appellant-third defendant that the plaintiff should sue for the amount due under the first mortgage and also to pray that in default of payment of the amount due under the first mortgage it be declared that the third defendant is absolutely debarred of his right to redeem the prior mortgage and he be directed to surrender possession of the property. It was contended that if such a suit is filed, the third defendant will have an opportunity to redeem the prior mortgage and that inasmuch as such an opportunity is not given, the right of the 3rd defendant should not be prejudiced. I do not accept this argument. No authority is cited in support of the argument that the only kind of suit which the purchaser in execution of the prior mortgage decree can file is a suit of the kind referred to above and no other suit. In *Goverdhan Doss v. Veerasami Chetti*, (1903) ILR 26 Mad 537, the plaintiffs were the prior mortgagee auction purchasers in a suit filed on the prior mortgage without impleading the puisne usufructuary mortgagee, as in the instant case. They sued for recovery of the money by sale of the property and prayed that in default of such payment, the usufructuary mortgagee be declared to be barred of his right to redeem the prior mortgage. The trial Court directed the usufructuary mortgagee to redeem the mortgage within the time specified and further declared that if he failed to do so, he was debarred of his right to redeem the prior mortgage. In Appeal, Sir Arnold White C. J. and Moore, J. held that the reliefs granted were proper. It is not the principle laid down in that decision that the only form of suit in a case of this kind is the one in that suit.

8. Lastly, Mr. Somasundaram, appearing for the appellant, cited *Shanmugam v. Sivan Pillai*, 1967-2 Mad LJ 233 at p. 236 = (AIR 1957 Mad 418 at p. 420) and strongly relied upon it as supporting his contention that the suit is not maintainable. In

that case, the facts are a bit complicated. The question considered was whether the auction purchaser in execution of the decree obtained by the first mortgagee without impleading the puisne mortgagee though the sale was held earlier is entitled to redeem the auction purchaser in a sale held in execution of the decree obtained on the puisne mortgage though held subsequently. The learned Judge, Kailasam, J., examined the question as to what right was acquired by the auction purchaser in execution of the first mortgage decree. At page 236 (of Mad LJ)= (At p. 420 of AIR) it is observed:—

"When a prior mortgagee suing to enforce his mortgage does not make the puisne mortgagee a party to the suit and brings the property to sale, the auction purchaser acquires the rights both of the mortgagee and mortgagor and as assignee of the mortgagor he may sue to redeem the puisne mortgagee. Under S. 91 the puisne mortgagee as an assignee of the equity of redemption has a statutory right to redeem an earlier mortgage." At page 237 (of Mad LJ)=(At page 421 of AIR) it is observed:—

"By not making the puisne mortgagee a party, the right to which the puisne mortgagee was entitled, cannot be taken away or the right of the purchaser without notice be enhanced. Taking all the circumstances into consideration I am of the view that the right of the puisne mortgagee to redeem a prior mortgagee cannot be prejudiced by a court sale at the instance of the prior mortgagee without impleading the puisne mortgagee. Though in law the purchaser in the prior mortgagee's sale as an assignee of the mortgagor is entitled to redeem his right to redemption in law or in equity cannot prevail over the puisne mortgagee's right to redeem."

In the result, the learned Judge held that the purchaser in the sale held in execution of the first mortgage decree was not entitled to redeem the auction-purchaser in the sale held in execution of the puisne mortgage.

9. Mr. Rangaswami Aiyangar, appearing for the plaintiff-respondent, contended that the above view is not correct having regard to the decision of the Bench in 1921 Mad WN 603=(AIR 1921 Mad 648), in which the principle is laid down that the auction purchaser in execution of the prior mortgage decree is entitled to redeem the puisne mortgagee even though the latter had not been impleaded as a party in the suit filed on the first mortgage. He also referred to the observations of the learned author Mul-lah on the Transfer of Property Act, 5th Edn. at pages 606 and 607, where the learned author has pointed out that in a case where the right of the puisne mortgagee to redeem the prior mortgagee and

the right of the prior mortgagee as the assignee of the equity of redemption, as in the instant case, to redeem the puisne mortgagee come in conflict, the right of the prior mortgagee purchaser to redeem the puisne mortgagee takes priority. This view is supported by the decisions in *Hasanbai v. Umaji*, (1904) ILR 28 Bom 153; *Parasram Singh v. Pandhohi*, ILR 44 All 462=(AIR 1922 All 135) and *Rambaran Chaube v. Bhagwati*, ILR 47 All 751=(AIR 1925 All 804). In my view, it is unnecessary to express any opinion on this question in this case as there is no question of conflict of interest between two auction purchasers, one having taken a sale in execution of the first mortgage decree and the other in execution of the subsequent mortgage decree as in the case reported in 1967-2 Mad LJ 233=(AIR 1967 Mad 418). I have already pointed out that in the instant case the appellant is only a usufructuary mortgagee and without any more right.

10. I am of the view that the lower appellate Court was right in holding that the plaintiff is entitled to redeem the usufructuary mortgage and recover possession. In the result, the appeal fails and is dismissed. There will be no order as to costs in this appeal. Leave granted. Appeal dismissed.

AIR 1970 MADRAS 247 (V 57 C 66) VEERASWAMI, J.

M. Allauddin, Petitioner v. P. S. Lakshminarayanan, Respondent.

Civil Revn. Petn. No. 618 of 1968, D/-17-2-1969; from order of Dist. Munsif, Madurai, in I. A. No. 2483 of 1966 in O. S. No. 189 of 1965.

Civil P. C. (1908), O. 6, R. 17; O. 7, R. 10 — Amendment of plaint — Amendment if allowed likely to result in deprivation of jurisdiction of court — Amendment should be allowed and plaint to be retained or returned after examining pecuniary jurisdiction of Court.

Where the plaintiff applied for an amendment of the plaint and it was found by the Court that in case the amendment was allowed the value for the purpose of jurisdiction would probably exceed the Court's powers:

Held, the right course to adopt was to allow the amendment, grant an opportunity to the plaintiff to pay the deficit court-fee, and if there was any question about pecuniary jurisdiction arising, examine the matter on a definite finding on that question, to decide whether the plaint should be retained or would have to be returned to the plaintiff as one in excess of the pecuniary jurisdiction of

that Court. AIR 1928 Mad 400 & 1959-1 Mad LJ 307, Disting. (Para 3)

Cases Referred: Chronological Paras
(1959) 1959-1 Mad LJ 307, Nagutha
Md. Nainar v. Vedavalliammal 3
(1928) AIR 1928 Mad 400 (V 15)=
54 Mad LJ 145, Singara Mudaliar
v. Govindaswamy Chetty 3
(1914) AIR 1914 PC 41 (V 1)=ILR
38 Mad 807, Annie Besant v.
Narayaniah 3

T. S. Subramaniam for T. R. Srinivasan,
for Petitioner; K. Hariharan and P. Viswa-
nathan, for Respondent.

ORDER:— This petition is directed against an order of the First Additional District Munsif, Madurai Town, refusing to allow an amendment of the plaint. The suit as laid was for a permanent injunction on the footing that the plaintiff was in possession and that the defendant should be restrained from interfering with it. There was an application for an interim injunction pending disposal of the suit and in the counter affidavit, it seems to have been alleged by the defendant that he was in possession. Thereafter the plaintiff filed the application to add a prayer for recovery of possession. The dismissal of the application was grounded on the supposition of the Munsif that the suit site appeared to have potential value as house site and if the amendment were allowed, the value for the purpose of jurisdiction would probably exceed the Court's powers. On that view the Munsif directed the plaint to be returned for presentation before the Court of the Subordinate Judge of Madurai, which alone, according to him, had jurisdiction to try this suit. There was a further direction that the plaint should be made ready by 16-1-1968 and when the Munsif found that it was not so ready, he dismissed the application.

2. In my view, the order of the Court below cannot be sustained. A Commissioner appointed for the purpose reported the value of the property to be only Rs. 1988. This value was not objected to by the plaintiff. The Court below examined a certain document and with reference to it, and the situation of the suit property, speculated that it had potential value as house site and its value might possibly exceed its jurisdiction. It gave no definite finding as to the value of the property. That being the case, I fail to see how the Court below could return the plaint. For ought we know the plaintiff may choose to continue the suit without pressing for the amendment. Apart from that, it is only as and when the plaint is amended and the Court below finds that the plaint as amended is in excess of its pecuniary jurisdiction that the question of returning the plaint could arise. In that case, the plaint could be

treated, as I think as one presented to a Court having no jurisdiction, with the concomitant result that the Court will have to return it for representation to the proper Court. But the Court below in this case has acted too soon before it considered the amendment and ordered it. The point is that so long as the amendment is not allowed, it would be nobody's case that the unamended plaint would be without the jurisdiction of the Court, and it would follow from it that it has no jurisdiction at all to return the plaint unless the plaintiff himself wanted a return of it for presentation to a different Court. That being the case, the further consequential order dismissing the application is also bad.

3. Sri Hariharan for the respondent contends that where allowing an amendment of a plaint sought for will result in deprivation of the jurisdiction of the Court allowing it, the amendment should not be allowed. I do not think that this proposition is supported by Singara Mudaliar v. Govindaswami Chetty, 54 Mad LJ 145= (AIR 1928 Mad 400) and Nagutha Md. Nainar v. Vedavalliammal, 1959-1 Mad LJ 307, which he relies on. The first of them related to the Original Side of this Court acting as a transferee Court from the City Civil Court in respect of a plaint. Venkatasubba Rao, J. referred to Annie Besant v. Narayaniah, ILR 38 Mad 807= (AIR 1914 PC 41), which held that the powers of the High Court, in dealing with suits transferred under Cl. 13 Letters Patent, would be the powers which, but for the transfer, might have been exercised by the Court, from which the transfer was made, and posed the test, in view of that decision, if the amendment sought for was allowed by the Original Side of the High Court, it would take it ipso facto outside the jurisdiction of the City Civil Court. The learned Judge considered that if the answer was affirmative, the amendment sought for should be disallowed. With due respect, that principle is well understandable. The transferee Court allowing an amendment which would have that effect, would imply that the suit could neither be transferred to the original Court nor the transferee Court could proceed with the suit because its jurisdiction is controlled by the width of the jurisdiction of the Court from which the suit is transferred. That is not the case here. The Court below is the Court properly in seisin of the plaint as it is and it is only as and when the amendment is allowed the question would arise whether that Court could try the suit having regard to the enhanced valuation of the suit property for purposes of court-fee and jurisdiction. In my view, the right course to adopt in such a case is to allow the amendment, grant an opportunity to the plaintiff to pay the deficit

court-fee, and if there is any question about pecuniary jurisdiction arising, examine the matter and if necessary in the light of a report to be called for from a Commissioner and on a definite finding on that question, to decide whether the plaint should be retained or will have to be returned to the plaintiff as one in excess of the pecuniary jurisdiction of that Court.

The other case cited is also not of assistance to the respondent, because, thereafter the suit had ended in the trial Court and during the pendency of an appeal therefrom, amendment of the plaint was sought for which, if allowed, would at once make the suit outside the jurisdiction of the trial Court. The view was expressed by Ramaswami, J., that in such a case, amendment of the plaint should not be allowed. I entirely agree with that principle. Only it has no application to the instant case as the situation, as I have endeavoured to point out, is different. The amendment of the plaint, if allowed, would not here have the effect of undoing the result of a suit which has been tried and disposed of by the very fact of allowing the amendment and rendering the suit in excess of the pecuniary jurisdiction of the trial Court.

4. The petition is allowed. No costs.
Petition allowed.

AIR 1970 MADRAS 249 (V 57 C 67)
VEERASWAMI AND RAMAPRASADA
RAO, JJ.

Late R. Sridharan by Legal heirs Mrs. Rosa Marie Stenbchler and Minor Nicolas Sundaram Co., T. V. S. & Sons, Madurai, Applicants v. The Commissioner of Wealth Tax, Madras and others, Respondents.

Tax Case No. 314 of 1964, (Reference No. 82 of 1964), D/- 20-12-1968.

(A) Hindu Law — Joint family— History of the origin and growth of joint family status as refined by judicial precedents and statutory enactments traced.

(Para 5)

(B) Hindu Law— Joint family—Members — Marriage between member of twice born community and a Christian woman under Special Marriage Act is valid in law— Son born out of such wedlock being legitimate son can claim status of being a member of joint family of which his father is the head. (Paras 5, 7)

(C) Hindu Succession Act (1956), S. 2, Explan. (b) — 'Hindu' — Conferment of status of Hindu on a child one of whose parents is a Hindu — (Hindu Marriage Act (1955), S. 2, Explan. (b)) — (Hindu Adoptions and Maintenance Act (1956),

S. 2, Explan. 2(b)) — Hindu Minority and Guardianship Act (1956), S. 2 Explan. 2(b).

Explanation (b) to Section 2 of the Hindu Succession Act, 1956, the Hindu Marriage Act, 1955, the Hindu Adoptions and Maintenance Act, 1956, and the Hindu Minority and Guardianship Act, 1956, whose language is in pari materia, expressly provides for the conferment of the status of a Hindu on a person even though such status is doubtful when the personal law of the parties is invoked. All such Acts provide that the expression 'Hindu' shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless a person to whom these Acts apply by virtue of the provisions contained respectively in such Acts. Therefore, if a son of a parent belonging to a twice-born class inducts the child into the Hindu family and brings him up as such, then the statute invests him with the status of a Hindu and recognises him as a Hindu. (Para 8)

(D) Income-Tax Act (1922), S. 3 — Hindu undivided family — Assessee, separated member of Hindu undivided family marrying with Austrian lady under Special Marriage Act — Son born out of such wedlock — Assessee is entitled to claim status of Hindu undivided family for purposes of assessment.

The assessee, a member of a Hindu undivided family got a share on partition at a time when he was unmarried. Subsequently he got married with an Austrian lady B under the Special Marriage Act 1954 and a son N was born to them on 29-11-1957. The assessee who was hitherto assessed as an individual on his own declaration claimed the status of Hindu undivided family consisting of himself and his son during the assessment years 1959-60 to 1961-62 but the claim was rejected by the Revenue and the Appellate Tribunal.

Held on the facts and circumstances of the case that the assessee and his son N constituted a Hindu undivided family for purposes of assessment under the Income Tax Act, Wealth Tax Act and the Expenditure Tax Act and the claim of the assessee to be reckoned as a Hindu undivided family was well merited and founded and had to be accepted. AIR 1966 SC 1523, Foll.; AIR 1966 SC 984, Explained and Dist. (Para 15)

The son of the assessee was a Hindu and having been unequivocally declared to be a member of the Hindu undivided family of which the assessee was the head, he ought to be deemed to be a member of the joint family consisting of the assessee and his son. (1859) 8 Moo Ind App 400 (PC) & (1904) ILR 27 Mad 13, Disting. (Para 8)

The character of the property in the hands of a sole surviving coparcener, on

the induction of a lineal descendant or in the presence of a person who has to be treated as a member of the joint family, has to be impressed with the character of joint family property. AIR 1964 Mys 204 & (1967) 13 ITR 505 (All) & (1968) 70 ITR 20 (SN) (All) & AIR 1967 Pat 16, Rel. on. (Para 11)

The decision in AIR 1963 Mad 280 & (1964) 53 ITR 613 (Raj) & AIR 1965 Andh Pra 447 if they are intended to sustain a general proposition of law that the property in the hands of a sole surviving coparcener, under no circumstance can be characterised as joint family property, are no longer good law in view of AIR 1966 SC 1523. (Para 12)

(E) Special Marriage Act (1954), S. 21 — Section does not affect or alter joint family structure between person married under Act and his son.

S. 21 of the Special Marriage Act, 1954 which regulates the rights of succession after the lifetime of a person whose marriage is solemnized under the Act cannot be deemed to affect or alter the joint family structure between an assessee and his son. The discretion vested in the Hindu father to treat his properties as joint family properties by an overt or a covert act of his by taking into his fold his Hindu sons so as to constitute properties as joint family properties is certainly supreme and unexceptionable and Section 21 does not interdict such a vested discretion in a Hindu father to do so. (1907) ILR 31 Bom 25, Rel. on. (Para 9)

(F) Hindu Succession Act (1956), S. 5 — Section does not injunct Hindu parent married under Act from treating his legitimate son as an undivided member of Hindu joint family.

What Section 5 of the Hindu Succession Act effectively means is that as regards succession even though the son is legitimate and can be deemed to be a Hindu, his rights to succeed to the estate of his father, on intestacy, have to be governed by the provisions of the Special Marriage Act, 1954. But, this would not in any way injunct a Hindu parent from treating a legitimate son of his born in lawful wedlock as per the provisions of the Special Marriage Act, 1954 as an undivided member of the Hindu joint family. (Para 10)

(G) Civil P. C. (1903), Pre. — Interpretation of Statutes — Taxing statutes — Mode of interpretation.

Taxing statutes ought not to be so astutely considered so as to ignore physical facts and literally be strained against the assessee. Fiscal statutes have to be interpreted for the benefit of the assessee, if Courts are confronted with any doubt regarding its strict application. (Para 14)

Cases Referred: Chronological Paras

- (1968) 70 ITR 20 (SN) (All), Commr. of Income-tax v. Beni Prasad Tandon II
- (1967) AIR 1967 SC 272 (V 54)= (1967) 1 SCR 7, Satrugan v. Sabujpari 6
- (1967) 63 ITR 505=1966-2 ITJ 885 (All), Pratap Narain v. Commr. of Income-tax II
- (1967) AIR 1967 Pat 16 (V 54)= (1967) 65 ITR 592, Panna Lal Rastogi v. Commr. of Income-tax II
- (1966) AIR 1966 SC 984 (V 53)= (1966) 60 ITR 36, T. S. Srinivasan v. Commr. of Income-tax 11, 14
- (1966) AIR 1966 SC 1523 (V 53)= (1966) 60 ITR 293, Gowli Buddanna v. Commr. of Income-tax 11, 12, 13, 14
- (1965) AIR 1965 SC 825 (V 52)= (1965) 1 SCR 26, Lakshmi Perumallu v. Krishnavenamma 5
- (1965) AIR 1965 Andh Pra 447 (V 52)= (1967) 65 ITR 579, Commr. of Wealth-tax v. Narendranath 12, 13
- (1964) AIR 1964 Mys 204 (V 51)= (1964) 51 ITR 790, Commr. of Wealth-tax v. D. C. Basappa II
- (1964) 53 ITR 613 (Raj), Mukat Beharilal Bhargava v. Commr. of Income-tax 12, 13
- (1963) AIR 1963 Mad 280 (V 50)= (1963) 48 ITR 959, K. R. Ramachandra Rao v. Commr. of Wealth-tax 12, 13
- (1960) AIR 1960 Mad 568 (V 47)= 1960-2 Mad LJ 262, Lakshmi Ammal v. Ramachandra Reddiar 5
- (1958) 34 ITR 42 (ED)=1957 AC 540, Attorney-General of Ceylon v. Arunachalam Chettiar 13
- (1958) AIR 1958 Mad 228 (V 45)= 1957-2 Mad LJ 382, Ramalingam Pillai v. Ramalakshmi Ammal 5
- (1957) AIR 1957 Mad 456 (V 44)= 1957-1 Mad LJ 250, Subramaniam v. Kalyanarama Iyer 5
- (1954) AIR 1954 Mad 576 (V 41)= 1954-1 Mad LJ 250 (FB), Parappa v. Nagamma 5
- (1953) AIR 1953 SC 433 (V 40)= 1952 SCJ 507, A. R. Raja Kumar v. Narayana Rao B
- (1952) AIR 1952 SC 225 (V 39)= 1952 SCR 869, Gur Narain Das v. Gur Tahal Das 5
- (1950) AIR 1950 Mad 785 (V 37)= 1950-2 Mad LJ 21, Seethamma v. Veeranna Chetty 5
- (1942) AIR 1942 Mad 693 (V 29)= 1942-2 Mad LJ 292 (FB), Amirthammal v. Vallimayil Ammal 6
- (1937) AIR 1937 FC 36 (V 24)= (1937) 5 ITR 90, Kalyanji Vithaldas v. Commr. of Income-tax 11, 13
- (1935) AIR 1935 Bom 412 (V 22)= (1935) 3 ITR 367, Commr. of

Income-tax, Bombay v. Lakshmi-narayan

[1931] AIR 1931 PC 294 (V 18)=61
Mad LJ 522, Vellaiyappa Chetty v. Natarajan

[1907] ILR 31 Bom 25=8 Bom LR 770, Francis Ghosal v. Gabri Ghosal

[1904] ILR 27 Mad 13, Lingappa Goundan v. Esudasan

[1859] 8 Moo Ind App 400=2 Suthi WR 4 (PC), Myan Boyee v. Ootaram

S. Swaminathan and K. Ramagopal, for Applicants; V. Balasubramanyam and I. Jayaraman, for Respondents.

RAMAPRASADA RAO, J.— On applications made by the assessee under Section 27(1) of the Wealth Tax Act, S. 66(1) of the Income-tax Act and S. 25(1) of the Expenditure Tax Act, the Income Tax Appellate Tribunal has referred the following common question for our decision:—

“Whether on the facts and in the circumstances of the case, the assessee and his son constituted a Hindu undivided family for purposes of assessment under the Income Tax, Wealth Tax and Expenditure Tax Acts.”

2. The Tribunal passed a consolidated order in the appeals against the assessments respectively made under the Income-tax Act and Wealth Tax Act for the assessment years 1960-61 and 1961-62 and against the assessment under the Expenditure Tax Act for 1961-62. In all the appeals the Tribunal sustained the assessment made on the assessee in the status of an individual. The assessee late R. Sridharan, was a member of a Hindu undivided family, along with his father and brothers. On a partition between the assessee, his brothers and father, a block of shares in T. V. Sundaram Iyengar and Sons Private Limited and three other Limited Companies were allotted to his share. At the time of the partition he was not married. On June 24, 1956, he married an Austrian Lady, Rosa Maria Steinbchler, under the Special Marriage Act, 1954. A son, Nicolas Sundaram, was born to them on November 29, 1957. Initially the assessee was assessed to income-tax and wealth tax in the status of an individual on his own declaration. In 1959-60, the assessee claimed the status of a Hindu undivided family consisting of himself and Nicolas Sundaram. The assessee repeated his claim to be treated as a Hindu undivided family for the assessment years 1960-61 and 1961-62. The main contention of the assessee was that Nicolas Sundaram was a Hindu and the property held by him was ancestral property and that therefore he has to be assessed in the status of a Hindu undivided family. The Revenue negatived the contention. The appeal to the Appellate

Assistant Commr. was unsuccessful. The Tribunal was of the view that although Section 21 of the Special Marriage Act preserved some of the rights in the family property to the children born of such wedlock, yet it did not clothe such issue with the character of a Hindu. The analogy of the status of a Hindu widow, recognition to which was statutorily given by the Hindu Women's Rights to Property Act, 1937, was, according to the Tribunal, inappropriate. Ultimately the Tribunal was of the view that there was no Hindu undivided family of Sridharan and his son which could claim to be taxed for the assessment years 1960-61 and 1961-62 as demanded by the assessee. Aggrieved against the said decision of the Tribunal, the reference in the manner stated above is before us for consideration.

3. The contentions urged by the assessee before the Revenue and the Tribunal were repeated before us. Mr. Swaminathan, appearing for the assessee, strenuously argued that in the light of the treatment of the various members of a Hindu joint family, either under the orthodox Hindu Law or by later statutory recognition thereof, it should be held in the instant case that Nicolas Sundaram is a member of a Hindu undivided family in which the assessee is the head. He would also urge that the father having openly recognised and treated his son as a member of the joint family, that by itself is a positive indicia that there existed a Hindu undivided family. Relying upon the definition of 'Hindu' in the various enactments such as the Hindu Succession Act, 1956, the Hindu Adoptions and Maintenance Act, 1956, and other such allied enactments, it was urged that Nicolas Sundaram is a Hindu and he has to be treated as such. Mr. Swaminathan proceeds that if their is a Hindu undivided family consisting of the assessee and Nicolas Sundaram, then it is easy to appreciate the character of the property held by the assessee at or about the material time, and in particular during the assessment years, as it ought to be treated, recognised and upheld to be ancestral property or joint family property. If therefore there is a joint family and the family owns ancestral or joint family property, then the question referred answers itself in favour of the assessee. The Revenue on the other hand represented by Mr. Balasubramaniam, contending contra would state that Section 21 of the Special Marriage Act, 1954, would not envisage a joint family as is orthodoxly understood in traditional Hindu Law as between the assessee and his son, and even otherwise the property in the hands of the assessee which was secured by him at a partition, cannot be treated to be joint family property as is commonly understood. His contention in the

main is that there is no substantial evidence to show that Nicolas Sundaram was brought up as a Hindu, and even otherwise the incursions made by the statute law on the personal law of the parties cannot be pressed into service so as to compulsorily recognise Nicolas Sundaram as a Hindu and as a member of a Hindu undivided family and thereby and thereunder recognise the status of the assessee as a Hindu undivided family.

4. The problem posed and the question referred has to be considered in the light of the historic development of the system of joint family amongst Hindus to whom the Mitakshara Law is applicable and having regard to the march of Hindu Law from time to time with particular reference to the inroads made on the personal law of Hindus by legislation. It has to be stated at the outset that certain doctrines of Hindu Law though seemingly inconsistent with the spirit and scheme of the Income Tax Act, yet a possible reconciliation can be made when a seeming or apparent conflict arises and find whether the intention of the Legislature when it enacted the fiscal enactment was to overlook the universal application of the accepted doctrine under the personal law of the parties. Of course, each case has to be decided on its own merits and the age-old rule that Courts lean towards the assessee in cases of doubt has to prevail.

5. The institution of a joint Hindu family is peculiar to Hindu jurisprudence and has its origin in ancient orthodox texts and writings of Smritikars. Though it originated in the propagation of the theory of despotism and autocracy in the father, yet by efflux of time, such a concept considerably sloped down so as to confer equal rights on his sons by birth. The induction of parceners by birth into the family considerably whittled down the absolute power of the father. Several other inroads into such unitary rights and privileges of the father, which incursions had to be made with the growth of society and the appreciation of the value of individual rights, resulted in the enlargement of the body constituting the joint Hindu family. This body which is a creature of law enfolds within it the lineal male descendants of a common ancestor and includes their mothers, wives or widows and unmarried daughters. Joint family status is ordinarily the result of birth or affiliation by adoption or marriage and need not necessarily be linked with the possession of joint family property. All members constituting the family have no equal rights, such as the daughter or a maintenance holder. The march of the personal law amongst Hindus has been from time to time refined by passive and provocative judicial precedents. From ancient times, even an illegitimate son

was not in any sense considered as quasi nullius filius although he did not share and had no coparcenary right in the joint family estate. He had a recognised, though lower, status in the family of his father and he was bound to be maintained from and out of the family estate. In fact, the principle appears to be that the disqualification is only as regards the sharing of the family estate, but it did not involve the disqualification to be maintained out of that estate. The above principle is unexceptional in so far as Sudras are concerned. But in the case of the twice-born, judge made law recognised such an illegitimate son of a person belonging to a twice-born class as being entitled to maintenance which could also be made a charge on the joint family property. Such maintenance is in lieu of inheritance—See Vellalappa Chetty v. Natarajan, 61 Mad LJ 522 at p. 526—(AIR 1931 PC 294 at pp. 295-296) approved in Gur Narain Das v. Gur Tahal Das, AIR 1952 SC 225. Though an illegitimate son may not strictly be a coparcener in the Hindu family, yet he has undoubtedly the status of a member of such a family. There is therefore abundant authority to hold that even an illegitimate son is a member of the family consisting of the putative father and his status as such cannot be denied even by the twice-born class. If this is so, what would be the status of Nicolas Sundaram in the instant case? He cannot be called an illegitimate son, because he is the son born of lawful wedlock. Marriage between a member of the twice-born community and a Christian under the Special Marriage Act is recognised as valid in law. Therefore he is a legitimate son even viewing it with the lynx's eye of orthodox Hindu Law. The assessee (son?) therefore is a lineal descendant who could claim to have the status of being a member of the joint family of which the assessee is the head. At this stage the analogy of a Hindu widow and her rights both under the ancient texts and by virtue of the later statutory law may also be considered so as to appreciate the status of the assessee's son. The catena of decisions cited at the Bar. Seethamma v. Veeranna Chetty, (1930) 2 Mad LJ 21—(AIR 1950 Mad 785); Parappa v. Nagamma, (1954) 1 Mad LJ 250—(AIR 1954 Mad 576) (FB); Subramanian v. Kalyanarama Iyer, (1957) 1 Mad LJ 250—(AIR 1957 Mad 456); Ramalingam Pillai v. Ramalakshmi Ammal, (1957) 2 Mad LJ 382—(AIR 1958 Mad 228); Lakshmi Ammal v. Ramachandra Reddhar, (1960) 2 Mad LJ 262—(AIR 1960 Mad 568) and Satrugnan v. Sabulpuri, AIR 1967 SC 272, do all afford a positive indica as to how and in what circumstances the widow is treated as a member of the joint family. Observed the Supreme Court in the last case:

"The Act seeks to make fundamental changes in the concept of a coparcenary and the rights of members of the family in coparcenary property, the Act in investing the widow of a member of a coparcenary with the interest which the member had at the time of his death has introduced changes which are alien to the structure of coparcenary. The interest of the widow arises not by inheritance, nor by survivorship, but by statutory substitution: AIR 1965 SC 825 Lakshmi Perumallu v. Krishnavenamma relied on. By the Act certain antithetical concepts are sought to be reconciled. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of her husband and the widow so introduced, there arises community of interest and unity of possession"

6. Even so the position of an idiot who cannot share but yet is considered as a coparcener on principle, is adumbrated in *Amirthammal v. Vallimayil Ammal*, (1942) 2 Mad LJ 292 = (AIR 1942 Mad 693) which is very instructive. If a person is a congenital idiot, that by itself is a disqualification for him to be a heir. But still he has all the status of an aurasa son. He is a parcener; he has a right by birth; he can induct persons into the joint family who could have varied rights of inheritance or succession therein.

7. If therefore a widow who by virtue of matrimony could be inducted into the family and can claim the status of a member thereto and indeed can call for a partition and if an idiot who is disqualified to be a sharer can yet be a coparcener and claim himself to be a member of the joint family, it would be hypertechnical and indeed a refinement without any fineness if it is to be said that a legitimate son born out of lawful wedlock and who is acknowledged by the father to be a Hindu, and who has rights of succession though not under the orthodox Hindu law or under the Hindu Succession Act to the estate of his father, cannot be terminologically called as a member of the family of his father.

8. This discussion apart, explanation (b) to Section 2 of the Hindu Succession Act, 1956, the Hindu Marriage Act, 1955, the Hindu Adoptions and Maintenance Act, 1956 and the Hindu Minority and Guardianship Act, 1956, whose language is in *pari materia* in each of the Acts, provides as follows:—

"Explanation — The following persons are Hindus"

(a)

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu..... by religion and who is 'brought up as a

member' of the tribe 'community', group or family to which such parent belongs or belonged."

The underlining (here in ' ') is ours. The later statutory law therefore expressly provides for the conferment of the status of a Hindu on a person even though such status is doubtful when the personal law of the parties is invoked. All such Acts provide that the expression 'Hindu' shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless a person to whom this Act applies by virtue of the provisions contained respectively in such Acts. Ordinarily under the personal law, an illegitimate child would take after the religion of the mother. Particularly it is so in the case of regenerate classes. But as already stated, if such a son of a parent belonging to a twice-born class inducts the child into the Hindu family and brings him up as such, then the statute invests him with the status of a Hindu and recognises him as a Hindu. Mr. Balasubramanyam placed reliance upon the decision in *Myna Boyee v. Ootaram*, (1859) 8 Moo Ind App 400 (PC). That was a case where the illegitimate children born to a woman of the Brahmin caste through an Englishman were disentitled to claim inter se as between themselves rights of survivorship though they were considered as Hindus. This has no application to the facts of this case. Even so, the decision in *Lingappa Goundan v. Esudasan*, (1904) ILR 27 Mad 13 cited by the Revenue where the plaintiff therein was not regarded as a Hindu by birth as his mother was a Christian, has no application for the reason that the later development of statute law recognises such a status in the child, by an overt act on the part of the father who is a Hindu, who takes him into the fold of the family and brings him up as his son and acknowledges him as his undivided son. Incidentally it may be mentioned that even under the Mitakshara Law, an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance even among the regenerate classes — See A. R. Raja Kumar v. Narayana Rao, AIR 1953 SC 433. If this were so, it is not open to the Revenue to say that Nicolas Sundaram who is a legitimate son who is admittedly entitled to statutory rights of succession under the Special Marriage Act, 1954, cannot under 'any circumstances' be considered or deemed to have the status of a Hindu. It is not in dispute that the assessee is a Hindu. He has during the assessment year in question claimed the status of Hindu undivided family along with his son Nicolas Sundaram. It is imperative to understand the necessary implications in such a claim made by the

assessee. In our view, it obviously means what he says. According to the assessee, his son is in his family and obviously it also reflects his mind that his son is being brought up by him as a Hindu. Cryptically it was contended that there was no evidence that the child was being brought up as a Hindu within the meaning of the explanation cited above. If the assessee has taken his son into his family and has openly acknowledged him as a member thereto by claiming the status of a joint family, it would be unreasonable to still hold that the subject required further elucidation by way of evidence that the son is being 'brought' up by the father as a member of the family to which the father belongs. It would be strange to insist upon evidence aliunde. The assessee when he declared that he and his son do form members of a Hindu undivided family, has done so obviously to preserve the solidarity of his family and indeed his religion. His lapse even if it is to be considered as one, in marrying outside the community, does not necessarily mean that he is not a Hindu and his legitimate son born of such a lawful wedlock even though in his fold, under his care and protection and brought up by him, is also not a Hindu. In fact, such a status in the son as a Hindu is preserved by the above statutory provisions. Nicolas Sundaram, in this case, satisfies the usual norms prescribed to enable one to claim maintenance from his father, (1) existence of a particular relationship, and (2) possession of property. Even viewing the status of Nicolas Sundaram from the point of view of a maintenance holder, Sec. 20 of the Hindu Adoptions and Maintenance Act, 1956, is certainly to his benefit and advantage. We have no hesitation in holding that the son of the assessee is a Hindu and having been unequivocally declared to be a member of the Hindu undivided family of which the assessee is the head, he ought to be deemed to be a member of the joint family consisting of the assessee and his son.

9. The Revenue however relies on Section 21 of the Special Marriage Act, 1954, and would say that such son born to the assessee could only claim rights of succession therein, and he cannot claim any interest in the property of the assessee as a member of an undivided Hindu family. If, as already opined by us, Nicolas Sundaram has to be considered to be a Hindu within the meaning of the statutory enactments referred to above, then the mere fact that his rights of succession to his father's property are concurrently provided for in a special enactment like the Special Marriage Act, 1954, would not be a bar for him to get himself associated with his father as a member of a Hindu joint family. In fact, a Division Bench of the Bombay High Court in Francis Ghosal

v. Gabri Ghosal, (1907) ILR 31 Bom 25 considering the impact of the Indian Succession Act, 1865, in similar circumstances was of the view:—

"The Indian Succession Act, 1865, does not affect rights of coparcenership as between those to whom it applies. The purpose of that Act was to amend and define the rules of law applicable to intestate and testamentary succession. It is with the devolution of rights on intestacy that the Act deals....."

While respectfully adopting this view of the learned Judges therein, we would add that Section 21 of the Special Marriage Act, 1954, also does not affect the question at issue. The said section states that succession to the property of a person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the Indian Succession Act. Such provision which regulates the rights of succession after the lifetime of a person whose marriage is solemnized under the Special Marriage Act, 1954, cannot be deemed to affect or alter the joint family structure between an assessee and his son. The discretion vested in the Hindu father to treat his properties as joint family properties by an overt or a covert act of his by taking into his fold his Hindu sons so as to constitute properties as joint family properties is certainly supreme and unexceptionable and Section 21, in our view, does not interdict such a vested discretion in a Hindu father to do so.

10. Reference was made to Section 5 of the Hindu Succession Act wherein it is said that the Act does not apply to any property, succession to which is regulated by the Indian Succession Act, 1925, by reason of the provisions contained in Section 21 of the Special Marriage Act, 1954. This, however, overlooks the fact that if a Hindu father possessed of property declares that a legitimate son born to him is also a member of his own family, that by itself does not militate against the principle of exclusion provided for in Section 5 of the Act. What Section 5 of the Hindu Succession Act effectively means is that as regards succession in the instant case, even though the son is legitimate and can be deemed to be a Hindu, his rights to succeed to the estate of his father, on intestacy, have to be governed by the provisions of the Special Marriage Act, 1954. But, as already stated this would not in any way injunct a Hindu parent from treating a legitimate son of his born in lawful wedlock as per the provisions of the Special Marriage Act, 1954, as an undivided member of the Hindu joint family. This joint family is created by the father by an option exercised for that purpose by himself and no sooner such option is exercised by him, there springs from it a Hindu joint family.

which has to be recognised and whose legal entity has to be given effect to in accordance with the provisions of the Hindu Law both traditional and statutory and a fortiori by the taxing statute as well.

11. Having thus come to the conclusion that Nicolas Sundaram belongs to the family of the assessee by reason of the treatment meted out by the assessee and his unequivocal intention and declaration to treat him as his son and as a member of the Hindu undivided family, it is for consideration whether the property in the hands of the assessee and at his disposal during the assessment years, was impressed with the character of ancestral property or should it be deemed to be the property of the assessee and liable to be assessed as was done by the Revenue. Considerable light was thrown at the Bar on this aspect and the discussion was almost full and complete. It is unnecessary for us to delve into the historical development on the concept as we have a few decisions of the Supreme Court entirely covering the ground. Strong reliance was placed by Mr. Balasubramaniam on *Kalyanji Vithaldas v. Commr. of Income-tax*, (1937) 5 ITR 90 = (AIR 1937 PC 36) which disapproved the ratio of the Bombay High Court in *Commr. of Income-tax, Bombay v. Lakshminarayan*, (1935) 3 ITR 367 = (AIR 1935 Bom 412). It is very significant that the Supreme Court in *Gowli Buddanna v. Commr. of Income-tax*, (1966) 60 ITR 293 = (AIR 1966 SC 1523) expressly approved the decision of the Bombay High Court in (1935) 3 ITR 367 = (AIR 1935 Bom 412) and observed:—

"Property of a joint family, therefore, does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. In the case in hand the property which yielded the income originally belonged to a Hindu undivided family. On the death of Buddappa, the family which included a widow and females born in the family was represented by Buddanna alone, but the property still continued to belong to that undivided family and income received therefrom was taxable as income of the Hindu undivided family." On the salient question whether there should be more than one male member to form a Hindu undivided family as a tax unit under the taxing Statutes, the Court said:

"The plea that there must be at least two male members to form a Hindu undivided family as a taxable entity also has no force. The expression "Hindu undivided family" in the Income-tax Act is used in the sense in which a Hindu joint family is understood under the personal law of Hindus. Under a Hindu system of

law a joint family may consist of a single male member and widows of deceased male members, and apparently the Income-tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members." In the case under review the assessee acquired the property at a partition. During the accounting years relevant to the assessment years, a lineal descendant of his, has come into existence. He is a Hindu. Notwithstanding the collateral statutory rights of succession guaranteed to the minor son under Section 21 of the Special Marriage Act, 1954, he does not cease to be a member of the joint family. We have held him to be such a member. If this has to be accepted, as it ought to be there is no difficulty in rejecting the contention of the Revenue that the instant case is only reflective of facts where there is only a sole surviving coparcener and none else. In fact, the Supreme Court in (1966) 60 ITR 293 = (AIR 1966 SC 1523) left open the question whether the Hindu undivided family may for purposes of the Income-tax Act be treated as a taxable entity when it consists of a single member, male or female. Emphasis was apparently laid on the presence of a single member and no more. Rightly the Revenue drew our attention to an earlier decision of the Supreme Court in the same volume in *T. S. Srinivasan v. Commr. of Income-tax*, (1966) 60 ITR 36 = (AIR 1966 SC 984) where the Court held the view that in such a case:

"..... Till the child was born, the income which accrued or arose to, or was received by, the appellant was his income, as no Hindu undivided family was then in existence, and this position could not be displaced by the birth of the son, which brought into existence a Hindu undivided family."

We are of the view that the opinion expressed by the Supreme Court in the last case to the effect:

"The doctrine that under Hindu law a son conceived or in his mother's womb is equal in many respects to a son actually in existence, in the matter of inheritance, partition, survivorship and the right to impeach an alienation made by his father, is not one of universal application and it applies mainly for the purpose of determining rights to property and safeguarding such rights of the son. This doctrine does not fit in with the scheme of the Income-tax Act, and it was not the intention of the legislature to incorporate the special doctrine into the Act."

does not militate against the ratio in (1966) 60 ITR 293 = (AIR 1966 SC 1523) as the facts in those two cases are different. Whilst in the former case the Supreme Court was confronted with a

case where the sole surviving coparcener had no son at least for a part of the accounting year, in the latter case it was not so; particularly in the case under review the son was there during the entire year. In fact, the claim for being assessed as a Hindu undivided family was made long after the birth of the lineal descendant. Adopting the ratio of the Supreme Court in (1966) 60 ITR 293 = (AIR 1966 SC 1523) we hold that the claim of the assessee to be reckoned as a Hindu undivided family is well merited and founded and has to be accepted. In fact, under similar circumstances the Mysore High Court in Commr. of Wealth Tax v. D. C. Basappa, (1966) 51 ITR 790 = (AIR 1964 Mys 204) the Allahabad High Court in Pratap Narain v. Commr. of Income-tax, (1967) 63 ITR 505 (All), Commr. of Income-tax v. Beni Prasad Tandon, (1968) 70 ITR 20 (SN) (All) and the Patna High Court in Panna Lal Rastogi v. Commr. of Income-tax, (1967) 65 ITR 592 = (AIR 1967 Pat 16) are all of the same view that the character of the property in the hands of a sole surviving coparcener, on the induction of a lineal descendant or in the presence of a person who has to be treated as a member of the joint family, has to be impressed with the character of joint family property.

12. The decision in K. R. Ramachandra Rao v. Commr. of Wealth Tax, (1963) 48 ITR 959 = (AIR 1963 Mad 280); Mukat Beharilal Bhargava v. Commr. of Income-tax, (1964) 53 ITR 613 (Raj) and Commr. of Wealth-tax v. Narendranath, (1967) 65 ITR 579 = (AIR 1965 Andh Pra 447) relied on by the Revenue if they are intended to sustain a general proposition of law that the property in the hands of a sole surviving coparcener, under no circumstance can be characterised as joint family property, we are afraid that they are no longer good law after the Supreme Court has laid down a contrary tenet in unmistakable terms in (1966) 60 ITR 293 = (AIR 1966 SC 1523).

13. No doubt (1963) 48 ITR 959 = (AIR 1963 Mad 280) is in a line with the reasoning of the Supreme Court in (1966) 60 ITR 293 = (AIR 1966 SC 1523). The case related to a single coparcener with no lineal descendant and no other person either female or others entitled to claim maintenance. In the instant case, however, the facts are entirely different. The Rajasthan High Court in (1964) 53 ITR 613 (Raj) relied upon (1937) 5 ITR 90 = (AIR 1937 PC 36) the ratio in which is of doubtful value after the pronouncement of the Privy Council in Attorney-General of Ceylon v. Arunachalam Chettiar, (1958) 34 ITR (ED) 42. No reference has been made in this case to Attorney-General of Ceylon v. Arunachalam Chettiar, (1958)

34 ITR (ED) 42. In any event after the elucidation of the facts in (1937) 5 ITR 90 = (AIR 1937 PC 36) by Shah, J., in (1966) 60 ITR 293 = (AIR 1966 SC 1523) it is clear that that case concerned itself with the:

"Income assessed to tax which belonged separately to four out of six partners; of the remaining two it was from an ancestral source, but the fact that each such partner had a wife or daughter did not make that income from an ancestral source income of the undivided family of the partner, his wife and daughter."

It is not safe, therefore, to rest our conclusions on the decision reported in (1937) 5 ITR 90 = (AIR 1937 PC 36). With great respect to the learned Judges who decided (1967) 65 ITR 579 = (AIR 1965 Andh Pra 447) we are bound to say that the principle laid down therein is opposed to that set in (1966) 60 ITR 293 = (AIR 1966 SC 1523).

14. Even the dicta in (1966) 60 ITR 36 = (AIR 1966 SC 984) and that in (1966) 60 ITR 293 = (AIR 1966 SC 1523) are reconcilable. Though one may gain the impression that the principle excerpted above and contained in (1966) 60 ITR 36 = (AIR 1966 SC 984) eliminates the application of the Hindu Law doctrine which concedes the right of a son in the womb of the mother being equal in many respects to a son actually in existence, it was stated so in the peculiar facts of that case where there was no lineal descendant upto a particular point of time during the accounting year, during which the Department rightly treated the assessee therein as an individual. In the later decision of the Supreme Court in (1968) 60 ITR 293 = (AIR 1966 SC 1523) the true content of the doctrine has been brought out and stated succinctly thus:

"..... Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members, and the income-tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members."

In the case under consideration, Nicolas Sundaram has to be treated as a male lineal descendant of the assessee. Even otherwise, as a son who should at least be maintained by the assessee, his claim to be engrafted into the joint family as its member cannot be lightly brushed aside. Taxing statutes ought not to be so astutely considered so as to ignore physical facts and literally be strained against the assessee. Fiscal statutes have to be interpreted for the benefit of the assessee, if Courts are confronted with any doubt regarding its strict application.

15. The Tribunal therefore, was in error in holding that there was no Hindu undivided family of Sridharan and his

filing the application for review of the judgment dated 17th October 1968 of this Court by which writ of Shri C. Indra Singh, a Government Servant, against the Union of India, the Chief Commissioner of Manipur, and the General Manager, Manipur State Transport, Manipur, for quashing the order dated 9-2-1966 made against him by the General Manager was allowed.

2. The review application was filed on 14-1-1969. The time consumed in securing a copy of the judgment of which the review was sought admittedly took 26 days, the application for the copy having been made on 19-10-1968 and the copy having been supplied on 13-11-1968. The period of limitation for review is 30 days counted from the date of the decree or order sought to be reviewed—vide Article 124 of the Limitation Act. The review application should consequently have been filed within 56 days but it was actually filed 89 days after the impugned judgment. Therefore, the review application, it is not in dispute, was instituted late by 33 days.

3. Shri Ibtombi Singh, representing the applicants, submitted that in the matter of condonation of delay the Government should not be equated with private parties for the simple reason that before the Government can make up its mind on whether to go to the Court, unlike what happens in the case of an individual the relevant papers have to be examined by a number of officers and that inevitably involves longer time. In other words, his contention was that some indulgence must be shown by the Court to the Government while examining the facts relevant to the prayer made for condonation. He cited the case of K. R. Beri v. Employees' State Insurance Corporation, AIR 1962 Punj 308, to shore up his submission. It was held in that case that a private individual has only to make up his own mind and is normally presumed to be aware of or familiar with all the relevant factors and aspects of the case, whereas the Government has to take into consideration the public interest involved and so, comparatively speaking, longer time must, looking at things in a practical way, be required for enquiry and consideration before taking final decision and then acting on it. It may therefore be not wholly unreasonable to state, the High Court observed, that a period of time which may be sufficient for a private litigant may not necessarily be sufficient in the case of Government.

These observations as also another observation made by the High Court, namely, that the statute makes no distinction between Government and private individual in the matter of condonation

of delay, are clearly unexceptionable. However, the real difficulty arises in their application to individual cases. It remains to be emphasised, at the same time, that the Government officers charged with the double duty of taking the decision and instituting the proceedings in Courts must not carry the impression that they can bank on the indulgence of Courts even if they take their own time in processing the papers or making up their mind. Nothing else would be more farther from truth. Section 5 of Limitation Act envisages no distinction between the Government and a private litigant. It is the established and well known practice or the manner in which the Government machinery works which the Court can take into consideration while adjudging adequacy or otherwise of the reason for delay in filing the proceedings. The Court would certainly not put up with any laches or smug nonchalance on the part of Government officials in the matter of Court proceedings, just as it would not do in the case of a private litigant.

4. Now I proceed to examine the facts and circumstances urged in support of the prayer for condonation. In para 3 of the application made on behalf of the Government, it is mentioned that the office of the Government Advocate forwarded the copy of the judgment to the Law Department on 20th November 1968 for examination, and that the Government, after looking through the judgment, made up its mind to apply for review on 3-1-1969 when it sent back the copy to the Government Advocate with the direction to file an application for review. The Government Advocate then prepared draft of the review petition and forwarded the same on 4-1-1969 to Government for its approval. The Government approved of that draft and sent back the same to the Government Advocate on, 9-1-1969. The Government Advocate then submitted the review application to the Court on 14-1-1969. Assuming for the sake of argument that the matter involved was of complex nature and the Government could not make up its mind to file an application for review earlier than 3-1-1969, that the Government Advocate was justified in taking one day more in preparing the draft of the review application, and that the Government were justified in taking another 5 days, until 9-1-1969, in looking through the draft and approving the same, there appears to be no justification, nor any has been mentioned in the review application, why the Government Advocate took no less than 5 days in presenting the application to the Court after he had received the approved draft from the Government on 9-1-1969. The affidavit filed by clerk employed in

the office of the Government Advocate in support of the allegations made in the review application is also silent on the point what stood in the way of the Government Advocate in filing the review application in a day or two after he had received the approved draft of the application from the Government. Therefore, I am not satisfied that there was any justification for not filing the review petition immediately after the approved draft had been received from the Government. It is also not explained in the affidavit why the Government Advocate took as many as 7 days in sending the copy of the judgment to the Government after he had taken delivery of it on 13th November 1968.

5. Another fact of which I want to take notice is that according to the affidavit of the clerk the copy of the judgment was ready for delivery on 23rd October 1969 but the charges for the copy in the shape of stamps were paid to the Copying Department on 13-11-1968. It is not mentioned in the affidavit why the charges could not be deposited soon after the copy was ready for delivery. The delay of 15 days in depositing the charges apparently looks to be unjustified, and this is specially so when no explanation is forthcoming.

6. As a result of the conclusions recorded above, I dismiss the application for condonation of delay. However, I make no order as to costs.

Petition dismissed.

AIR 1970 MANIPUR 34 (V 57 C 10)

R. S. BINDRA, J. C.

Chanambam Modhu Singh and another, Petitioners v. Yunniam Ningthemjao Singh and others, Respondents.

Civil Revn. Case No. 5 of 1967, D/- 23-8-1969.

Civil P. C. (1908), S. 115 (c) — Expressions “illegally” and “material irregularity” — Meaning — Interference permissible only if Subordinate Court has committed some breach of a provision of law or some error of procedure.

The expressions “illegally” and “material irregularity” do not cover either errors of fact or of law, and they do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated by Cl. (c) relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with. It would therefore, follow that the High Court can interfere under Cl. (c) of Section 115 only if the subordinate Court has acted in exercising its

jurisdiction illegally, that is, in breach of some provision of law, or with material irregularity, which in other words means, some error of procedure in the course of the trial which is material in that it may affect, or may have affected, the ultimate decision in the case. AIR 1953 SC 23, Folly AIR Commentaries on Civil P. C. 7th Edition P. 1569 cited with approval. AIR 1953 SC 28 & (1885) 11R 11 Cal 6 (PC) & AIR 1949 PC 156 & AIR 1917 PC 71, Ref.; AIR 1952 Ajmer 24 (1), Dist. (Para 6)

Plaintiff made an application to the trial Court for examining additional witnesses to prove a document namely a power of attorney lying on the file of a case pending in the Court of the District Judge. Notice of this application was given to the defendants and after hearing the counsel for both the parties, the trial Court rejected the prayer.

Held, that the order could not be interfered with. The trial Court had the jurisdiction to decide whether the prayer made by the plaintiffs should be allowed or rejected. It was also imperative that before making up its mind the Court should allow an opportunity to both the parties to address arguments on the merits of the prayer made. All this was admittedly done and so if the decision reached was unsavoury to one party or the other, it could not be urged plausibly that the Court had violated any provision of law or procedural rule. (Para 7)

Cases Referred: Chronological Paras

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|--------------------------------------|---|------|
| (1953) AIR 1953 SC 23 (V 40) = | 1953 SCR 136, Keshardeo v. Radha Kissen | 6 |
| (1953) AIR 1953 SC 23 (V 40) = | 1953 SCR 197, Nemi Chand v. Edward Mills Co. Ltd. | 5, 7 |
| (1952) AIR 1952 Ajmer 24 (1) (V 39). | Kannal Kedarmal v. Madan Lal | 3 |
| (1949) AIR 1949 PC 156 (V 36) = | 76 Ind App 67, Venkatagiri v. Hindu Religious Endowments Board. | 5, 7 |
| (1917) AIR 1917 PC 71 (V 4) = 44 | Ind App 261, Balakrishna Udayar v. Vasudeva Ayyar | 5 |
| (1885) 11R 11 Cal 6 = 11 Ind App | 237 (PC), Amir Hasan Khan v. Sheo Baksh Singh | 5 |

R. K. Manisana Singh, for Petitioners;
R. K. Dorendra Singh, for Respondents
Nos. 1 to 3.

ORDER:— This revision petition under Section 115 of the Civil P. C. is directed against the order dated 21-12-1966 by which the trial Court rejected the application of the plaintiffs to prove a document (power-of-attorney) lying at present on the file of Civil Appeal No. 31 of 1965 pending in the Court of the District Judge after summoning three witnesses mentioned in the application. It was urged, in

support of the prayer made, that the proof of power-of-attorney "is of a formal nature and will not affect the substantial rights, if any, of the defendants and power-of-attorney, if allowed to be proved, will not prejudice the rights, if any, of the defendants". It was also stated in the application that though the defendants had not denied in their written statement that the power-of-attorney had been executed, as mentioned in the plaint, by the defendant No. 2 in favour of M. K. Binodini Devi, and though no specific issue had been formulated by the trial Court in the connection, the necessity for proving the power-of-attorney had arisen because in one of the appeals pending in the Court of District Judge between the same parties an objection had been raised that the power-of-attorney had not been formally proved and so it could not be relied upon. It was to get over such an objection in the present suit that it was thought necessary to prove the power-of-attorney in a formal manner.

2. The prayer for summoning the witnesses and the file containing the power-of-attorney was opposed by the defendants, it appears, on the score that it was highly belated. It may be mentioned here that the suit was instituted on 27-8-1962 and that by 11-11-1965, when the application under discussion was made, almost the entire evidence of the plaintiffs had been concluded. Only a part of the statement of one of their witnesses remained to be recorded.

3. The trial Court dismissed the application on the footing that a previous application for placing on the file a copy of the power-of-attorney had been rejected on 10-1-1966 with the remark that it was mala fide and belated and unless that order was vacated by a superior Court the present application, which substantially contained an identical prayer, could not be entertained. The trial Court observed further that if the plaintiffs had moved it for review of the first order dated 10-1-1966, the situation may have been different.

4. On the authority of *Kanmal Kedar-mal v. Madanlal*, AIR 1952 Ajmer 24 (1), it was urged by Shri Manisana Singh, appearing for the petitioners, that this Court can interfere in revision under Section 115 of the Code if the trial Court refuses to permit a party to produce additional evidence or to examine additional witnesses. I think Shri Manisana Singh stated the proposition much too widely. If such a contention were to prevail, we shall be arming unscrupulous litigants with a weapon with which to obstruct civil proceedings ever reaching the destined end. It is correct that in the Ajmer case the Judicial Commissioner set aside the order of the trial Court disallowing the defendants to examine two additional wit-

nesses, and directed the trial Court to permit the defendants to examine them. However, no discussion at all was made respecting the crucial point whether the refusal of the trial Court to a party to examine additional witnesses is an order which can be interfered with by the High Court under Section 115 of the Code. Therefore, that decision is not enlightening, nor helpful, in deciding the point canvassed in this Court. As such, the reply to the question debated in this Court will have to be found either by the analysis of the provisions of Section 115 or by scrutinising the judicial pronouncements bearing on its exact scope.

5. Section 115 is in the following terms:

"115, the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit".

Shri Manisana Singh did not contend that the impugned order falls within the scope of Cls. (a) and (b) of the section. He, however, submitted that that order falls within the ambit of Cl. (c). The interpretation of that clause has resulted in a crop of judicial pronouncements which are not only mutually irreconcilable but occasionally confounding. However, the pronouncements of the Privy Council in regard to interpretation of that clause since the year 1884 and a recent judgment of the Supreme Court, AIR 1953 SC 28, *Nemi Chand v. Edward Mills Co. Ltd.*, go a long way to solve the problem. In the case of *Amir Hassan Khan v. Sheo Baksh Singh*, (1885) ILR 11 Cal 6 (PC) the Privy Council observed as follows in regard to the exact scope of Section 622 of the former Code of Civil P. C., which was replaced by Section 115 of the present Code:—

"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

Subsequently, in the case of *Bala-krishna Udayar v. Vasudeva*, AIR 1917 PC

71, their Lordships of the Privy Council held:—

"It will be observed that the section applied to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved".

Thereafter, the Privy Council happened to examine Cl. (c) of Section 115 in the case of Venkatagiri v. Hindu Religious Endowments Board, AIR 1949 PC 156. It was held therein that "Section 115 applies only to cases in which no appeal lies, and where the Legislature has provided no right of appeal, the manifest intention is that the order of trial Court, right or wrong, shall be final". The Privy Council then expounded the true meaning and scope of Cl. (c) of Section 115 in the following terms:—

"The section empowers the High Court to satisfy itself upon three matters: (a) that the order of the subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate Court upon questions of fact or law. There can be no justification whatsoever for the view that Section 115 (c) was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate Courts. It would indeed be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured".

In this particular case, the Privy Council set aside the judgment of the High Court on the ground that the High Court had interfered with the order of the subordinate Court on the basis that "it (subordinate Court) had made a serious mistake in the construction of a will". In the opinion of the Privy Council, the High Court had acted without jurisdiction in interfering with the order of the subordinate Court and so the order of the High Court could not be sustained.

6. The Supreme Court cited the aforementioned three authorities of the Privy Council with approval in the case of Keshardeo v. Radha Kissen, AIR 1953 SC 23. The Supreme Court observed that the expressions "illegally" and "material irregularity" do not cover either errors of fact or of law, and that they do not refer to the decision arrived at but to the

manner in which it is reached. The errors contemplated by Cl. (c), the Supreme Court observed further, relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with. It would therefore, follow that the High Court can interfere under Cl. (c) of Section 115 only if the subordinate Court has acted in exercising its jurisdiction illegally, that is, in breach of some provision of law, or with material irregularity, which in other words, means some error of procedure in the course of the trial which is material in that it may affect, or may have affected, the ultimate decision in the case.

At page 1569 of A. I. R. Commentaries on the Code of Civil Procedure, 7th Edition, it is stated that where the law has prescribed the manner in which a Court shall exercise its jurisdiction and the Court acts in disregard of those provisions, it acts illegally or irregularly in the exercise of jurisdiction, and that where the Court exercises its jurisdiction in the manner prescribed but arrives at a conclusion or decision which is erroneous in law or fact, it does not act illegally or with material irregularity but only decides erroneously in the proper exercise of jurisdiction. These observations of the learned commentators are founded on a large number of authorities mentioned in the foot-note, and, if I may say so with respect, are quite helpful in understanding the true scope of Cl. (c) of Section 115.

7. In the light of principles set out above, I feel satisfied that this Court has no jurisdiction to interfere with the impugned order. What happened in this case was that an application was made to the Court for examining additional witnesses to prove a document lying on the file of a case pending in the Court of the District Judge. Notice of this application was given to the defendants and after hearing the counsel for both the parties, the trial Court rejected the prayer. None can find fault with the procedure followed by that Court in disposing of the matter before it. The only criticism made is that since the power-of-attorney constituted an important piece of evidence in support of the plaintiffs' case and since its non-production may result in the dismissal of the suit, the Court went wrong in rejecting the application. In view of the principles enunciated by the Privy Council in the case of Venkatagiri AIR 1949 PC 156 (Supra), it cannot be said that the trial Court has committed breach of any provision of law or has been guilty of some error of procedure. The Court had the jurisdiction to decide whether the prayer made by the plaintiffs should be allowed or rejected. It

was also imperative that before making up its mind the Court should allow an opportunity to both the parties to address arguments on the merits of the prayer made. All this was admittedly done and so if the decision reached was unsavoury to one party or the other, it cannot be urged plausibly that the Court had violated any provision of law or procedural rule. To quote the words of the Supreme Court in the case of Nemi Chand AIR 1953 SC 28 (Supra), the objection raised by the petitioners is against the "decision arrived at" and not against "the manner in which it is reached". Unless the Court violates a rule of law or a procedural provision prescribing the mode in which jurisdiction is to be exercised, the case would not fall under Cl. (c). The impugned order is, therefore, not hit by Cl. (c) and as such the present petition for revision is not maintainable.

8. As a result, I dismiss the revision petition but since it has been rejected on a point of law, I make no order as to costs.

Petition dismissed.

AIR 1970 MANIPUR 37 (V 57 C 11)

R. S. BINDRA, J. C.

Radha Krishna and another, Petitioners v. Purnanand Sharma, Respondent.

Misc. Civil Appeal No. 2 of 1966, D/- 26-8-1969, against order of Ind Sub. J., Manipur, D/- 14-3-1966.

(A) Civil P. C. (1908), O. 39, R. 1, S. 107 — Injunction — Relief is discretionary — Discretion used in a judicial and not in a capricious manner — High Court will not interfere — Wrongful use of discretion by Lower Court — Burden of proof is on the appellant.

In any appeal arising out of prayer for temporary injunction the appellate Court will interfere only if it is satisfied that the Trial Court had acted in the exercise of its discretion not judicially but in a capricious manner. The mere fact that the appellate Court might have come to a different conclusion is not enough.

(Para 7)

An order for injunction is discretionary order and it is essential for the party appealing against a discretionary order to prove that the Court against whose judgment the appeal is preferred acted in the exercise of its discretion wrongly in not granting the prayer for injunction. AIR 1949 PC 207 & AIR 1914 Cal 531, Rel. on.

(Para 7)

(B) Civil P. C. (1908), O. 39, R. 1 — Injunction — Grant of — Considerations which weigh with the Court stated.

The considerations which should weigh with the Court in deciding the prayer for temporary injunction are (I) whether the plaintiff has made out a prima facie case, (II) whether the balance of convenience is in favour of the plaintiff, that is to say, whether it would cause greater inconvenience to the plaintiff if the temporary injunction is not granted than the inconvenience to which the defendant would be put if it is granted, and (III) whether the plaintiff would suffer an irreparable injury if his prayer for temporary injunction is disallowed.

(Para 8)

(C) Civil P. C. (1908), O. 39, R. 1 — Injunction — Grant of — Court must be satisfied that prima facie case has been made out.

While deciding an application for temporary injunction the Court must form the opinion whether or not a prima facie case has been made out.

(Para 8)

Cases Referred: Chronological Paras

(1953) AIR 1953 Raj 136 (V 40) =

1952 Raj LW 404, Mst. Govindi

Bai v. Lakshmi Chand

8

(1949) AIR 1949 PC 207 (V 36) =

76 Ind App 17, Chandra Kishore

v. Dy. Commr. of Lucknow

7

(1914) AIR 1914 Cal 531 (V 1) =

19 Cal LJ 305, Umesh Chandra v.

Nibaran Chandra

7

R. K. Manisana Singh, for Appellants; A. Nilamani Singh, for Respondent.

JUDGMENT:— The deity Radha Krishna, Paona Bazar, Imphal, and the Secretary of Radha Krishna Mandir Prabandhak Karya Karini Committee of the same place filed a suit against Purnananda Sharma claiming the relief, inter alia, that he (Purnananda Sharma) be restrained from performing puja and other religious rites in respect, of the deity, and from entering into the temple for those purposes. Along with the plaint, an application under Rules 1 and 2 of Order 39 and Section 151 of the Civil Procedure Code was filed wherein the prayer for temporary injunction on line with the relief asked for in the plaint was made. Purnananda Sharma opposed that prayer, and Shri M. C. Ray, the second Subordinate-Judge in whose Court the suit was filed, rejected that prayer by his order dated 14-3-1966. Having felt aggrieved, the plaintiffs have come up in appeal.

2. The allegations on which the suit was founded are that there has been a Committee for a long period managing the affairs and properties of the deity in its capacity as the Shebait of the deity. Though originally the Committee was an unregistered body, but in the year 1960-61 it got itself registered under the Societies Registration Act in the name and style of Radha Krishna Mandir Prabandhak Karya Karini Committee. The defendant is a pujari appointed by the Committee for the purposes of performing

puja of, and other religious ceremonies in connection with, the deity. The Committee had provided one building, belonging to the deity and described in Schedule B of the plaint, to the defendant for his residence as the pujari of the deity. On 16-4-1960 the defendant instituted a suit in the Court of the Munsiff at Imphai against the members of the Committee, claiming, *inter alia*, the declaration that he is the Shebait of the deity and its properties. That suit, however, was dismissed by the Munsiff on 20th February 1960. After the institution of that suit, in April 1961 the defendant filed another suit in the Court of the Subordinate Judge, Manipur, claiming, in his capacity as the Shebait, an account relating to the income of the deity and its properties. This suit was filed in *forma pauperis*. That suit was dismissed by the trial Court on 26-12-1961 and that dismissal was confirmed by this Court in due course. The Committee, it was alleged further, did not approve of the attitude and behaviour of the defendant in filing two suits asserting his right as Shebait and so the Committee terminated the services of the defendant as pujari on 21-2-1965, the date following the one on which the suit for declaration was dismissed by the Munsiff. The prayer made in the suit was for a decree for possession of the Schedule B property made over to the defendant for the purposes of his residence as pujari and for permanent injunction restraining the defendant from performing the puja and religious ceremonies in the Mandir.

3. In his written statement the defendant traversed all the allegations made in the plaint. He denied that the so-called Committee has any existence in law or any right respecting the deity or the property owned by the deity. In regard to the building said to have been given to him by the Committee for the purposes of his residence as pujari, the stand of the defendant was that it was his private ownership. The defendant also detailed the history of how the deity was installed and how the land on which the Mandir and the other buildings stand was acquired. According to his version, it was his father, Gopal Ram Sharma, who had acquired the patta of the land underneath the temple and the other properties from the Maharajah of Manipur, and then constructed the residential house mentioned in Schedule "B" of the plaint, as also the temple, a Mandop, and three shops detailed in Schedule "A" of the plaint. It was Gopal Ram Sharma, again, who installed the deity of Shri Radha Krishna in the temple and dedicated the three shops, the temple and the Mandop to the deity, he himself having taken over as the founder-Shebait. On 20th January, 1934, that Gopal Ram appointed the defendant, his son, as the Shebait of the deity after re-

signing himself from that office. Since then, the defendant pleaded further, he had been acting as the Shebait of the deity and performing the duties and functions connected with that office. In the year 1955 the defendant constituted a Committee, for his own assistance, for management of the temple, with himself as its only permanent member in his capacity as Shebait and one Nathmal as the Secretary-cum-Treasurer. The Committee, however, did not function properly and so it was dissolved by the defendant within two months of its constitution. However, Nathmal continued to act as a Treasurer-cum-Accountant with the defendant's consent. On 6-7-1958, the said Nathmal and a few others, availing themselves of the opportunity provided by the absence of the defendant from the station, constituted themselves into a self-styled Committee in the name of Radha Krishna Mandir Prabandhak Karyakartini Committee. When the defendant learnt about the constitution of that Committee, he sent a registered notice to them on 8-2-1960 challenging their authority to realise the rents from the tenants of the shops dedicated to the deity. It is to assert his right as Shebait that he instituted the two suits mentioned in the plaint. The defendant alleged further that the first suit had undoubtedly been dismissed on 20th February 1965 but his appeal had been accepted and the suit remanded. Respecting the other suit for account, the stand of the defendant was that it had been dismissed not on merits but on the footing that a suit in the name of the deity could not be filed in *forma pauperis*.

4. Shri M. C. Ray dismissed the plaintiffs' application for temporary injunction observing that the plaintiffs had failed to establish a *prima facie* case.

5. Shri Manisana Singh, representing the appellants, urged in this Court that the trial Court had grievously erred in rejecting the prayer for temporary injunction. He submitted that it is the Committee which is now managing the deity and its properties, that the defendant had been working as pujari appointed by the Committee, that the defendant had never worked as Shebait, and that since the Committee had terminated his appointment as pujari he had no right or authority to continue to act in any capacity in the Mandir.

6. Shri Nilaman Singh, appearing for the respondent, urged, on the other hand, that the defendant had been managing the temple and its properties in his capacity as Shebait appointed by his father, who had founded the institution, since 20th January 1934, and that there was no material on the record to establish that he had relinquished that office in favour

of the Committee or that he had ever been appointed as a pujari by that Committee.

7. After going through the arguments addressed at the bar and analysing the pleadings of the parties and the affidavits put in by them, I have reached the conclusion that the appellants have failed to establish that any interference with the discretion exercised by the trial Court in the matter of temporary injunction is called for. It is well settled that in every appeal it is incumbent on the appellant to show some justification why the order appealed from should be disturbed. In other words, it is for the appellant to satisfy the Court that there is some balance in his favour to justify the alteration of the impugned judgment or order. In support of this view I invite attention to the case of Chandra Kishore v. Deputy Commissioner of Lucknow, AIR 1949 PC 207. Another principle equally well established is that in any appeal arising out of prayer for temporary injunction, it is for the appellant to show that the lower Court had acted wrongly in the exercise of its discretion. The mere fact that the appellate Court might have come to a different conclusion is not enough to justify interference with the discretion exercised by the trial Court. The appellate Court will interfere only if it is satisfied that the trial Court had acted in the exercise of its discretion not judicially but in a capricious manner. The Calcutta High Court held in the case of Umesh Chandra v. Nibaran Chandra, AIR 1914 Cal 531, that an order of injunction is a discretionary order, and it is essential for the party appealing against a discretionary order to prove that the Court against whose judgment the appeal is preferred acted in the exercise of its discretion wrongly in not granting the prayer for injunction. It would therefore follow that it is for the appellants to satisfy this Court, before their appeal can be accepted and temporary injunction issued, that the trial Court had exercised its jurisdiction wrongly in making the order under appeal.

8. The considerations which should weigh with the Court in deciding the prayer for temporary injunction, it is not in dispute, are, (i) whether the plaintiff has made out a prima facie case, (ii) whether the balance of convenience is in favour of the plaintiff, that is to say, whether it would cause greater inconvenience to the plaintiff if the temporary injunction is not granted than the inconvenience to which the defendant would be put if it is granted, and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for temporary injunction is disallowed. All these three conditions must co-exist before the relief sought can be granted to the plaintiff. In

the instant case, the trial Court has expressed the opinion that the plaintiffs have failed to establish a prima facie case. It was held in *Mst. Govindi Bai v. Lakshmi Chand*, AIR 1953 Raj 136, that where the first Court has given the finding that a prima facie case has not been made out by the plaintiff, the appellate Court can grant the relief of temporary injunction only on setting aside that finding of the trial Court on the basis of justifiable grounds. Therefore, before I can grant the temporary injunction prayed for by the plaintiffs, it was obligatory for Manisana Singh to satisfy this Court that the finding of the trial Court that a prima facie case is not made out is faulty. Frankly speaking, he was unable to satisfy me that it is so. The pleadings adopted by the defendant in his written statement undoubtedly indicate that there had been some Committee managing the properties attached to the temple. However, it is not clear whether that Committee had been constituted in a manner and by a person different from those mentioned in the written statement. The plaintiffs have not furnished the details of how the Committee came into being in the first instance. Nor have they mentioned in the plaint how the land on which the temple and other buildings stand had been acquired, who constructed the temple and the other buildings, who was responsible for installation of the deity in the temple, in what manner the various properties were dedicated to the deity, and when the Committee appointed the defendant as pujari. Unless all these particulars are brought before the Court, it is not possible to reach any conclusion, even tentatively, that the Committee has a better right to manage the temple and its properties as compared to the defendant who admittedly has been working as pujari of the deity for a long time. The situation, to say the least, is very nebulous, and so I am not inclined to interfere with the order under appeal. However, I must mention that nothing said in this judgment or in the order under appeal would influence the mind of the trial Court while deciding the suit on merits. Shri Manisana Singh expressed the apprehension, during the course of arguments, that the trial Court may be influenced in its final decision in the suit by its finding in the order under appeal that a prima facie case had not been made out by the plaintiffs. I cannot share that apprehension, nor can find any fault with the reasoning adopted by the trial Court while disposing of the injunction application. It is the demand of law that while deciding an application for temporary injunction the Court must form the opinion whether or not a prima facie case has been made out. I trust that the trial Court expressed itself in that spirit only.

while stating that a prima facie case had not been made out.

9. As a result, the appeal fails and is dismissed with costs, Advocate's fee Rs. 16/-.

Appeal dismissed.

AIR 1970 MANIPUR 40 (V 57 C 12)

R. S. BINDRA, J. C.

Manjunatta George Varaghes, Appellant v. Government of Manipur, Respondent.

Criminal Appeal No. 9 of 1969, D/- 26-9-1969, against order of Spl. J. (II), Manipur, D/- 31-7-1969.

(A) Prevention of Corruption Act (1947), S. 5(3) — Accused has to satisfactorily account — Plausible explanation is not sufficient.

The legislature has advisedly used the expression "satisfactorily account" in Section 5(3) of the Act, and the emphasis must be placed on the word "satisfactorily". The Legislature, has, thus, deliberately cast a burden on the accused not only to offer a plausible explanation as to how he came by his large wealth, but also to satisfy the Court that explanation was worthy of acceptance. Further, subsection (3) also prescribes that once it is proved by the prosecution that the accused is in possession of pecuniary resources or property disproportionate to his known sources of income, the Court shall presume that the accused person is guilty of criminal misconduct in the discharge of his official duty unless the contrary is proved by the accused. The verb "proved" has to be specially taken note of. It negatives a plausible explanation. Hence, it is obligatory on the accused to prove by dependable evidence that the sum seized from him and which sum has been held to be disproportionate to his known sources of income, had been acquired by him by honest means. In case he fails to establish that fact, the charge of criminal misconduct clearly stands proved against him. AIR 1960 SC 7, Foll. (Para 14)

(B) Prevention of Corruption Act (1947), S. 5 (3) — Trial under — Provisions of S. 517 (3), Criminal P. C. apply — S. 8(3) of Criminal Law Amendment Act (1952) does not render them inapplicable. (Para 16)

(C) Evidence Act (1872), S. 32 (3) — Applicability — Clause applies to statements against pecuniary or proprietary interest of person making it or when, if true, would expose him to prosecution — Statement by another person that he had lent money to the accused is not relevant under S. 32 (3). (Para 8)

Cases Referred: Chronological Paras (1960) AIR 1960 SC 7 (V 47) = 1960

Cri LJ 131, C. S. D. Swami v. State

14

R. K. Manisana Singh, for Appellant; N. Ibotombi Singh, Public Prosecutor, for Respondent.

JUDGMENT:— By his judgment dated 31-7-1969, Shri P. N. Roy, Special Judge (II), Manipur, convicted the appellant, Manjunatta George Varaghes under Section 5(2) of the Prevention of Corruption Act, 1947, hereafter called the Act, and sentenced him to two years' rigorous imprisonment. The sum of Rs. 11,300/- seized from the convict by the Police was directed to be confiscated to the State. Having felt aggrieved, the convict has come up in appeal.

2. The facts of the prosecution case, shortly put, are that on getting some firm intelligence, Shri A. Nilamani Singh, Sub-Inspector of Police, rushed to the Tulihal airport and contacted Manjunatta George Varaghes who was one of the passengers to board the plane that was expected to fly shortly afterwards. The Sub-Inspector searched the baggage of Manjunatta George Varaghes and found currency notes of rupees one hundred each of the total value of Rs. 11,300/- inside a pillow forming part of that baggage. The money was seized and the accused taken into custody. After necessary investigations, the accused was hauled up under Section 5(2) of the Act.

3. The accused entered the plea of not guilty. He admitted in the statement made under Section 342 Cr. P. C. that the sum of Rs. 11,300/- had been recovered from his possession by the Sub-Inspector of Police, Nilamani Singh on 10-4-1963 from the airport just before he was to board the plane. His defence was that he had made a saving of Rs. 6,300/- from out of his salary during the period when he was employed in Manipur, that he was proceeding to his native State Kerala when he was arrested on 10-4-1963, that he required Rs. 10,000/- in connection with his own marriage and that of his sister, that he had borrowed Rs. 1,500/- from R. M. Thomas, Extension Officer, Jiribam, that three persons by the names of Issac Mathew, Section Officer in P.W.D., Manipur, K. C. Mathew, Surveyor in the P.W.D., Manipur and C. K. Jacob had respectively given him Rs. 2,000/-, Rs. 1,000/- and Rs. 500/- to be delivered to their parents in the State of Kerala, and that in this manner he had a total sum of Rs. 11,300/- with him on the date of his arrest. He examined five witnesses to support his defence version.

4. The learned Special Judge disbelieved the accused on the points that he had borrowed Rs. 1,500/- from P. M. Thomas, or that Issac Mathew, K. C. Mathew, and

C. K. Jacob had given him any money for being delivered to their parents in Kerala, or that he had saved Rs. 6,300/- out of his earnings during the period of his employment in Manipur from 20th November 1958 to 31st March 1963. The Special Judge found that the accused was possessed on 10-4-1963 of money which was disproportionate to his known sources of income and that as such he was guilty of criminal misconduct as defined in clause (d) of Section 5(1) of the Act. He, therefore, convicted and sentenced the accused in the manner stated above.

5. Shri Manisana Singh, appearing for the appellant, urged two points during the course of arguments. Firstly, he canvassed that the Special Judge had gone wrong in rejecting the defence version. According to Manisana Singh, the statement of the accused reinforced by the defence evidence completely smashes the charge formulated against him. The second point raised by Shri Manisana Singh, which he pressed as alternative to the first submission, was that the sentence imposed upon the appellant is excessive and that the confiscation of Rs. 11,300/- is illegal.

6. Before proceeding to examine the merits of the first submission made by Shri Manisana Singh, I would like to reproduce the definition of the expression "criminal misconduct" as given in Section 5(1) of the Act. According to clause (d) of that provision a public servant is said to commit the offence of criminal misconduct in the discharge of his duty if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

Sub-section (3) of Section 5 is highly relevant to the point raised by Shri Manisana Singh. It provides that in any trial of an offence punishable under sub-section (2) "the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefore shall not be invalid by reason only that it is based solely on such presumption". It is on the basis of this provision of law that the Special Judge has founded the verdict of guilty against the appellant. Therefore, the primary question that falls for determination is whether the prosecution has successfully established that the sum of Rs. 11,300/- is disproportionate to the known sources of income of the

appellant. If the prosecution has succeeded in establishing that fact, the burden shall shift to the accused to account in a satisfactory manner the money found in his possession to displace the conclusion that it is not disproportionate to his known sources of income, or to prove that he is not guilty of criminal misconduct in the discharge of his official duty. If he fails to satisfy the Court on those two points, or either of them, it shall be open to the Court to presume that he is guilty of criminal misconduct and to base conviction on that finding alone. I now proceed to examine the parties' evidence to ascertain if the findings of fact reached by the Special Judge are sustainable.

7. There is no dispute on the points that the accused joined as a Surveyor in the Central Water and Power Commission in Manipur on 20th November 1958 and served in that Department upto 13-2-1960, and that his pay during that period was Rs. 115/- per month. With effect from 15-2-1960 he joined in the Census Office and remained attached to that office up to 20th June 1961. His pay during that period was Rs. 185/- per mensem for 12 months and Rs. 192.05 for the rest of the period. On 21-6-1961 the accused was transferred as Sectional Officer in the Tribal Welfare Department and he worked in that Department up to 31st March 1963. His total pay during the period he worked as Sectional Officer was Rs. 4,706.18. It is the contention of the accused that as Sectional Officer he had drawn Rs. 813.82 P. by way of travelling allowance and that that amount should be taken into account. He has also stated that as a Surveyor in the Central Water and Power Commission he had drawn a total pay of Rs. 1,705.26 and while working in the Census Office he had earned Rs. 3,025.62. All this income, including the travelling allowance of Rs. 813.82, aggregates to Rs. 10,704.69.

The contention of the prosecution that the accused did not have any other source of income was not disputed by the latter. The accused affirmed in his statement under Section 342 that he had remitted to his home (in Kerala) a sum of Rs. 1000/- during his stay in Manipur, that he had purchased a lady watch for his sister for Rs. 130/-, that he had purchased the plane ticket for Rs. 116/-, and that he had a balance of Rs. 268.69 in his pocket, at the time of his arrest, to meet the journey expenses. Another fact mentioned by him in that statement was that he had been spending only a sum of Rs. 50/- per month during his stay of 54 months in Manipur besides Rs. 200/- involved in miscellaneous expenditure. He stated further, on the basis of this data, that he had Rs. 7,800/- of his own inclusive of Rs. 1,500/- borrowed from P. M. Thomas, when he went to airport to board the

plane on his way to Kerala and another Rs. 3,500/- entrusted to him by the three persons mentioned above.

8. C. K. Jacob and Issac Mathew, who were alleged to have respectively given Rs. 500/- and Rs. 2,000/- to the accused for payment to their parents, were neither summoned by the accused nor examined. It was submitted by Shri Manisana Singh that the whereabouts of Issac Mathew are unknown and C. K. Jacob is now living in Ethiopia, and on that basis he urged that their statements made during the departmental proceedings against the accused, and of which Exts. D/3 and D/4 are the copies, should be admitted into evidence under Section 32(3) of the Indian Evidence Act. I think this argument is without merit. Firstly, we have no dependable evidence that the whereabouts of Issac Mathew are not known, or that C. K. Jacob is actually now in Ethiopia. The fact that the accused did not mention their names in the list of witnesses in a way belies his contention in regard to their whereabouts. Taking the accused, however, at his word that C. K. Jacob is in Ethiopia, it was open to him to move the Court under Section 503 Cr. P. C. to issue a commission for his examination. No such step having been taken, it does not lie in the mouth of the accused to urge that the statement made by C. K. Jacob during departmental enquiry against him (accused) should be read as evidence in the present case under clause (3) of Section 32 of the Evidence Act.

I also feel clear that that clause in terms is unavailing to the appellant. That clause makes the previous statement relevant only if that statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages. In the statement Ex. D/4 all that C. K. Jacob, happened to state was that he had given Rs. 750/- to the accused for delivery to his parents in Kerala. That statement obviously is neither against pecuniary or proprietary interest of C. K. Jacob, nor, if true, it would expose him to a criminal prosecution or to a suit for damages. Therefore, this statement is not relevant under clause (3) of Section 32 of the Evidence Act. It may be appropriately mentioned that though the case of the accused is that he had been given Rs. 500/- by C. K. Jacob, but the latter's version is that he had given Rs. 750/- to the accused. The discrepancy is too vital to miss notice.

9. The statement Ext. D/3 of Issac Mathew is on line with that of C. K. Jacob and so is not relevant for identical reasons. Further, Issac Mathew was not cited as witness by the accused, nor it is established that his whereabouts are not known. He is admittedly in India and

so if the accused had any serious intention of examining him as a defence witness, he could have moved the Court for assistance in finding him out.

10. This brings us to the consideration of the statement made by D.W. 1 K. C. Mathew. He deposed that he had given Rs. 1,000/- to the accused in the year 1963 for making the same over to his parents in Kerala. His pay in 1963 was Rs. 150/- or Rs. 160/- per mensem. He admitted in cross-examination that he used to remit money to his house some times regularly and at others casually, and that he had never opened any bank account. If he had been remitting money to his parents regularly, it passes comprehension how could he have saved Rs. 1,000/- out of his small pay of Rs. 150/- a month. It is also difficult to believe that the witness could have kept Rs. 1,000/- in his house. If he had such a substantial spare money, he was expected to deposit it in the bank rather run the risk of its being stolen from his house. Moreover, this witness did not specify either the date or the month in which he had entrusted Rs. 1,000/- to the accused. His statement on the subject is that in the year 1963 he had sent Rs. 1,000/- to his parents in Kerala through the accused. It is too vague a statement to commend itself to the Court. Therefore, I hold, in agreement with the Special Judge, that this witness had perjured in stating that he had given Rs. 1,000/- to the accused, and that the reasons for it were that he and the accused both hail from Kerala and they appear to be friendly to each other. In Ext. D/3 it is mentioned that they are cousins.

11. P. M. Thomas, D.W. 5, deposed that in March 1963 he had lent Rs. 1,500/- to the accused as the latter required funds in connection with his own marriage and that of his sister. The Special Judge has disbelieved the witness, and after close scrutiny of his statement I have reached the conclusion that the Special Judge had enough of justification for acting that way.

The witness admitted in cross-examination that neither the accused nor his sister had been engaged by the time he had advanced money to the accused. The accused affirmed in his statement under Section 342 Cr. P. C. that he required only Rs. 10,000/- for the two marriages and that he had Rs. 6,300/- in cash with him. According to P. M. Thomas, the father of the accused belongs to a middle class family and is possessed of 10 to 15 acres of land. In view of easy financial position of his father, the accused was not expected to finance completely his own marriage and also that of his sister. He could expect a substantial contribution from his father. The witness, I may point out, did

not take any writing from the accused to safeguard his own rights respecting Rs. 1,500/-. He was frank to affirm that the accused is his intimate friend, and that he turned up in the Court to depose for the accused without having been summoned, though admittedly he was out of pocket by Rs. 50/- in the process. All these facts cumulatively prove in a demonstrable manner that P. M. Thomas entered the witness box not to depose to a factual occurrence but to help his "intimate friend" out of a difficult situation, if possible. I agree with the Special Judge that the witness could not have saved a sum of Rs. 1,500/- out of his salary of Rs. 250/- per mensem for making a loan of that amount to the accused. The witness did not indicate in his statement whether he had kept Rs. 1,500/- in some bank or post office account or the sum was lying at his own residence. It remains to be said that the witness has his native place in Kerala, hardly 10 miles distant from that of the accused in the same State.

12. The outcome of the conclusions recorded above is that out of a total sum of Rs. 11,300/- recovered from his possession the accused has failed to account satisfactorily respecting Rs. 5,000/-. That finding leads to the inevitable conclusions that the accused had obtained Rs. 5,000/- by corrupt or illegal means or by abusing his position as a public servant and that he is consequently guilty of criminal misconduct within the meaning of Sec. 5(1) of the Act.

13. I feel equally convinced that the balance sum of Rs. 6,300/- seized from his possession also does not represent his honest earnings. Quite a substantial portion of it, if not the whole, falls, in my opinion, in the category of ill-gotten gains. The bare word of the accused from the dock that he had saved Rs. 6,300/- from out of his pay during 5 years' posting in Manipur would not discharge the burden that lay on him in view of the facts established by the evidence. According to the statement of the accused, this large sum of Rs. 6,300/- had been lying at his house. He never opened a bank account. He admits he had remitted Rs. 1,000/- to his father in Kerala. If he had no apprehensions or guilty conscience respecting his possession of Rs. 6,300/-, he could have taken a draft from Manipur for some convenient station in Kerala. To carry this huge amount, besides another sum of Rs. 5,000/-, as part of one's baggage from Manipur, in the remote east of India, to the far distant State of Kerala in the south-west of India, was not without hazard; and if the accused decided to undertake such a risk there must be adequate reasons for it. However, the accused did not indicate any. Therefore, I feel safe in assuming that he did not take

a bank draft fearing that if he took one his possession of a big amount in cash may leak out and that might land him in difficulties.

14. At any rate, the accused has failed to account for Rs. 5,000/-. In terms of Section 5(3) of the Act, the Special Judge was therefore, I think, right in concluding that the accused was guilty of criminal misconduct because the cash found in his possession was disproportionate to his known sources of income. It was pointed out by Supreme Court in the case of S. C. D. Swami v. State, AIR 1960 SC 7, that the Legislature has advisedly used the expression "satisfactorily account" in Section 5(3) of the Act, and that the emphasis must be placed on the word "Satisfactorily". The Legislature, the Supreme Court observed further, has, thus, deliberately cast a burden on the accused not only to offer a plausible explanation as to how he came by his large wealth, but also to satisfy the Court that his explanation was worthy of acceptance. I may add that sub-section (3) also prescribes that once it is proved by the prosecution that the accused is in possession of pecuniary resources or property disproportionate to his known sources of income, the Court shall presume that the accused person is guilty of criminal misconduct in the discharge of his official duty unless the contrary is proved by the accused. The verb "proved" has to be specially taken note of. Its import is obvious. It clearly negatives the contention, canvassed by Shri Manisana Singh, that the accused is bound only to offer, as in all criminal trials, a plausible explanation in support of his defence to earn an acquittal on a charge of criminal misconduct as defined in clause (d) of Section 5(1) of the Act. Hence, it was obligatory on the accused to prove by dependable evidence that the sum of Rs. 11,300/- seized from him and which sum has been held above to be disproportionate to his known sources of income, had been acquired by him by honest means. He having failed to establish that fact, the charge of criminal misconduct clearly stands proved against him. Hence, I confirm his conviction under Section 5(2) of the Act.

15. I am now left to determine whether the sentence of two years' rigorous imprisonment imposed on the accused is excessive and whether or not there is legal justification for confiscating the sum of Rs. 11,300/-. It was brought to my notice during the course of arguments that a departmental enquiry arising out of the possession by the accused of the sum of Rs. 11,300/- has already culminated in his dismissal from service. Taking that fact into consideration, I have reached the conclusion that a sentence of one year's rigorous imprisonment would

amply meet the ends of justice, I order accordingly.

16. Section 517(1) of the Code of Criminal Procedure states that when an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence. All the ingredients of this statutory provision, I feel convinced, are satisfied respecting the sum seized from the possession of the accused except to the extent I will presently mention.

The accused was tried in a Criminal Court and that trial has concluded; a cash of Rs. 11,300/- seized from the accused had been produced before the Criminal Court; that amount is now lying in custody of that Court; and it has also been held that the offence of criminal misconduct respecting that money had been committed. In face of these facts, the Special Judge was well within his rights to order confiscation of the amount. Shri Manisana Singh, however, contended that the procedural provisions bearing on the trial of a case contained in the Criminal Procedure Code alone have been made applicable by Section 8(3) of the Criminal Law (Amendment) Act to a trial under Section 5(2) of the Act, and not the provisions of the nature enacted in Sec. 517(3) of the Code. I regret my inability to accept that contention as sound in law. It is plainly mentioned in Section 8(3) of the Criminal Law (Amendment) Act that the provisions of the Code shall, so far as they are not inconsistent with that Act, apply to the proceedings before a Special Judge and for the purposes of those provisions the Court of Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors. It looks obvious that all the provisions enacted in the Code, unless they are inconsistent with any provisions of the Criminal Law (Amendment) Act, are made applicable to a trial held by a Special Judge. Hence, repelling the contention raised by Shri Manisana Singh, I hold that the provisions of Section 517(1) of the Code do apply to a trial held by Special Judge, since they are not inconsistent in any manner with the Criminal Law (Amendment) Act.

17. It was not the contention of the accused that Rs. 5,000/- out of a total of Rs. 11,300/- belonged to him. Since it is the finding of this Court that this sum had been collected by the accused not in the manner stated by him, but by dishonest means, it has to be confiscated.

However, there is some doubt in my mind on the point whether the whole of the balance amount of Rs. 6,300/- had been collected by the accused in the same manner or a part of it might represent his savings out of his pay. It cannot be said with complete certainty that no part of this amount may belong to the latter category. The benefit of doubt on this point, as in the matter of conviction, must go to the accused. Hence, I have decided to confiscate Rs. 5,000/- out of the sum of Rs. 6,300/-. The net result is that a total of Rs. 10,000/- shall stand confiscated to the State and Rs. 1,300/- shall be refunded to the accused.

18. As a result, the appeal fails except in the matter of reduction of sentence and the amount confiscated in the manner indicated above.

Appeal partly allowed.

AIR 1970 MANIPUR 44 (V. 57 C 13)

R. S. BINDRA, J. C.

The Union of India and another, Petitioners v. Md. Abdul Manaf, Respondent.

Civil Revn. Case No. 7 of 1967. D/- 16-8-1969, against order of 1st Sub. J., Manipur D/- 8-12-1966.

Civil P. C. (1968), O. 6, R. 17; O. 7, R. 11 and S. 80 — Amendment of plaint introducing discordance between facts alleged in notice under S. 80 and those pleaded in the plaint — Although relief may be the same plaint has to be rejected under O. 7, R. 11 — Service agreement between President of former Manipur State and plaintiff — Ratification of agreement by successor the Union of India not mentioned in notice under S. 80 — Subsequent amendment introducing fact of ratification cannot be allowed. AIR 1960 All 420; AIR 1960 SC 1309, Rel. on; AIR 1969 Goa 76, Rel. (Paras 6 and 7)

Cases Referred: Chronological Paras (1969) AIR 1969 Goa 76 (V 56).

Cipriano Negredo v. Union of India 5

(1960) AIR 1960 All 420 (V 47) = ILR (1959) 2 All 561, Govt. of U. P. v. Nanhoo Mal Gupta 7

(1960) AIR 1960 SC 1309 (V 47), State of Madras v. C. P. Agencies 6

N. Iyotambi Singh, Govt. Advocate, for Petitioners; A. Nilamani Singh, for Respondent.

ORDER:— This revision petition under Section 115 of the Civil Procedure Code by the Union of India and the Union Territory of Manipur, who were defendants in the suit filed by the respondent Abdul Manaf, is directed against the order dated 8-12-1966 by which Shri M. C. Ray, the Second Subordinate Judge, Manipur at

RM/KM/F270/69/GGM/M

Imphal, allowed the application of Abdul Manaf under O. 6, R. 17 of the Code for amendment of the plaint by incorporating therein para 8 (A), the substance of which shall presently be indicated.

2. Abdul Manaf instituted the suit in forma pauperis claiming compensation of Rs. 5 lakhs besides another sum of Rupees 60,000 representing interest on that sum of Rs. 5 lakhs and also future interest. The allegations on which the suit was founded were that immediately after the town of Imphal was bombarded on 10th and 16th of May 1942 all the officials of the State of Manipur deserted their posts and fled to places of safety thereby paralysing the Civil Administration and creating a law and order problem. Faced with that situation, Mr. T. A. Sharpe, I. C. S., the then President of the Manipur State Darbar, recruited the plaintiff with the concurrence of H. H. the Maharajah of Manipur with effect from 9-6-1942 for service in Administrative Commandant's office as Station Interpreter. His employment in that post, the plaintiff alleged, was based on agreement of even date entered into between him and the State of Manipur, and that the salient term of the agreement was that after the termination of war the State shall offer him a senior post not inferior to that of a Darbar Member, or any first class permanent post he preferred, within 14 years of his discharge by the Military.

It was also pleaded that the Maharajah of Manipur passed an order on 15-3-1943 that the plaintiff shall be awarded a compensation of Rs. 5 lakhs in case he was not offered the promised post within that period of 14 years. The plaintiff worked with the Military Authorities from 9-6-1942 upto 31-5-1946 when he was discharged. Sometime thereafter, he was appointed as a Clerk in the Manipur Administration. He is at present working there as Upper Division Clerk. In para 10 of the plaint it was alleged that there had been quite a few changes in the Governmental set-up in the State of Manipur until it was declared the Union Territory, and that under the provisions of the Constitution of India the two defendants, in their capacity as the legal successors of the former State of Manipur, are bound to honour the lawful obligations, liabilities, and commitments entered into by the Darbar of the Manipur State with the approval of the Maharajah of Manipur. In para 12 it was pleaded that the order of the Maharajah dated 15-3-1943 has the force of a statutory legislation and so it is binding on the two defendants in terms, inter alia, of the Constitution of India. In the next para 13 of the plaint the plaintiff complained that ever since his discharge on 1-6-1946 from the Military Service he had not been given the promised senior appointment in the Manipur Ad-

ministration and so he was entitled to claim the amount of compensation mentioned in the Maharajah's order dated 15-3-1943.

3. The suit was resisted by the defendants who denied that any agreement had been made by the President of the Darbar or the Maharajah of Manipur with the plaintiff, and pleaded in addition that such agreement was not binding on either of them (the defendants). It was alleged further that the Government of India is not a legal successor to the former State of Manipur, nor are the agreements concluded between the State and private individuals binding on either of the two defendants unless, of course, such agreements were recognised by them in express terms or impliedly or by appropriate legislation. It was stated further that neither the Government of India nor any of its agents had recognised the agreement pleaded by the plaintiff.

4. Before the suit could reach the stage of recording evidence, the plaintiff moved an application for amendment of the plaint by adding para 8 (A) thereto. The substance of the proposed amendment was that the Chief Commissioner of Manipur had made an order in February 1951 to the effect that the contractual obligation undertaken by the President of the Manipur State Darbar towards the plaintiff would be honoured and that the plaintiff shall be posted in the Manipur Secretariat temporarily pending his appointment to a suitable post in terms of the contract. This order of the Chief Commissioner, it was stated further, had been communicated to the Deputy Commissioner (Civil Supplies) by the Development and Revenue Commissioner of the State. This proposed amendment was opposed by the two defendants. However, the learned Subordinate Judge allowed the amendment by his order dated 8-12-1966 on the basis that it would not introduce any new cause of action but would only clarify certain matters which had already been set out in the plaint. It is against this order of amendment that the Union of India and Union Territory of Manipur have come up in revision.

5. Shri Ibotombi Singh, the learned Government Advocate, urged for the petitioners that since the amendment allowed, introduced a fundamental change in the cause of action on which the suit was originally founded, there had come about an equally fundamental discordance between the notice served on the defendants under Section 80 of the Code and the plaint as it stands at present. He submitted further that on account of that discordance between the plaint and the notice, the plaint will have to be rejected under O. 7, R. 11, of the Code, and that constitutes sufficient justification for the contention that the prayer for amendment should have been

disallowed. The Government Advocate submitted further that the accession of the State of Manipur to the Union of India on 15-10-1949 was an "act of State" and for that reason all agreements made between the erstwhile Manipur State and its citizens lapsed and so they could not be enforced against the new sovereign, namely, the President of India.

It was also urged by him that the Chief Commissioner had no authority to recognise such agreements without the express sanction of the new sovereign. These are all weighty submissions. It was held in the case of Cipriano Negrodo v. Union of India, AIR 1969 Goa 76, that when one State is absorbed in another, whether by its cession, conquest, merger, or integration, all contracts of service between the prior Government and its servants are automatically terminated. It was observed further that if after such termination of service, those who elect to serve in the new State and are taken on by it, serve on such terms and conditions as the new State may choose to impose. This is nothing more than an application of principle that underlies the law of Master and Servant when there is a change of the masters. The justification for these principles lies in the fact that the "act of State" is an act which does not purport to have been done under colour of a legal title but in exercise of the sovereign authority of the State in external politics. Hence, when the State of Manipur merged with the Union of India, all agreements between the former State and its servants came to an abrupt and automatic end. Therefore, Abdul Manaf could not have based the present suit on the original agreement between him and the Maharajah of Manipur unless that agreement had been recognised, expressly or impliedly, by the new sovereign.

Since this recognition was not mentioned in the plaint originally filed and was introduced for the first time by the amendment allowed by the Court, there has been, without doubt, a fundamental change in the cause of action. The notice served on the defendants under Section 80 of the Code does not correspond to the pleadings set out in the amended plaint. The inevitable consequence of the amendment now made would be that the plaint shall have to be rejected for the reason that it does not correspond with the notice served on the Government under Section 80 of the Code. In such circumstances, the trial Court would have been better advised not to allow the amendment.

6. The Supreme Court held in the case of State of Madras v. C. P. Agencies, AIR 1960 SC 1269, that Section 80 of the Code is express, explicit and mandatory and admits of no implications or exceptions. The object of the section is manifestly to

give the Government or the public officer sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted. In order to enable the Government or the public officer, the Supreme Court observed further, to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him 'and the facts on which the claim is founded' and the precise reliefs asked for. The underlined (here in ' ') words clearly negative the view of the trial Court that if the amendment does not alter the relief claimed in notice and the suit, no further notice prior to the amendment is necessary. Since the relief claimed in the notice has to be adjudged by the Government or the public officer concerned, before accepting or rejecting the same, in the light of the facts mentioned in the notice, it is only logical that if after mentioning one set of facts in the notice the suit is instituted and then facts of fundamentally different nature are introduced by way of amendment of the plaint, that notice should not be considered legally sufficient. The case in hand falls in such category. The plea of ratification of the agreement on behalf of the new sovereign having not been mentioned in the notice under Section 80, that notice cannot serve the purpose of the amended plaint.

7. The Government Advocate cited the case of U. P. Government v. Nanhoo Mal Gupta, AIR 1960 All 420, in support of the contention that a suit cannot be instituted by the plaintiff on a cause of action which is substantially different from the one mentioned in the notice. The facts of that case have a close parallel to those of the case in hand. The agreement made in that case between certain officers of the Government and Nanhoo Mal plaintiff did not comply with the provisions of Section 175 (3) of the Government of India Act 1935, which provisions correspond with Article 299 of the Constitution. When this legal lacuna was brought to the notice of the plaintiff by the High Court while hearing the appeal filed by the Government against the decision of the trial Court, the plaintiff sought the permission of the High Court to amend the plaint to introduce the allegation that the agreement had been ratified by the Government. However, since this allegation of ratification had not been mentioned in the notice under Section 80 of the Code, the High Court rejected the prayer with the observation that after a suit has been instituted against the Government it is not open to the plaintiff to make a fundamental departure in his plaint from the cause of action already mentioned in the notice given under Section 80.

The High Court held further that where the position is that ratification of the agreements which are ex facie unenforceable against the Government is not stated in the notice under Section 80, and it is also not pleaded in the plaint and the record of the case does not contain any fact or facts which would show that the Government had in fact ratified the said agreements, it would not be open to the plaintiff to introduce by way of amendment the plea of ratification in the plaint, since that would mean substantial variance from the allegations set out in the notice. Shri Nilamani Singh, the learned counsel for the plaintiff, conceded at the bar that he had not been able to find any authority differing from the view taken by the Allahabad High Court in this case. I think that view is unexceptionable on principle. No Court can, or should, allow an amendment of the pleading which will not serve any practicable purpose. If the amendment permitted by the trial Court in our case were allowed to stand, there would be, as stated above, complete discordance between the amended plaint and the facts mentioned in the notice given under Section 80, with the inevitable consequence that the plaint shall have to be rejected under O. 7, R. 11, of the Code.

8. For the reasons stated above, it is legally not possible to uphold the order dated 8-12-1966 by which the trial Court permitted the plaintiff to amend the plaint. Hence, I allow the revision petition and quash that order. Since the point involved was not altogether free from difficulty, I leave the parties to bear their own costs. Advocate's fee Rs. 32.

Petition dismissed.

AIR 1970 MANIPUR 47 (V 57 C 14)

R S. BINDRA, J. C.

Laisangthem Chaoba Singh, Appellant
v. Thongam Ningol Yumnang Ongbi Ketuki Devi and others, Respondents.

Second Appeal No. 15 of 1967, D/- 27-1-1970, against order of Addl. Dist. J., Manipur, D/- 21-9-1967.

Registration Act (1908), S. 72 — Non-appearance of executant to admit execution before Sub-Registrar — Denial of execution cannot be presumed — Sub-Registrar refusing to register document on that ground — Appeal under S. 72 to Registrar to get document registered is maintainable.

Where on failure of the executant to appear, the Sub-Registrar refuses registration on the ground that there is denial of execution, the refusal cannot be said to have been made on ground of denial of execution and the only course open

to get the document registered is to file appeal to the Registrar under S. 72. No presumption can be raised from mere non-appearance of the executant before the Sub-Registrar to admit execution that it is a case of denial of execution. Whether non-appearance is due to denial of execution or for some other cause will have to be adjudged in the context of the facts proved before the Sub-Registrar, and those facts can best be gathered from the reasons recorded by the Sub-Registrar in Book No. 2 as statutorily required by S. 71(1) of the Act. AIR 1924 Lah 28 & AIR 1925 Oudh 445, Rel. on.

(Paras 4, 5, 6)

Cases Referred: Chronological Paras
(1925) AIR 1925 Oudh 445 (V 12)=

2 Oudh WN 348, Jwala Sahay v. Balbhaddar Singh

(1924) AIR 1924 Lah 28 (V 11)=5
Lah LJ 217, Uttam Singh v. Ratan Devi

M. Charugopal Singh, for Appellant;
A. Ibopishak Singh, for Respondents.

JUDGMENT:— On the basis of mortgage deed dated 11-10-1956 L. Chaoba Singh filed a suit for the recovery of Rs. 4,300/- against Y. Ibomcha Singh. The mortgage deed, it was alleged, had been executed for a sum of Rs. 3,000/- and that that sum was to carry interest at the rate of 3 per cent per month.

2. The suit was resisted by Ibomcha Singh who denied that he had taken Rs. 3,000/- from the plaintiff or had executed mortgage deed in his favour. The mortgage deed was described as a forged document. It was alleged further that the Sub-Registrar had refused to register the mortgage deed, that the plaintiff had preferred an appeal against that order of the Sub-Registrar to the Registrar Shri W. C. Sikka, and that despite the denial of execution of the mortgage deed by Ibomcha Singh, Shri Sikka illegally and without jurisdiction directed the document to be registered. The defendant pleaded further that since the mortgage deed had been illegally registered at the direction of an officer who had no jurisdiction in the matter, no suit could be founded on the basis thereof.

3. The trial Court settled the following issues between the parties:

(1) Had the registering Officer granting registration in appeal no jurisdiction to grant registration? If so, its effect on the admissibility of the document?

(1-A) Is the order of the Registrar granting registration of the deed void because of its being passed without enquiry under the law?

(2) Did the defendant borrow Rs. 3,000/- from the plaintiff by executing the alleged mortgage deed? Is the deed genuine?

(3) To what relief, if any, is the plaintiff entitled?

Issues Nos. 1, 1-A and 2 were decided by the trial Court in favour of the plaintiff with the consequence that the suit was decreed with costs. The decretal amount, it was directed, shall carry future interest at the rate of 6 per cent per annum. The defendant Ibomcha Singh having died during the pendency of the suit, his representatives were brought on the record. Those representatives having felt aggrieved with the decree made by the trial Court filed an appeal in the Court of the District Judge. The appeal came up for hearing before Shri M. H. Khan, Additional District Judge, Manipur. Shri Khan accepted the contention of the defendants that the order dated 9-9-1957 by which the Registrar Shri Sikka had directed the registration of the deed was illegal. He therefore held that the deed could not be said to have been registered in the eye of law. Towards the close of the arguments before Shri Khan, an application was made on behalf of the plaintiff for permission to amend the plaint to enable the plaintiff to claim decree for the amount advanced to Ibomcha Singh independent of the mortgage transaction. That application was accepted by Shri Khan.

He, therefore, set aside the decree of the trial Court and remanded the case to him with the direction that after the amended plaint and the written statement were filed, the trial Court shall formulate the additional issues and then dispose of the suit in the light of the evidence led. The plaintiff Chaoba Singh felt aggrieved with the order of Shri Khan and so filed the instant second appeal.

4. The only point that was debated in this Court was whether the order dated 9-9-1957 of the Registrar Shri Sikka was bad in law and without jurisdiction. Shri Ibopishak Singh, representing the defendants, submitted that the Sub-Registrar had refused to register the mortgage deed for the reason that Ibomcha Singh had denied the execution thereof and that in such circumstances Chaoba Singh, the plaintiff, could have moved an application before the Registrar under Section 73 of the Registration Act rather than to file an appeal under Section 72 of the Act as done by him. The counsel urged further that assuming that the Registrar could have treated the memorandum of appeal filed under Section 72 as an application under Section 73, still the order made by him was invalid because it was obligatory for the Registrar to hold an enquiry in terms of Section 74 of the Act and such an enquiry was never held by him (the Registrar). These submissions correspond with the stand taken by the defendant before the first appellate Court.

That Court held in para 14 of its judgment that the order of Shri Sikka was not valid because, firstly, instead of an application under Section 73 Shri Sikka had been moved by Chaoba Singh by an appeal under Section 72, and, secondly, Shri Sikka had held no enquiry as enjoined by Section 74 of the Act. These conclusions would be valid only if it were established that Ibomcha Singh had denied the execution of the mortgage deed before the Sub-Registrar, and that the Sub-Registrar had refused to register the deed on that basis. Section 72(1) of the Act enacts that except where the refusal is made on the ground of denial of execution, an appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration to the Registrar to whom such Sub-Registrar is subordinate. Section 73(1) of the Act, on the other hand, provides that when a Sub-Registrar has refused to register a document on the ground that any person by whom it purports to be executed, denies its execution, any person claiming under such document may, within thirty days after the making of the order of refusal, apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered.

Therefore, very clearly the Registration Act provides different procedure to meet the situation created by an order of the Sub-Registrar refusing the registration depending on the fact whether the refusal is on the ground of denial of execution or on some other basis. Section 71(1) states, *inter alia*, that every Sub-Registrar refusing to register a document shall make an order of refusal and record his reasons for such order in his Book No. 2, and endorse the words "registration refused" on the document. Sub-section (2) of that section contains the injunction that no registering officer shall accept for registration a document so endorsed unless and until the document is directed to be registered in the manner provided by the Act. The defendants of this suit did not place either the statement, if any, made by Ibomcha Singh before the Sub-Registrar or the order made by the Sub-Registrar refusing registration. Therefore, there is no evidence on the present record on behalf of the defendants to establish that either Ibomcha Singh had denied the execution of the mortgage deed before the Sub-Registrar or that the Sub-Registrar had refused registration on the basis of such denial.

The burden of issues 1 and 1-A lay squarely on the defendants, and if no evidence was led by them to establish that Ibomcha Singh had denied the execution of the document or that the Sub-Registrar had refused registration thereof on that basis, it cannot be contended

under Rule 1 (s) of Order 43, C.P.C. In the view I am disposed to take on the question of maintainability of the appeal, any further discussion on this aspect of the controversy is rendered unnecessary.

8. Among the decided cases relied on, on behalf of the petitioner those of the High Courts at Bombay, Allahabad and Calcutta, have been analysed in the decision in AIR 1958 Assam 171. It is therefore, unnecessary to attempt a further analysis of the cases. Suffice it to observe that, broadly speaking, all those decisions turn primarily on the interpretation placed on the language of the rule in question and on general considerations such as avoidance of multiplicity of appeals or proceedings. The decision by a majority in the Full Bench case in AIR 1918 Mad 1147 (FB) was considered and was either distinguished or not followed. It may also be observed at this stage that certain anomalies pointed out in the majority opinion in that case have not been explained away in any reasonable manner, if I may say so with respect, in so far as I have been able to gather from the said decisions while coming to the conclusion that in the absence of an appointment of a receiver by name any order regarding the appointment of a receiver would amount to merely a statement regarding the entertainment of an intention to appoint a receiver within the meaning of R. 1 of O. 40, Civil P. C. In this view of the matter, it was concluded that such an order would not be an order falling under R. 1 of O. 40, Civil P. C., making it appealable under R. 1 (s) of O. 43, Civil P. C.

9. In AIR 1938 Nag 540, Stone, C. J., while referring to the Madras, Patna and Lahore cases, did not think it necessary to analyse or distinguish them as, in his opinion, the point raised in those cases did not fall to be considered in the case on hand. His Lordship has also indicated the practice to be followed in cases falling under O. 40, R. 1, Civil P. C. However, it was observed by the learned Chief Justice that on an examination of the above cases it would be seen that they turned upon whether the order that was appealed against was final or something less than final order. Therefore, the order which had the characteristic of finality would become appealable although a receiver had not been actually named by way of appointment. In such a situation more than one order would become necessary in the exercise of jurisdiction under R. 1 of O. 40, Civil P. C. In the passage extracted below, a dilemma that may arise from the application of the test of finality, as adumbrated in the Madras, Lahore and Patna views, has been referred to and the manner in which it can be avoided does not appear to be specifically disagreeing with the principle re-

lating to the right of appeal as laid down in these decisions. The passage runs thus:

"To make two separate orders, in my opinion, might cause great inconvenience and some injustice. It may well be that such an order as the first named, that is to say, an order stating that a receiver will be appointed but leaving at large who he shall be, or an order such as it was stated was made in this case that the application is granted, when the application is merely an application for appointment of a receiver unnamed, is not such an order as O. 40, R. 1 (a) contemplates. It may be that such an order cannot be appealed against as not being a final order. But it is that order that decides the matter of substance between the parties. On the other hand, it may be that that order is appealable in which case, if the person aggrieved by it waits until the next order appointing the receiver by name is passed, he will find himself on appeal by the argument that his appeal is out of time. No litigant should, in my opinion, be placed on horns of this kind of dilemma and it can be very easily avoided by taking care that there is only one order and that that order appoints the receiver by name. Many cases may arise where such an order will be preceded by an announcement by the Court that it has come to the conclusion that in the circumstances of the case a receiver should be appointed. But that announcement should not be made so as to amount to an order."

10. In the same decision, Niyogi, J., the other learned Judge preferred to follow the language employed in R. 1 of O. 40 in conjunction with Form 9, Appendix F, of Civil P. C. In this connection it is observed thus:

".....From these considerations, it must follow that the only order which is appealable is the order appointing a receiver by name and that alone would give the party aggrieved a right of appeal. There is a principle underlying this because, if an appeal is permitted from a finding which contains merely an expression of the opinion of the Judge as to the expediency of the appointment of a receiver, no receiver may ultimately be appointed and the appeal would be of a purely academic character and the order would be infructuous."

11. In a brief reference to the Full Bench case of the Madras High Court, the learned Judge has observed that he was not in agreement with the interpretation put upon the word 'order' in the said decision. It may, however, be mentioned that it was not indicated in what conceivable cases that an order for appointment of a receiver would become infructuous.

12. In the case in AIR 1958 Assam 171 the High Court of Assam, after referring to cases of the several High Courts in-

cluding the Full Bench decision of the Madras High Court, was inclined to accept the view of the Bombay, Calcutta and Allahabad High Courts in coming to the conclusion that an appeal against an order for appointment of a receiver, not actually naming a receiver as such, was premature. It may also be seen from certain observations therein that the case primarily turned on an interpretation of the provisions of O. 40, R. 1, Civil P. C., and keeping in view the principle of interpretation that in interpreting a statute an interpretation which might lead to multiplicity of proceedings should be avoided. It may however, be mentioned that the learned Judges, if I may say so with respect have not considered or explained certain anomalous situations, pointed out in the decisions of the Madras and Patna High Courts, which would arise from an acceptance of the view that an order appointing a receiver should necessarily name the receiver in the context of a right of appeal as envisaged under R. 1 (s) of O. 43, Civil P. C.

13. I shall now proceed to consider the cases in favour of the view that an order for the appointment of a receiver, without actually appointing any one by name, would be appealable under R. 1 (s) of O. 43, Civil P.C. The first of these cases is the Full Bench of the Madras High Court in AIR 1918 Mad 1146. The majority opinion was in favour of the conclusion that an order for the appointment of a receiver was as much an order 'appointing a receiver' under R. 1, O. 40, Civil P. C. The observations are as follows:

".....It is not, therefore, improper to speak of an order 'for the appointment of a receiver' as an order 'appointing a receiver' within the meaning of O. 40, R. 1." After referring to the English practice their Lordships referred to certain anomalies or difficulties that may arise in this connection. They are expressed thus:

".....In a majority of cases, the appeal will be directed against the determination that it is necessary to appoint a receiver rather than against the particular person appointed as the person to be appointed is very often a matter of agreement between the parties. This construction may, no doubt, lead to a multiplicity of appeals as was pointed out in 1915-29 Ind Cas 504=(AIR 1915 Bom 41) but I do not see how that can be avoided in any view; for instance one man may be appointed receiver, and after appeal filed, he may resign and another appointed. In fact the learned pleader who argued that the order was not appealable said that if after an appeal the person appointed as receiver resigned or ceased to be receiver, the appeal abated, though the grounds of appeal may have been solely directed to challenging the necessity for the appointment of any receiver".

Again at page 1149 it is observed:

"There may again be a difficulty in ascertaining the date of appointment of a receiver and the date may become important for calculating the period of limitation for appeal. The order appointing a named person as receiver may appoint him receiver and direct him to give security within a limited time, or may make the appointment conditional on giving security: Seton, Form No. 5 p. 727, No. 1, p. 757. In the former case if the person appointed does not give the security he may cease to be receiver and an appeal presented in the meantime would become useless"

14. In this connection it will be relevant to refer to a further difficulty adverted to by Bucknill, J. in AIR 1922 Pat 577. In the view expressed therein, it would be clear that the questions that fall for consideration in an order for appointment of a receiver would not be the name as for the appointment of a particular person as a receiver. That being the position, it is not quite clear as to how it would be necessary to avoid an order for the appointment of any person as a receiver in order to question an order for appointment of a receiver. Indeed there may be cases where the objections would be wholly confined to the qualifications or only to the decision to appoint a receiver.

15. Bucknill, J. in the above cited decision at page 579 has observed thus:

"I must confess that, so far as I myself am concerned I am inclined to think that the logic of the matter rests better upon the Madras decision than upon the other decisions. To my mind the objection which has been suggested that there might be a series of appeals is not really very material. One cannot but contemplate the marked distinction which exists between the fact of a necessity for the appointment of a receiver and the circumstances relating to the qualifications and the conditions upon which 'the' receiver is appointed. Why it is necessary that there should be present before an appeal can be preferred, a combination of those two factors which in themselves are disconnected? I do not see why there should not be an appeal from the decision that the appointment of a receiver is necessary nor why there should not be another appeal against the status or personality of any individual who is actually appointed the receiver in a case." (underlining (italics) here in 'I is mine).

16. In the case in AIR 1956 Trav-Co 264 it is laid down that the test to be applied regarding the question whether an order for the appointment of a receiver is appealable or not, is whether the order in appeal has an element of finality about it. At page 265 of the above decision their Lordships have observed as follows:

".....There is a degree of finality in the order appealed against in the present case which we hold is enough to bring it under the category of appealable orders contemplated under O. 43, R. 1 (s). Hence the preliminary objection is overruled."

17. In view of the aforesaid enunciations, it is unnecessary to refer to the other cases relied on by Sri Jagannath Shetty on this question.

18. On an examination of the several cases cited in support of the view that an order appointing a receiver should also nominate a particular person as a receiver for such an order to become appealable under R. 1 (s) of O. 43, Civil P. C., it will be seen that the decisions turn on the conclusion that there cannot be more than one order under R. 1 of O. 40, Civil P. C., or at any rate, in so far as CL (a) of that Rule is concerned. In my view, on a fair reading of the entire Rule, particularly sub-cl. (a) & (d) together it would follow that the orders or directions that might be issued under sub-clause (d) of that rule could be issued sometime subsequent to the actual appointment of a receiver by name. At any rate, there is nothing in O. 40, R. 1 itself prohibiting the making of such separate and independent orders. It is no doubt true that ordinarily directions envisaged under sub-clause (d) of that Rule are issued along with the warrant of appointment. But, it is also possible for such directions to be issued as and when they become necessary and after a lapse of some time subsequent to the issuance of warrant of appointment. In such a situation, it may not be reasonable to conclude that any such subsequent directions are part of the earlier order of appointment of a receiver. Nor would it be reasonable to hold that they are not orders which are appealable under R. 1 (s) of O. 43, Civil P. C. Once this position is reached, it follows that any order made under R. 1 of O. 40 would become appealable.

19. Still the question remains whether an order made without actually appointing a receiver by name is an order falling within the ambit of R. 1 (a) of O. 40. The argument which has found favour in some of the decisions, on this question, is that it amounts to an interlocutory determination which is in the nature of a declaration of an intention to appoint a receiver and is not an appointment of a receiver as envisaged under R. 1 (a) of O. 40. As earlier mentioned, the view of the Madras, Patna and Lahore High Courts on this question is to the contrary. These High Courts in arriving at this conclusion have proceeded on the basis of the degree of finality attached to such orders. Having to make a choice between the two views discussed above, I should say that the view expressed in the decisions of the Madras, Patna and Lahore High Courts

appeals to me. I am, therefore, in respectful agreement with that view.

20. I hold, therefore, that an order for appointment of a receiver without actually appointing any one by name would be appealable under O. 43, R. 1 (s), Civil P. C., provided there is a degree of finality about it.

21. In my view, there is another approach to this question. Even assuming that an order for the appointment of a receiver, whether such an order expressly contemplates a further order regarding the appointment of a receiver by name or not, it would be an order binding on the parties to the litigation. In this context it is relevant to refer to a decision of the Federal Court in AIR 1950 FC 140 Rayarappan v. Madhavi Amma. In that case, the question for determination was whether an appeal lay against an order removing a receiver, in the context of Section 104 and O. 43, R. 1 (s), Civil P. C. Although it was plain from the language of R. 1 of O. 40, that there was no express provision relating to the making of any such order, their Lordships after a reference to the provisions of the General Clauses Act, observed that if O. 40, R. 1, Civil P. C., was read along with the provisions of the General Clauses Act, it would follow by necessary implication that the order of removal would fall within the ambit of that R. 1. It was further observed that once such a decision was reached it would become appealable under the provisions of R. 1 (s) of O. 43, Civil P. C. Their Lordships further referring to a decision of the Calcutta High Court in Sripati Datta v. Babhuti Bushan Batta, AIR 1926 Cal 593 have observed as follows: (para 7 at p. 141):

".....That decision, in our opinion, is sound and states the law on the point correctly. It may further be pointed out that the scheme of O. 43 in making certain orders appealable is of a two-fold character. In a number of cases an appeal has been allowed from all kinds of orders passed under a certain rule, while in other cases the right of appeal has been limited only to certain specific orders passed under a certain rule. Reference in this connection may be made to O. 43, R. 1 (v) and R. 1 (t). In these rules appeal has been allowed against the certain specific orders but not against all the orders that could be made under these rules. O. 40, R. 1 falls in the category of cases where all orders made under it have been made appealable and it has not been said that the only order appealable is the one appointing a receiver. Whenever an order can be brought within the purview of O. 40, R. 1 it at once becomes appealable under the provisions of Order 43, R. 1 (s)."

Though the above decision is one relating to the removal of a receiver, the

principle enunciated in the passage above extracted will, in my opinion, equally apply to an order for the appointment of a receiver.

22. In the light of the above discussion, I am of the opinion that the contention advanced on behalf of the petitioner that the appeal of the respondents in the lower Court was not maintainable and consequently the order or decision made thereon was without jurisdiction, should fail.

23. The next contention urged on behalf of the petitioner was that the appellate Court exceeded its jurisdiction in interfering with the order of the trial Court for the appointment of a receiver. Reliance in this behalf is placed on a decision in *Bivan Lal v. I. T. Commr.*, AIR 1957 Punj 312. The argument is that the appointment of a receiver is a matter, which falls within the discretionary powers of a Court and as such is not ordinarily reviewable on appeal except to correct a clear and manifest abuse of justice. Sri K. Jagannatha Shetty, the learned counsel appearing on behalf of the respondents, did not dispute this proposition. But, what he submitted was that a trial Court in the exercise of its discretionary power relating to the appointment of a receiver, had clearly overlooked the several relevant circumstances or at any rate, assumed certain facts in favour of such an appointment of receiver. His contention was that the two elements to be considered in all cases where an appointment of a receiver was sought were that the existence of reasonable probability that the plaintiff asking for the appointment of a receiver would ultimately succeed in obtaining the general relief sought for in his suit and that the property in controversy would be wasted or destroyed unless a receiver was appointed.

He also submitted that it would not be enough to make mere general averments relating to the acts of waste or damage to the property. It must be established by affidavits setting out the grounds upon which such petition was based. In addition to the above circumstances, the conduct of the parties would also become relevant. In support of this proposition, which, was not disputed by Sri Muralidhar Rao, reliance has been placed on the decisions in *Iswara Shastri v. Ramakrishna Shastri*, 1965-1 Mys LJ 342, *Bore Gowda v. K. Channegowda*, 1965-2 Mys LJ 548, *Saraswathi Bai v. Kamala Bai*, 1964-1 Mys LJ 551 and *Krishnaswamy v. Thangavelu*, AIR 1955 Mad 430. In the last of the above decisions, after a detailed examination of the several cases bearing on the subject, Ramaswamy, J. has enunciated five principles, which have been described by him as the 'panch sadachar', which should be borne in mind by the Courts while exer-

cising equity jurisdiction in appointing receivers. The principles are; that the question of appointing a receiver is a matter resting in the discretion of the Court; that a receiver should not be appointed unless the party has an excellent chance of succeeding in the suit; that plaintiff himself shall show that there was some emergency or danger or loss that may be caused to the right involved in the suit; that an order appointing a receiver shall not be made if it has the effect of depriving a defendant of de facto possession; that, however, the position would be different if the property is shown to be 'in medio' that is to say, in the enjoyment of no one, and that the Court should always look into the conduct of the parties who seek for the appointment of a receiver.

24. Judging in the light of the principles above mentioned I am of the opinion that it is not established by the petitioner that the appellate Court had exercised its discretion in a capricious or arbitrary fashion. It is clear from the facts in the case that the first respondent had already secured an injunction in respect of the very properties in his own suit, O. S. No. 89/1 of 1965. The said temporary injunction after contest was sustained and made absolute by the District Court concerned. Although the present petitioner had secured a temporary injunction in his favour in his own suit, presumably being under the impression that he would not succeed in securing an order of confirmation of the temporary injunction obtained by him, being faced with an order of the Dist. Court, he has lodged the present application for the appointment of a receiver. As regards acts of waste and damage attributed to the defendants it is observed by the learned Civil Judge that they remain merely as averments and no basis has been afforded for the entertainment of such belief by the petitioner. Consequently there is an order of temporary injunction in favour of the first respondent, which is confirmed by the District Court which, at any rate, is prima facie, proof that the defendant is in possession of the properties. In these circumstances, the learned Munsiff, who dealt with the matter of the appointment of a receiver came to the conclusion that the properties were 'in medio', that is in the occupation of none of the parties. If in these circumstances the learned Civil Judge interfered with the order of appointment of a receiver, it cannot be said to be an improper exercise of jurisdiction by the appellate Court.

25. It may, however, be mentioned that the situation of having to resolve the difficulty arising from such conflicting orders of injunction could well have been avoided by the learned Munsiff, if only he had dealt with the interlocutory injunction

made by him earlier in the two suits, together.

26. Sri Muralidhar Rao submitted that the learned appellate Judge had not understood the facts correctly and as such the order passed by him was not entitled to be sustained. In this regard, he drew attention to a statement in the narration of facts by the learned Civil Judge to the effect that the learned Munsiff had not at all referred to the order of temporary injunction made by the learned District Judge, Gulbarga. It is no doubt true that this statement of the learned Civil Judge is not accurate. Be that as it may, this circumstance by itself is not sufficient to come to the conclusion that the order of the learned Civil Judge is vitiated.

27. In the result, this revision petition fails and is dismissed. In the circumstances of the case, there will be no order as to costs.

Revision dismissed.

Held, (1) that the authority had wrongly overlooked the scope of the application and had rejected it on the grounds which did not legitimately fall to be considered in an application which was expressly stated to have been made under S. 11 (2) of the Act. He erred in proceeding to consider it as one for modification of Standing Orders which were certified according to law. (Paras 7, 8 & 12)

(2) that the appellate authority had the obligation to draw up the standing orders in conformity with orders passed in appeal placed before it. Item 5 of Sch. I to the Act required the authority to prescribe the procedure in the matter of applying for the various categories of leave and the authority who should grant it. Hence, the order suffered from material omissions in the matters certified. (Paras 10 and 11)

and (3) that the application made by the employer under Section 11 (2) of the Act was wholly competent and the appellate authority was bound to decide it. (Para 12)

P. P. Bopanna and C. M. Monnappa, for Petitioner.

TUKOL, J.:— This is a petition under Arts. 226 and 227 of the Constitution of India for the issue of a writ of certiorari quashing the order passed by the Industrial Tribunal in Mysore, Bangalore (Res. No. 1) on November 20, 1967, and for a writ of mandamus or other appropriate direction to the first respondent to issue modified Standing Orders in conformity with the order passed by that authority in appeal No. 3 of 1966.

AIR 1970 MYSORE 149 (V 57 C 34)
T. K. TUKOL AND M. SANTHOSH, JJ.
N. G. E. F. Ltd., Byappanahalli, Petitioner v. Industrial Tribunal and another, Respondents.

Writ Petn. No. 2990 of 1967, D/- 3-4-1969.

Industrial Employment (Standing Orders) Act (1946), Ss. 11 (2), 6 (2) and Item 5 of Sch. I — Appellate authority certifying the very standing order which it had rejected — Authority also failing to prescribe the procedure in the matter of several classes of leave and as to who should grant it — Order held suffered from material omissions — Application under S. 11 (2) competent and had to be decided by the authority — Section 6 (2) and Item 5 of the First Schedule impose a duty on the authority.

In a case, the Appellate Authority under the Industrial Employment (Standing Orders) Act modified a Standing Order certified by the certifying officer. But, while certifying the Standing Order as modified, the Appellate Authority certified the very version which it had rejected. Further, with respect to another Standing Order, though it had fixed various categories of leave facilities, it overlooked to prescribe the procedure for applying for the leave and the authority who should grant it. The employer applied under Section 11 (2) of the Act seeking rectification of the accidental slips or omissions. The authority dismissed the application on the ground that it sought to modify the Standing Orders and that the same could be done only after the expiry of 6 months from the date of certification.

2. The petitioner company is an industrial establishment with more than 100 workmen as its employees coming within the purview of the Industrial Employment (Standing Orders) Act 1946 (hereinafter referred to as the Act). The petitioner submitted its draft Standing Orders to the Certifying Officer on December 16, 1964, for certification as required by Section 3 of the Act. The Certifying Officer heard the petitioner and the workmen (respondent No. 2) and certified the Standing Orders on February 23, 1966. Against the certification, the petitioner as well as respondent No. 2 preferred two separate appeals to respondent No. 1. We are not concerned in this case with the appeal filed by respondent No. 2.

In appeal No. 3 of 1966 filed by the petitioner, it challenged the correctness of Standing Orders Nos. 12.2 and 13 as certified by the Certifying Officer. The first respondent, who heard the appeal, passed an order (Exhibit A-3) on January 19, 1967, holding that Standing Order No. 12.2 was required to be modified as pleaded for by the petitioner, and in regard to Standing Order No. 13 which pertains to leave rules, he stated that the leave rules

of the Hindustan Aeronautics, Bangalore Division, Bangalore, should be adopted.

3. After the disposal of this appeal, respondent No. 1 sent copies of the Standing Orders to the petitioner as approved by him under the appellate order as per Annexure A-3.

4. Thereafter, the petitioner filed an application (Exhibit A-4) on February 21, 1967, under Section 11 (2) of the Act praying that Standing Orders Nos. 122 and 13 as certified by the first respondent on February 9, 1967, be amended as shown in the annexure to the affidavit accompanying the petition. It was contended that the Standing Orders as certified by the first respondent suffered from accidental mistakes and omissions and that they were required to be corrected. The first respondent rejected this application on November 20, 1967 stating that there were no accidental slips or clerical errors and that the proper course for the petitioner was to apply for modification of those Standing orders to the Certifying Officer after the expiry of six months from the date on which the Standing Orders were certified by that authority.

5. Mr. Bopanna, appearing for the petitioner, submitted that the application made to the Tribunal was under Sec. 11 (2) of the Act, that the two Standing Orders certified by the first respondent suffered from accidental slip in one case and accidental omission in the other, and that the first respondent should have corrected the Standing Orders as approved by it. There is no appearance for the second respondent.

6. We have therefore to see whether the application filed by the petitioner before the first respondent on February 21, 1967, was one under Section 11 (2) of the Act, and whether the first respondent had failed to exercise the jurisdiction vested in it by law.

7. In considering this question we do not think that it is necessary to refer to the order passed by the first respondent because instead of considering whether the petition fell under Section 11 (2) of the Act, the first respondent has proceeded to consider it on the basis that the application was one for modification of the standing orders which had been already certified according to law. The Presiding Officer has overlooked the scope of the petition and has rejected it on grounds which did not legitimately fall to be considered in an application which was expressly stated to have been made under Section 11 (2) of the Act.

Section 11 (2) of the Act reads:

"Clerical or arithmetical mistakes in any order passed by a Certifying Officer or appellate authority, or errors arising therein from any accidental slip or omission may, at any time, be corrected by

that Officer or authority or the successor in office of such officer or authority, as the case may be."

This sub-section therefore, provides for two clauses of rectification: (1) it provides for rectification or correction of clerical or arithmetical mistakes in the order passed by a Certifying Officer or the appellate authority. (2) It also provides for correction of errors arising in such order from any accidental slip or omission. Such correction may be made not only by that officer or authority, but it may be made by the successor in office of such officer or authority, as the case may be.

8. In order to ascertain whether the application made by the Petitioner before the first respondent was an application under the aforesaid provision, we have to refer to Section 6 of the Act and to the contents of the order passed in the appeal by the first respondent. Section 6 of the Act provides for appeals and for issuing of modified standing orders if required by the orders passed in appeal. That section provides:

"Appeals"

(1) Any person aggrieved by the order of the Certifying Officer under Sub-section (2) of Section 5 may, within thirty days from the date on which copies are sent under sub-section (3) of that section, appeal to the appellate authority, and the appellate authority whose decision shall be final, shall by order in writing confirm the standing orders either in the form certified by the Certifying Officer or after amending the said standing orders by making such modifications thereof or additions thereto as it thinks necessary to render the standing orders certifiable under this Act.

(2) The appellate authority shall, within seven days of its order under sub-section (1) send copies thereof to the certifying officer to the employer and to the trade union or other prescribed representatives of the workmen, accompanied, unless it has confirmed without amendment the standing orders as certified by the Certifying Officer by copies of the standing orders as certified by it and authenticated in the prescribed manner."

In the appeal preferred under sub-section (1), the appellate authority can either confirm the standing orders, in respect of which the appeal is filed in the form in which that has been certified by the Certifying Officer or direct such amendments as it thinks fit to be made therein. Sub-section (2) is akin to a provision requiring the drawing up of a decree in pursuance of the order passed by a Civil Court. What it requires the appellate authority is to send copies to the authorities mentioned therein after effecting amendments or modifications in terms of its order within seven days from the date of the order. In

other words, the obligation to draw up the standing orders in conformity with the orders passed in appeal is placed before the appellate authority and that obligation has to be discharged within the period of seven days from the date of the order passed under sub-section (1).

9. The petitioner has filed a copy of the order passed by the appellate authority (first respondent) on January 19, 1961. The first point for decision as stated in the order was as regards liberty to the workmen to come late. The appellate authority recorded its conclusion as follows on that point:—

"I would, therefore, accept the draft proposed and made by the management and set aside the order passed by the Certifying Officer in this connection. Similar is the situation in Hindustan Machine Tools Ltd., Bangalore where late attendance in a week for ten minutes is excused and is treated as a grace. I, therefore, accept the draft standing order proposed by the management in regard to late coming in toto."

It appears from the material placed before us that the first respondent concluded that ten minutes should be considered as the total period for coming late during the entire week. While the workmen required that has to be raised to thirty minutes, the first respondent came to the conclusion that ten minutes a week was reasonable and it therefore, accepted the draft standing orders proposed by the management "in toto".

10. Having come to this conclusion, the appellate authority sent the following standing order as modified by it.

"Employee will be allowed ten minutes grace time for every working day subject to a maximum of 30 minutes grace time per week. If an employee is habitually late, he will be treated habitual late comer and will be dealt with as per S. O. No. 21."

It would be evident from the records of the appellate authority that while certifying the standing order as modified by it, the appellate authority certified that very standing order which it had rejected. We have no doubt that such certification by the appellate authority was an accidental slip inasmuch as we have to presume that what is certified is consistent with the order recorded by that authority in appeal.

11. As regards Standing Order No. 13 which related to leave of all matters connected thereto, the appellate authority came to the conclusion that the leave rules of the Hindustan Aeronautics Ltd., Bangalore Division, Bangalore, should be adopted and that there would be four categories of leave. It would be found from paragraph 9 of the order that there was dispute as regards the contents of

the standing order relating to leave rules. The leave rules of the Kirloskar Electric Company, and of the Hindustan Aeronautics Ltd., Bangalore seem to have been produced before the appellate authority.

During the course of the order the Presiding Officer stated:—

"In the absence of any specific and definite proposals in regard to rules and the kind of leave facilities and the number of days of various kinds of leave which the Certifying Officer has failed to lay down, it would be very necessary to define the various kinds of leave facilities which the workmen are entitled to in this behalf. I set aside the order of the Certifying Officer which is very vague and besides indefinite in the matter of leave provisions."

Thereafter the Presiding Officer proceeded to consider the question of long leave as adumbrated by parties before it. That plea was rejected with the observation:

"It is needless to say that by resorting to this kind of long leave, the workmen can successively paralyse the industry and also the production which would certainly be not in the national interest."

Then there is a discussion of the proposals made by the parties as regards leave and the first respondent came to the conclusion that the provisions made by the petitioner, were:

"A little conservative when compared to neighbouring industries."

Then follows the conclusion to this effect:

"I, therefore, propose to adopt the leave rules, of Hindustan Aeronautics Ltd., Bangalore Division, Bangalore according to which, there will be four categories of leave."

While certifying, the Presiding Officer mentioned only the four categories of leave, viz. casual leave, sick leave, earned leave and maternity leave without specifying the procedure the workmen should follow in applying for leave and specifying the authority who should grant the same.

It would be evident from item No. 5 in the First Schedule in the Act which mentions the matters to be provided in the standing orders certified under the Act and that such standing orders should contain details regarding "conditions of, procedure in applying for, and the authority which may grant leave and holidays." While certifying under sub-section (2) of S. 6, the Presiding Officer seems to have overlooked the fact that it had proposed that the petitioner should "adopt the leave rules of the Hindustan Aeronautics Ltd., Bangalore Division, Bangalore". He should have therefore, acted in conformity with the decision taken by him and the order recorded by him, that is, he should have certified the leave rules of the

Hindustan Aeronautics Ltd., Bangalore Division, Bangalore. The order suffers from material omissions in the matter as already stated.

12. The aforesaid discussion will make it clear that in complying with the requirements of sub-section (2) of S. 6 which casts an obligation on the Presiding Officer (the first respondent), the latter overlooked the contents of its own order and committed errors which are attributable either to accidental slip or omission. In that view the petition filed by the present petitioner before the Presiding Officer under Section 11 (2) of the Act was wholly competent and the Presiding Officer would have been perfectly within the scope of his powers under that sub-section if he had granted the petitioner. As already observed, he has misconceived the scope of the petition filed before him by the present petitioner and has rejected it on grounds which are not germane to Section 11 (2) of the Act.

13. In the result, we allow this writ petition, quash the order of dismissal passed by the first respondent on November 20, 1967 and direct the first respondent to consider the petition filed by the present petitioner under Section 11 (2) of the Act and dispose of the same in accordance with law and in the light of what has been stated above. No costs.

Petition allowed.

AIR 1970 MYSORE 152 (V 57 C 35)

A. R. SOMNATH IYER, J.

Byrappa (decd.) by L. Rs. Smt. Muni Sanjeevamma and others, Appellants v. S. Mani and others, Respondents.

Regular Second Appeal No. 483 of 1964, D/- 29-7-1969, against judgment of Dist. J., Bangalore, D/-14-2-1964.

(A) Civil Procedure Code (1908), O. 21, R. 57 — The expression "where any property has been attached in execution of a decree" — Interpretation of — Attachment before judgment — Becomes attachment in an execution — Execution application — Dismissal for decree-holder's default — Attachment before judgment ceases to subsist — (Civil Procedure Code (1908), Order 38, Rule 11).

The words "where any property has been attached in execution of a decree" in the rule should not be interpreted too literally. They have to be understood as referring to an attachment in enforcement of which the decree could be executed and in the case of an attachment before judgment it is that attachment which assumes the character of an attachment in execution of a decree and so becomes

capable of enforcement in an execution proceeding.

The rule thus governs not only an attachment made in execution proceedings but also an attachment before judgment. Whether, therefore, it is an attachment before judgment which becomes an attachment in execution or whether it is an attachment made in execution proceeding that attachment ceases to subsist under the rule when an execution application is dismissed for decree-holder's default.

(Paras 9, 10, 11)

(B) Civil Procedure Code (1908), Section 64 — An alienation of an attached property is void only against all claims enforceable under the attachment and not against other claims. (Para 13)

A. T. Vijayarangam, for Appellants; M. L. Venkatanarasimhalah, for Respondents.

JUDGMENT:— On March 19, 1959 defendant 4 Anjanappa sold the suit properties to a certain Byrappa for a sum of Rs. 5,000. It is on the basis of this sale deed that Byrappa who is now dead brought a suit for declaration that he was the owner of the property and for an injunction restraining the defendants from disturbing his possession. It was not disputed in the pleadings that as stated by the plaintiff in his plaint defendant 4, the vendor, continued to be in possession of the suit property as the tenant of the plaintiff and the plaintiff had presented an application for eviction under the provisions of the Mysore Rent Control Act on the ground that defendant 4 had become a defaulter in the payment of rent. So the undisputed fact was that the plaintiff was in possession of the property through his tenant, defendant 4, when the suit was instituted, and if he establishes title to the suit property he could get the injunction along with the declaration sought by him. If the injunction sought is granted, it would have the effect of prohibiting disturbance of the plaintiff's possession through a disturbance of the tenant's possession.

2. While there was thus no controversy with respect to the question whether the plaintiff was in possession of the property as he indeed was through his tenant, there was a serious dispute with respect to the title asserted by him. The repudiation of the plaintiff's title was by defendants 1 to 3 on the strength of the execution purchase made in the execution proceedings to which I shall presently refer. Defendant 1 who had lent some money to defendant 4 brought a suit for its recovery in the Subordinate Judge's Court, Civil Station, Bangalore, in O. S. 17 of 1957 and in that suit there was an attachment before Judgment of the properties which formed the subject-matter of the present suit and which were purchased by

Byrappa. That attachment was made on April 6, 1957. There was a decree in that suit, and in the execution proceedings the suit properties were brought to sale and were purchased by defendant 2, a stranger auction purchaser, on September 4, 1961. But this sale is not yet confirmed since before any such confirmation could be made, Byrappa instituted the present suit and obtained an injunction restraining defendant 1 from continuing the execution of his decree and defendant 2 from proceeding with the proceedings for confirmation of the sale and restraining further proceedings with respect to that matter.

3. Defendants 1 and 2 contended that since there was an attachment before judgment when Byrappa purchased the property from defendant 4, that sale is void against all claims enforceable under the attachment obtained before judgment by defendant 1. Defendant 3 was another person who had a decree against defendant 4 and that decree he obtained in O. S. 21 of 1958 in the Court of the Munsiff, Civil Station, Bangalore, and he also obtained an attachment before judgment before defendant 4 executed the sale deed in favour of Byrappa. But it is not necessary to refer to the resistance to Byrappa's suit on the basis of that attachment before judgment since defendant 3 stated before the Court of first instance that his decree has been otherwise satisfied.

4. But the contention urged on behalf of Byrappa was that the attachment before judgment which was obtained by defendant 1 in his suit was no longer subsisting when defendant 4 executed the sale deed in his favour. So the question which had to be decided by the Courts below was whether that attachment was subsisting on that date or had perished.

5. The ground on which it was maintained that the attachment was no longer continuing on the date of Byrappa's sale deed was that on two occasions when defendant 1 presented an execution application for the execution of the decree obtained by him, his execution application was dismissed for default when he was absent and he had taken no steps to proceed with the execution. That the execution applications were so dismissed was not disputed by defendants 1 and 2. Exhibit P-1 shows that on October 9, 1957 defendant 1 presented his execution application in which the prayer was for the sale of the attached properties. On June 18, 1958 that execution application was dismissed when the decree-holder and his counsel were both absent. It is in evidence that the next execution application was dismissed on December 10, 1958. It was so dismissed for the reason that the sale fee and the verified statement were not produced by the decree-holder.

6. The Subordinate Judge was of the view that when the two execution applications were dismissed in that way, the attachment obtained by defendant 1 no longer continued to subsist and that the sale in favour of Byrappa was not affected by the attachment which disappeared in that way. But the District Judge was of a contrary view and thought that since the attachment obtained by defendant 1 was an attachment before judgment, the dismissal of the execution applications did not result in the disappearance of the attachment.

7. The question whether the Subordinate Judge is right or whether the view taken by the District Judge is correct, depends upon the interpretation to be placed on Rule 57 of Order 21 of the Code of Civil Procedure, which, when the execution applications presented by defendant 1 were dismissed, read:

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

The words "and unless specifically ordered" were added in the year 1959 to this rule and did not exist when there was a dismissal of the execution application.

8. The words "where any property has been attached in execution of a decree" have been understood differently by different Courts, some Courts taking the view that those words speak of an attachment made in execution proceedings, while the others take the contrary view that they also refer to an attachment before judgment which becomes an attachment in execution when a decree is made in the suit in which the attachment before judgment was made. The High Courts of Bombay, Nagpur and Andhra Pradesh take the former view, while the High Courts of Bombay, Calcutta, Kerala and of the former State of Mysore take the second although Bombay and Kerala High Courts had taken a different view on an earlier occasion but changed it subsequently.

9. It appears to me that it is proper and reasonable to say that Rule 57 of Order 21 which causes the disappearance of an attachment when an execution application is dismissed for the default of the decree-holder governs not only an attachment made in an execution proceeding but also an attachment before judgment which becomes an attachment in execution when a decree is made in the suit in which the attachment before judgment is made. That that is the proper way of understanding Rule 57 of Order 21 is clear from the Rule 11 of Order 38 of the Code of Civil Procedure which says that

when the plaintiff obtains an attachment before judgment in his suit and there is a decree in his favour, it shall not be necessary for him to apply for an attachment of that property again in order to enable him to execute the decree against it. The clear meaning of this provision is that an attachment before judgment becomes an attachment in execution when a decree is made in the suit. So the words "where a property has been attached in execution of a decree" occurring in Rule 57 of Order 21 have to be understood as referring to an attachment in enforcement of which the decree could be executed, and in the case of an attachment before judgment it is that attachment which assumes the character of an attachment in execution of a decree and so becomes capable of enforcement in an execution proceeding.

10. There can be very small reason for thinking that an attachment before judgment does not cease to subsist when an execution application is dismissed for decree-holder's default although an attachment which is made in an execution proceeding so ceases to subsist on such default. There can be no rational distinction between an attachment before judgment which becomes an attachment in execution and an attachment made in an execution proceeding for the purpose of the application of Rule 57 of Order 21, and I should not be justified in understanding the words "where any property has been attached in execution of a decree" with which Rule 57 of Order 21 opens too literally. It could not have been the intention of that rule that an attachment made in an execution proceeding alone should fall to the ground when the decree-holder commits a default, but that notwithstanding such default an antecedent attachment before judgment should continue to subsist.

11. I am therefore, of the opinion that whether it is an attachment before judgment which becomes an attachment in execution or whether it is an attachment made in the execution proceedings, that attachment ceases to subsist when an execution application is dismissed for the decree-holder's default. That, I think, is how I should understand Rule 57, of Order 21 of the Code of Civil Procedure.

12. The Subordinate Judge was, in my opinion, therefore, right in giving Byrappa the decree which he wanted, and the District Judge could not have disturbed it on the erroneous view taken by him that the attachment was still subsisting when the sale deed was executed in favour of Byrappa.

13. Mr. Vijayarangam appearing for the legal representatives of Byrappa who have now been brought on record in this appeal, makes a complaint that the Dis-

trict Judge made an observation prejudicial to the interests of the appellants in para 5 of his judgment. That observation is to the effect that the plaintiff Byrappa did not or could not get any right, title and interest to the suit properties by virtue of the sale deed in his favour. Mr. Vijayarangam is right in making the criticism that this observation overlooks the clear provisions of Sec. 64 of the Code of Civil Procedure which provides no more than that an alienation of an attached property is not wholly void but is void only against all claims enforceable under the attachment. So, the District Judge had to focus his attention on the limited question whether the sale to Byrappa was void against the attachment obtained by defendant 1, and he could not have reached the conclusion that it was void for all purposes as he appears to have done. That observation, in my opinion, is not correct, and since in consequence of the view I take on the interpretation to be placed on Rule 57 of Order 21 of the Code of Civil Procedure the District Judge's judgment and decree have to be set aside, the observation made by him to which Mr. Vijayarangam takes exception also falls to the ground.

14. So I set aside the decree of the District Judge and restore that of the Subordinate Judge with costs in this Court and in the lower appellate Court.

Appeal allowed.

AIR 1970 MYSORE 154 (V 57 C 36)

A. NARAYANA PAL, J.

M. Siddalingappa, Petitioner v. T. Nataraj, Respondent.

Civil Revision/Petition No. 1196 of 1967, D/- 22-7-1969, against order of Judge, Small Cause, Bangalore, D/- 3-7-1967.

Contract Act (1872), Ss. 23, 151 — Launderer's liability — Clause on receipt stipulating that launderer shall incur no liability in respect of any damage — Validity — No question of public policy is involved but minimum duty of care imposed upon all bailees under S. 151 cannot be avoided by inserting such a clause — Breach of that duty clothes party affected with right to recover damages commensurate with consequences. (Para 2)

Balarathnam, for V. S. Mohanrangam, for Petitioner; N. Keshava Murthy, for Respondent.

ORDER:— The petitioner who is a Dry Cleaner was sued by the respondent for damages in respect of damage caused to two silk sarees entrusted for dry cleaning. The suit has been decreed by the Court of Small Causes, Bangalore.

JM/AN/E966/69/RSK/W.

2. The only point of law raised is that the lower Court was wrong in not giving effect to the following clause of the contract printed on the back of the receipt given by the petitioner on the ground that it is opposed to public policy;

"All articles for cleaning and dyeing are accepted on conditions that the company shall incur no liability in respect of any damage which may occur and for delay or in the event of loss for which the company may accept the liability which shall in no case exceed eight times the cleaning charges."

The question whether any public policy is involved or not does not in my opinion, arise. The petitioner is, undoubtedly, a bailee in respect of the sarees given to him and there is a minimum duty of care imposed upon all bailees under Sec. 151 of the Contract Act which they cannot contract themselves out of. It is not subject to any contract to the contrary between the parties. Under that section, in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would in similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. Once that minimum duty is imposed upon the bailee by the law, a breach of that duty undoubtedly clothes the party affected with the right to recover damages commensurate with the consequences.

3. The revision petition, therefore, has to be and is hereby dismissed.

Petition dismissed.

AIR 1970 MYSORE 155 (V 57 C 37)

A. NARAYANA PAI, J.

Amalgamated Electricity Co. Ltd, Petitioner v. Kutubuddin Rajesaheb Chancha and others, Respondents.

Civil Revn. Petn. No. 1082 of 1967, D/- 26-9-1969, against order of Munsiff, Belgaum, D/- 17-6-1967.

Civil P. C. (1908), O. 23, R. 1 — Withdrawal of suit — Right of withdrawal and right of withdrawal with liberty to file fresh suit — Distinction — Application under sub-rule (2) — Conversion of into an application under sub-rule (1) — Not permissible.

The absolute right of withdrawal and withdrawal with liberty to file a fresh suit on the same cause of action are treated as two distinct and different matters by R. 1 of O. 23. The first one, while preserving liberty to a plaintiff to withdraw his suit, visits him with certain consequences set out in sub-rule (3). It is only if a plaintiff wishes to escape those consequences

that he is required to comply with the terms of sub-rule (2). The said rule vests a power in the Court to decide whether, in the circumstances stated, the plaintiff should be relieved of adverse consequences following upon a formal defeat or upon circumstances arising out of proceedings, and permitted to file a fresh suit. Whereas a choice made by the plaintiff under sub-rule (1) may be immune from any obstruction being placed in its exercise either by the opposing party or by the Court itself, an attempt to withdraw the suit with liberty to approach the Court again is expressly made subject to the Court being satisfied as to the particulars set out in sub-rule (2). On principle therefore, an application by a plaintiff under sub-rule (2) cannot be treated on a par with an application by him to exercise the absolute liberty given to him under sub-rule (1); it is actually a prayer for a concession from the Court after satisfying the Court regarding the existence of circumstances justifying the grant of such concession. If so, it is, like any other application, a prayer which is capable of being withdrawn before it is granted or refused. (Para 12)

If an application under sub-rule (2) is heard on merits and at the conclusion the Court is not satisfied that circumstances exist justifying the grant of permission to withdraw with liberty to file a fresh suit, the Court could proceed to dismiss the application, in which case the suit remains on file. If such is the consequence of an actual adverse order made by the Court on an application, the plaintiff cannot be placed in a worse situation by stating that the application must be regarded as one under sub-rule (1) and therefore, incapable of being withdrawn, or as having the immediate result of withdrawing the suit. It will be seen that in such an event, the plaintiff not only loses the right of filing a fresh suit but also loses even the possibility of getting such relief as he may be in a position to get in the existing suit. AIR 1968 SC 111, Dist. (Para 13)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 111 (V 55) =

Civil Appeal No. 897 of 1964, Hulas Rai Baijnath v. K. B. Das and Co.

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H. B. Datar, for Petitioner; W. K. Joshi, for Respondent No. 1.

ORDER:— The 213 respondents in this Revision Petition filed a regular Original Suit No. 218 of 1964 before the Munsiff at Belgaum against the petitioner, Amalgamated Electricity Company Limited, claiming certain reliefs regarding rates for electricity supplied by the Petitioner-Defendant. Sometime thereafter, more than 100 persons as plaintiffs filed another suit No. 263 of 1964 before the same Court

against the same defendant claiming similar reliefs. The second mentioned suit started as a representative suit under Order 1, Rule 8 of the Code of Civil Procedure, I am told that by some subsequent consent order, the suit has been confined to the named plaintiffs therein.

2. On 17-4-1967, the plaintiffs in the earlier suit (Respondents in this petition) filed an application praying that:

"the plaintiffs may be given liberty to withdraw the suit with permission to file another suit with liberty to plaintiffs to include themselves as plaintiffs in O.S. 263 of 1964."

In the affidavit in support of it, it is stated that after the suit of the respondents, another suit has been filed as a representative suit, that question in both the suits are same, that any decree in the representative suit will also bind the whole body of the consumers of electricity and that in those circumstances the plaintiffs propose to withdraw the suit "with permission to file a fresh suit for the same relief on the same cause of action to get the benefit of the decree passed in R.O.S. No. 263 of 1964."

3. The defendant filed a statement claiming that the plaintiffs should be directed to pay costs at the higher rate for the reasons set out in the statement and that certain deposits made pursuant to interim orders may be given back to him to the extent they relate to the suit sought to be withdrawn and that further deposits may also be likewise paid.

4. Thereupon the plaintiffs filed another statement to the effect that the application for withdrawal of the suit is not pressed.

5. Accordingly, the Munsiff has dismissed the application for withdrawal.

6. In this Revision Petition by the defendant, the main contentions are:

(1) that the order of dismissal amounting, *in grant of permission to withdraw* the original application to withdraw the suit was passed without hearing the defendant's counsel;

(2) that liberties sought to be reserved are not of the type permissible under sub-rule (2) of Rule (1) of Order XXIII of the Code of Civil Procedure which should therefore be treated as deleted or stand deleted as totally ineffective and that therefore all that remained of the application was the permission to withdraw, and

(3) that in such an event, the application must be regarded as an application made under sub-rule (1) of Rule 1 of Order XXIII and that there is no question of the plaintiffs being permitted to withdraw such an application.

7. As I have heard the counsel on merits, the first grievance no longer exists.

8. Briefly, the argument is that a plaintiff who has a right to file a suit has also a right to withdraw the suit and that such a right is recognised by sub-rule (1) of Rule 1 of Order XXIII and subject to his taking consequences as set out in sub-rule (3) thereof, there is nothing to prevent the plaintiff from withdrawing the suit, and that therefore the moment he files an application to withdraw the suit, it must be regarded as having become immediately effective because no judicial order by the Court is required to be passed thereon. The next step in the argument is that if an application purporting to be under sub-rule (2) of Rule 1 of Order XXIII is made reserving liberty or setting out conditions for withdrawal which are not within the scope of the said rule, the offending portions of the application should be regarded as so ineffective as to convert the application into one under sub-rule (1) itself with the same result as stated above.

9. It is pointed out that the liberty sought to be reserved in the application under consideration viz., that of getting themselves impleaded as plaintiffs in another suit, is not a sort of liberty which can be ordinarily asked for or granted sub-rule (2) of Rule 1 of Order XXIII. It is also pointed out that permission to file a fresh suit so as to get the benefit of the decree in the representative suit is an unnecessary prayer and thoroughly inconsistent with the immediately preceding statement that the decree in the representative suit will be binding on all persons represented by the plaintiffs therein. As both these grounds are so obviously beyond the scope of sub-rule (2) of Rule 1 of Order XXIII, it is urged that they are for the reasons stated to be regarded as ineffective.

10. Reliance is also placed on the observations of the Supreme Court in Civil Appeal No. 897 of 1964 (reported in AIR 1965 SC 111), *Hulas Yal. Bhat, Nath v. K. B. Dass and Co.* That was an account suit in which an application was filed expressly under sub-rule (1) of Rule 1 of Order XXIII without reserving any liberty for filing a fresh suit or taking any other steps. The defendant therein had objected to permission being granted to the plaintiff to withdraw the suit on the ground that the suit being one for account, there is always the possibility of the result of account turning to be in favour of the defendant. Upon facts, however, no preliminary decree had been passed and there was no such averment in the written statement as to amount to a set off or a counter-claim. In these circumstances, the Supreme Court observed that there is no provision in the Code of Civil Procedure which requires the Court to refuse permission to withdraw the suit and compel the plaintiff to pro-

ceed with it. They qualified their statement by observing that it is of course possible that different considerations may arise where by reason of a claim of set off or otherwise the defendant might have acquired some vested right in the continuation of the suit.

11. On the question whether an application purporting to be one made under sub-rule (2) should be regarded for all legal purposes as one made under sub-rule (1) if the liberty reserved or the statement of reasons set out in the application is not within the scope of sub-rule (2), there is no direct authority in the said decision of the Supreme Court. The learned counsel has also frankly stated that there is no direct authority for the proposition but insisted that upon principle, that should be the legal effect.

12. It appears to me that principles are to be derived or gathered from the fact that the absolute right of withdrawal and withdrawal with liberty to file a fresh suit on the same cause of action are treated as two distinct and different matters by Rule 1 of Order XXIII. The first one, while preserving liberty to a plaintiff to withdraw his suit, visits him with certain consequences set out in sub-rule (3). It is only if a plaintiff wishes to escape those consequences that he is required to comply with the terms of sub-rule (2). The said rule vests a power in the Court to decide whether, in the circumstances stated, the plaintiff should be relieved of adverse consequences following upon a formal defect or upon circumstances arising out of proceedings, and permitted to file a fresh suit. Whereas a choice made by the plaintiff under sub-rule (1) may be immune from any obstruction being placed in its exercise either by the opposing party or by the Court itself, an attempt to withdraw the suit with liberty to approach the Court again is expressly made subject to the Court being satisfied as to the particular set out in sub-rule (2). On principle therefore, an application by a plaintiff under sub-rule (2) cannot be treated on a par with an application by him to exercise the absolute liberty given to him under sub-rule (1); it is actually a prayer for a concession from the Court after satisfying the Court regarding the existence of circumstances justifying the grant of such concession. If so, it is, like any other application, a prayer which is capable of being withdrawn before it is granted or refused.

13. If an application under sub-rule (2) is heard on merits and at the conclusion the Court is not satisfied that circumstances exist justifying the grant of permission to withdraw with liberty to file a fresh suit, the Court could proceed to dismiss the application, in which case the suit remains on file. If such is the

consequence of an actual adverse order made by the Court on an application, I do not think the plaintiff can be placed in a worse situation by stating that the application must be regarded as one under sub-rule (1) and therefore incapable of being withdrawn, or as having the immediate result of withdrawing the suit. It will be seen that in such an event, the plaintiff not only loses the right of filing a fresh suit but also loses even the possibility of getting such relief as he may be in a position to get in the existing suit. I do not think, an interpretation which leads to such a consequence should be readily accepted.

14. There is, thus, no compelling reason why order of the Munsiff should be interfered with, under Sec. 115 of the Code of Civil Procedure.

15. *The Revision Petition is dismissed. No costs.*

Revision dismissed.

AIR 1970 MYSORE 157 (V 57 C 38)

A. R. SOMNATH IYER, J.

Saraswathamma and another, Appellants v. Bhadramma and another, Respondents.

Second Appeal No. 508 of 1965, D/- 27-10-1969, from judgment and decree of Civil Judge, Chikmagalur, D/- 12-3-1965.

(A) Evidence Act (1872), S. 154 — Fact that witness has become hostile — Fact to be established by eliciting information giving indication of hostility.

A witness cannot be treated as hostile merely because his evidence is favourable to the other side, and the fact that the witness has become hostile has to be established by eliciting information such as could give an indication of hostility.

(Para 11)

It is not possible for Court to say without giving reason that he will not believe a witness after permission for treating the witness as hostile has been refused by the Court unless the civil Judge himself comes to the conclusion that he has turned hostile.

(Para 12)

(B) Hindu Adoptions and Maintenance Act (1956), S. 18(2)(d) — B was first and C was second wife of one A — B's claim of separate maintenance from A will accrue to her only if second marriage between A and C was valid one.

(Para 16)

B. Puttaswamy, for Appellants; A. C. Manjappa, for Respondents.

JUDGMENT: There was a certain Basgowda, who lived in the District of Chikmagalur until his death which took place in the year 1962. He had two wives, the first of them being Bhadramma, who is

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plaintiff 1, through whom he had a daughter Eramma, who is plaintiff 2. The second is Saraswathamma, who is defendant 1, through whom he got a son Nagesha, who is defendant 2. This second appeal arises out of a suit brought by Bhadramma and her daughter Eramma for a declaration that they were exclusively entitled to all the properties of Basegowda and for an injunction restraining the defendants from disturbing their enjoyment and possession thereof. They also sought a decree for certain other reliefs to which it is not necessary to advert.

2. This suit was resisted by defendants 1 and 2 on the plea that each of them was entitled to a 4th share in the properties of Basegowda as his second wife and son respectively. It was asserted by defendants that the marriage of Basegowda with defendant 1 was solemnised in March 1955 before the Hindu Marriage Act which prohibited bigamy commenced to operate on May 18, 1955. The principal ground on which the plaintiffs repudiated the right asserted by defendants was that the marriage between Basegowda and defendant 1 took place in January 1956 after the Hindu Marriage Act came into force and that it was therefore a void marriage since it was solemnised during the subsistence of the first marriage and during the life-time of plaintiff 1 who was the first wife.

The Munsiff reached the conclusion that the marriage between the Basegowda and defendant 1 took place in March 1955 and was therefore a good marriage. So, he negated the exclusive claim asserted on behalf of the plaintiffs to the properties of Basegowda and made a decree for partition. He made a declaration that the two plaintiffs were each entitled to a 4th share and that each of the two defendants were similarly entitled to a 4th share in the properties of Basegowda. He directed a partition accordingly.

3. From this decree, the plaintiffs appealed and the Civil Judge allowed it. He was of the opinion that the marriage of Basegowda with defendant 1 was an invalid and void marriage since, it, according to his finding was solemnised in January 1956. So, in modification of the decree made by the Munsiff, he made a decree in favour of the plaintiffs as prayed for by them.

4. The defendants appeal.

5. Mr. Puttaswami contended that the decree made by the Civil Judge is unsupportable for the reason that he depended in support of his decree entirely upon a document Exh. P-6 which was produced by the plaintiffs on December 20, 1963, after the recording of the evidence had been completed on December 17, 1963 and the case had been posted for

arguments to December 20, 1963. He also maintained that the Civil Judge overlooked the omission on the part of the plaintiffs to produce any proof in support of their contention that Ex. P-6 was a genuine document and he also made a severe criticism that the Civil Judge entirely missed the importance of the admission made by the plaintiffs' witness P.W. 2 who gave evidence that the second marriage of Basegowda was celebrated in March 1955.

6. Although there was a plea by the defendants that Bhadramma was not the legally wedded wife of Basegowda, Mr. Puttaswami appearing for the defendants made no attempts to sustain any such plea which was rightly negated by the Courts below. So the important question which has to be decided is whether the finding of the Civil Judge that the second marriage of Basegowda was in January 1956, is open to any acceptable criticism, and in my opinion, it is.

7. The Civil Judge's judgment is remarkable for the contradictions in which it abounds. Exh. P-6 purports to be a marriage invitation issued in the context of Basegowda's second marriage and it states that the marriage would be celebrated on January 23, 1956. It is a printed invitation and the first plaintiff, who examined herself as P.W. 1 gave no evidence as to the date of the marriage when she was examined on December 17, 1963. She did not even state that the second marriage was celebrated after the Hindu Marriage Act came into force. She said nothing about the date of the marriage. After completion of the recording of the evidence on December 17, 1963, the case was posted for arguments to December 20, 1963, and it was on that date that the plaintiffs made an application for permission to produce further evidence which was granted by the Munsiff. It was at that stage that the 1st plaintiff examined herself further to produce Exh. P-6.

8. Not unnaturally the Munsiff attached no importance to Exh. P-6 which was produced at that very late stage, and he rightly pointed out that although the first plaintiff stated that at least three persons who were present at the wedding, were still alive, none of them was called to give evidence. The Printer of Exh. P-6 was not called and the first plaintiff gave no explanation for the omission on her part to produce Exh. P-6 at the earliest stage.

9. So, the Munsiff rightly discarded Exh. P-6 and in the earlier part of his judgment the Civil Judge also felt inclined to say that not much reliance could be placed on it. But, in another part of his judgment, he reversed his own reasoning and arrived at a contrary conclusion that Exh. P-6 had been sufficiently proved. It is difficult to understand how he

found it possible to say so. The finding which he reached in the earlier part of the judgment was in my opinion a correct conclusion and it is astonishing to find that he departed from that conclusion when he arrived in another part of his judgment where he adverted to the criticisms levelled against Exhibit P-6 in another context.

10. So, the finding of the Civil Judge that Exh. P-6 was proved is clearly contrary to law.

11. P.W. 2 who was examined by the plaintiffs gave evidence that the second marriage of Basegowda was in March 1955 and although more than one attempt was made to treat this witness as a hostile witness, that endeavour did not succeed since the Munsiff was very clear in his mind that there were no grounds for thinking that the witness has turned hostile. As I can see from the deposition of P.W. 2, no attempt at all was made for laying the foundation for the theory that P.W. 2 had become hostile to the case. A witness cannot be treated as hostile merely because his evidence is favourable to the other side, and the fact that the witness has become hostile has to be established by eliciting information such as could give an indication of hostility. But, no such attempt was made by the plaintiffs when P.W. 2 was in the box.

12. It appears from the discussion in the judgment of the Civil Judge that he did not correctly comprehend the evidence given by P.W. 2. He thought that P.W. 2's evidence was that the second marriage of Basegowda 'could' have taken place in March 1955, while on the contrary the clear evidence given by P.W. 2 was that that marriage did take place in March 1955. The Civil Judge stated that he would not believe P.W. 2, but gave no reason for reaching that conclusion. It was not possible for him to say so after permission for treating the witness as hostile had been refused by the Munsiff unless the Civil Judge himself came to the conclusion that he had turned hostile.

13. The Civil Judge next placed dependence upon the evidence given by P.Ws. 3 and 4, but their evidence could not assist the conclusion reached by him. All that they stated was that they saw defendant 1 in their own villages in the year 1956. Both these witnesses belong to places other than those to which Basegowda belonged and the marriage according to the defence case was in the District of South Kanara and the fact that these two witnesses saw defendant 1 in their own villages in January 1956 does not necessarily mean that the marriage was also in the year 1956.

14. The next infirmity in the ratiocination adopted by the Civil Judge was that he made entirely wrong arithmetic. In

her evidence defendant 1 stated when she was examined on December 17, 1963, that her marriage took place nine years before she was examined and that the second defendant had completed seven years of age when she was examined. She added that the second defendant was born a year after the marriage. On the basis of this chronology of events, the Civil Judge stated that the second marriage of Basegowda must have been celebrated in the year 1956.

15. It is clear that the Civil Judge got mixed up when he made this arithmetic. If the marriage was celebrated nine years before 1963 it means the marriage was in the year 1954 and if defendant 2 was born seven years before she gave evidence, it should follow that he was born in 1956 and if he was born a year after the marriage, it means that the marriage was in the year 1955. It was, therefore, impossible for the Civil Judge on the basis of these dates to reach a conclusion that the marriage was in the year 1956 and it is astonishing that he found it possible to say so.

16. There is also something in Exh. P-4 an application presented by the plaintiff in the maintenance suit which she brought against her husband Basegowda, which supports the defendants' allegation that the first defendant's marriage was a good marriage. In Exh. P-4 she referred to defendant 1 as the second wife of Basegowda, and there was no impeachment of that marriage on the ground that it was solemnised after the Hindu Marriage Act came into force. What is of further importance is that plaintiff 1 stated in that application that the right to claim separate maintenance from her husband accrued to her by reason of the second marriage between Basegowda and defendant 1. That right would not have accrued to her if the marriage was a void marriage since under the provisions of Hindu Adoptions and Maintenance Act that right to separate maintenance would accrue only if the second marriage was a good marriage, and there was a clear recognition of the validity of that marriage from the pleading which the plaintiff incorporates in Exh. P-4.

17. So, it is clear that the decree of the Civil Judge which is clearly contrary to law, cannot be sustained, and I allow this appeal, set aside that decree and restore that of the Munsiff.

18. In the circumstances each party will bear his or her own costs on all the three Courts.

Appeal allowed.

AIR 1970 MYSORE 160 (V 57 C 39)

A. R. SOMNATH IYER AND

B. M. KALAGATE, JJ.

B. M. Ramalingappa, Petitioner v. State of Mysore by its Chief Secretary to Govt., Vidhan Sabha, Bangalore and another, Respondents.

Writ Petn. No. 2247 of 1966, D/- 26-6-1969.

Constitution of India, Art. 309, proviso, Art. 226 and Art. 14 — Rules under Art. 309, proviso, framed by Governor of Mysore, R. 3 — Termination of service of local candidates in Motor Transport Department as a result of selection made by State Recruitment Committee — Selection quashed by High Court as invalid — Regularisation of services of all local candidates continuing in service under R. 3 — Petitioner refused benefit of R. 3 — Discrimination — Direction for regularisation of services of petitioner given under Art. 226.

The petitioner's services as a local candidate in the Motor Vehicles department of the State were terminated on 23-5-1964 as a result of selection of other persons to various posts in the State by the State Level Recruitment Committee. The selection made by the committee was challenged by the petitioner and also by other persons whose services had been terminated by various writ petitions. The petitioner, having failed to obtain an interim stay of the order of termination in his writ petition, was replaced by the candidate selected to his post. Other persons having obtained a stay continued in service and ultimately the selection made by the Committee was quashed. The selection made by the Committee was, however, validated by subsequent legislation. By Rule 3 of the rules framed by the Governor under the proviso to Article 309 of the Constitution, regularisation of all local candidates who had been appointed before 31-12-1964 and who had continued in service till the Governor's rules commenced to operate was directed. The petitioner who was not in service was refused the benefit of R. 3 and therefore he filed a writ petition praying for regularisation of his service.

Held (i) that the effect of quashing the selection made by the selection committee as incompetent was that no one selected by the Recruitment Committee acquired the right to hold the post which was already held by another. And if nonetheless the petitioner's service was terminated to make his post available to the person chosen by an incompetent group of persons, such termination had no validity and the petitioner should be deemed to have continued in service. Hence, the authority which had to make the regula-

risation could not refuse it on the basis of interruption caused by its own illegal act.

(ii) that the petitioner and other persons whose services were regularised were equal in every way and the accidental fact that there was no stay in the case of the petitioner did not make them unequal. So, it would be extremely unreasonable to refuse the benefit of regularisation in the case of the petitioner who, for no fault of his and for the reason that he was prevented from continuing in service by an illegal selection by the State level recruitment committee could not be in service at the relevant point of time. Since the purpose of the rules was to confer a benefit on persons like the petitioner who were affected by the validating Act subsequently made, the petitioner could not be excluded from their operation. (Paras 12, 13, 14)

(iii) that the subsequent validation of the Recruitment Committee's selection could not impair a right which the Governor's rules created when they commenced to operate. (Para 15)

H. B. Datar, for Petitioner; P. K. Shyamasunder, High Court Govt. Pleader, for Respondents.

SOMNATH IYER, J.:— On September 4, 1962, the petitioner was appointed as a Motor Vehicles Inspector as a local candidate in the department of Motor Vehicles of the State. But from that post there was a displacement when, on May 16, 1964 the State Level Recruitment Committee made a selection of other persons to various posts in the State. So, by an order made on May 23, 1964, the petitioner's services were terminated.

2. The selection made by the State Level Recruitment Committee was challenged in more than one writ petition before this Court and one of them was W.P. No. 903 of 1964. That writ petition and the companion matters succeeded, and, by an order made on June 3, 1955, the selection made by the State Level Recruitment Committee was quashed on the ground that that body had not been properly constituted.

3. But, during the pendency of those writ petitions some persons whose services had also been terminated in the same way in which the petitioner's service had been terminated, continued in the concerned writ petition, but in writ petition 919 of 1964 which was the writ petition presented by the petitioner, he was not able to get an order of stay, and so, the person selected by the State Level Recruitment Committee took charge of the post from and there was discontinuance in the service of the petitioner.

4. But, the selection made by the State Level Recruitment Committee stood validated by an Ordinance dated September 24, 1965 and by subsequent legislation.

giving benefit of doubt." It has been observed that while the former will amount to an acquittal on merits, the latter will not. For this purpose, it was observed that the criminal court judgment can be gone through to find out the reasons for the acquittal, though the reasonings and conclusions therein cannot be relied upon as conclusive or decisive in the civil suit claiming damages for malicious prosecution.

17. It is well settled that in every suit for malicious prosecution, the civil Court must hear the evidence on both sides and decide for itself independently whether or not the prosecution was without reasonable and probable cause and malicious. It is equally well settled that the judgment of the criminal Court is evidence and conclusive at that to show the acquittal of the plaintiffs as a fact in issue which is one of the essential elements to be determined in a suit for damages for malicious prosecution. No doubt the judgment of a criminal Court is admissible to show certain facts and circumstances, such as, the names of witnesses examined, the documents exhibited or that the acquittal was on some technical grounds without going into the evidence or on the merits of the evidence, but in our opinion, the reasonings and conclusions in the judgment of a criminal Court cannot be gone into to determine whether the acquittal resulted on account of the prosecution evidence being weak, insufficient or doubtful.

Therefore, the words "acquittal on merits" must mean an acquittal after trial on a consideration of the evidence as distinguished from and in contradistinction to acquittals which occur due to certain technical defects, such as, want of sanction etc. There seems to be no authority, and in our opinion, no adequate justification to make a further distinction between acquittals on weakness of prosecution evidence, acquittals by giving benefit of doubt or acquittals on insufficiency of evidence and holding that only some of them will amount to acquittals on merits and others not. Embarking on making such a distinction will necessarily mean utilisation of reasonings and conclusions in the criminal court judgment by the civil court in the trial of the suit which is not permissible.

18. In the circumstances of the present case, the presumption mentioned above being in favour of plaintiffs, we now proceed to consider the second contention of appellants that the court below has failed to examine the evidence in the light of the said presumption in favour of the plaintiffs.

19. In the F. I. R. (Ex. 4) lodged by defendant no. 1, the main accusations relating to alleged acts of the plaintiffs

which defendant no. 1 claimed to have seen them commit are: (1) when he was arranging his articles in the tea stall some members of the Brahmin Nijjog including plaintiffs formed into an unlawful assembly and trespassed into his tea stall with the common object of forcibly evicting him therefrom; (2) they committed mischief by damaging the separating wall between the Nijjog house and the tea stall; (3) some of them assaulted defendant no. 1 and pushed him away when he protested; and (4) threw away his furniture and other articles which he was rearranging inside his stall.

20. The two essential points for determination are: (1) whether there was absence of reasonable and probable cause for making the aforesaid accusations against all or any of the plaintiffs and (2) whether it was malicious. It is not disputed that unless both these points are found in favour of the plaintiffs, the claim cannot be sustained.

21. Before dealing with the evidence relating to the incidents on the date of occurrence, it is relevant to refer to the background of the relationship which existed between defendant no. 1 on the one hand and members of the Brahmin Nijjog to which plaintiffs belong. The undisputed facts are that defendant no. 1 has got his tea stall on a portion of plot no. 737 near the Rathagada Chhak of Bhubaneswar Town, while the house used as the office of the Nijjog is situate on plot no. 738 adjacent to the tea stall. The northern wall of the Nijjog house serves as a southern protection wall of defendant no. 1's tea stall. According to defendant no. 1, he had purchased Rupee 0/15/6 pie's interest in plot no. 737 from the common Manager of the Bhangapur Debottar Estate in 1956. Besides 0.001 1/2 acre out of the same plot claimed to have been purchased on behalf of the Nijjog, plaintiffs also purported to have purchased interests of other Choudhuries in the said plot and wanted to dispossess defendant no. 1.

Thus, there was some dispute between defendant no. 1 and the Nijjog about the ownership and possession of the land comprising plot no. 737. Plaintiffs also alleged that defendant no. 1 had requested them to lease out a portion of the vacant land from the Brahmin Nijjog for expansion of his tea stall which request had been turned down. In this background of the existing relationship between the parties, the evidence regarding the incidents that are alleged to have occurred on the date of occurrence is to be considered.

22. What the expression "reasonable and probable cause" means has been explained by Hawkins, J. in the decision

reported in (1881) 8 QB 167, (Hicks v. Faulkner) in the following words:

"Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".

23. To determine whether there was reasonable and probable cause for defendant No. 1 to lodge the F. I. R. (Ex. 4) on 31-10-58, the first point for consideration is whether there was any occurrence at all on that day, and if so, the nature of occurrence and whether all or any of the plaintiffs against whom accusations were levelled participated therein. The facts that the roof of the tea stall of defendant No. 1 during his absence on the night preceding 31-10-58 was burnt; that he came to the spot on the morning on receipt of the information, by which time, the fire had been put out and then engaged himself in arranging his articles in his stall are not seriously disputed. The substance of the accusations is that while he was so arranging, members of the Brahmin Nijjog including plaintiffs forcibly entered into his tea stall, damaged the separating wall, committed mischief in relation to his articles and assaulted him when he protested. Some of these incidents did occur on that day is amply established by evidence.

D. W. 3, a police constable who was on Patrol duty was attracted to the spot on hearing the hullah. He found 20 or 30 persons had entered the tea stall and defendant No. 1 complained to him. He also saw people engaged in damaging the separating wall. He further mentions the arrival of D. W. 2, A. S. I. with two constables who removed people from the tea stall as well as the Nijjog Office, seized crowbar and gainti and locked both the places. He has seen a hole which was made in the separating wall between the Nijjog Office and tea stall. There is hardly any reason to discredit his testimony as it cannot be said that he is interested in one or biased against the other party. D. W. 2 has deposed that on being approached by defendant No. 1, he came to the spot, removed the persons both from the tea stall and the Nijjog office, locked both houses and seized crowbar and pickaxes. That D. W. 2 arrived at the spot and took some steps finds support from the testimony of P. W. 11 who has stated that D. W. 2 and constable came to the spot and locked the damaged tea stall as well as the Nijjog house.

It has been argued that the evidence of D. W. 2 should be disbelieved as no seizure list relating to the seizure of crowbar and pickaxes has been prepared. Failure to prepare a seizure list or loss of the seizure list, if one was prepared, may show laches or dereliction of duty on the part of D. W. 2 but hardly justifies his testimony of what he claims to have seen being disbelieved. The Inspector (D. W. 1) who came subsequently after the F. I. R. was lodged found a hole in the separating wall and also found both the Nijjog Office and the tea stall locked which at his direction were opened by D. W. 2. The evidence of defendants Nos. 1 to 4 examined as D. Ws. 6 to 9 thus finds ample corroboration from the unimpeachable evidence of D. Ws. 1 to 3 which clearly establishes that on that day an occurrence did take place, during the course of which, the separating wall between the tea stall and the Nijjog was partially damaged, the furniture and articles of the tea stall were littered and D. W. 2 had to take steps in locking both the places to prevent the situation from further deteriorating and getting worse.

Therefore, the report by defendant No. 1 in Ex. 4 that some persons belonging to the Brahmin Nijjog with whom his relations were not cordial entered his stall taking advantage of the situation created by fire, damaged the wall and tried to commit mischief in respect of other properties cannot be said to be false or made without any reasonable and probable cause. Though an occurrence took place during the course of which certain acts were committed as alleged by defendant No. 1 in Ex. 4, the further question arises whether defendant No. 1 had reasonable and probable cause to implicate all the appellants as participants in the commission of the aforesaid acts, and if some of them were implicated without reasonable and probable cause, whether the same can be said to be malicious. Mr. Mohapatra for appellants contends that even if the occurrence as alleged is found to have taken place, and as such, report of the said occurrence was not without reasonable and probable cause, the evidence does not disclose that there was any reasonable and probable cause for implicating plaintiffs Nos. 2 to 4, 6 and 8.

It is argued by him that these plaintiffs were implicated as participants in the alleged criminal acts out of a malicious motive simply because they were members of the Brahmin Nijjog with whom the relation of defendant No. 1 was anything but cordial. Therefore, so far as these plaintiffs are concerned, in any view of the matter, they will be

entitled to damages. There appears to be some force in this contention.

24. The trial Court while assessing the evidence has not applied its mind to find out whether there was reasonable and probable cause in levelling the accusations against all the plaintiffs, but has simply proceeded to decide whether there was reasonable and probable cause for lodging a report like Ex. 4. When the accusations by defendant No. 1 were made alleging that he had seen different plaintiffs commit the offences in his presence, their acquittal after trial, as already observed by us, amounts to an acquittal on merits. In such a case, the presumption of absence of reasonable and probable cause being in favour of the plaintiffs, it is for the defendant No. 1 to prove affirmatively that he had reasonable and probable cause for making the accusations against different plaintiffs who are said to have committed the offences in his presence. Each of the plaintiffs other than plaintiffs Nos. 5 and 7, has denied their participation in the occurrence.

On a perusal of the evidence of the D. Ws., we find that there is hardly any evidence of participation in the occurrence by plaintiffs Nos. 2, 3, 6 and 8. Defendant No. 1 examined as D. W. 6 has deposed that plaintiffs Nos. 11 and 12 were instigating standing outside and mentioned the names of Jogi, Madhab and Ghana (Plaintiffs Nos. 1, 9 and 10 respectively) as persons engaged in damaging the separating wall. He has further stated that Bula Panda, who is dead and plaintiff No. 7 dragged him outside the tea stall. Thus, his evidence does not attribute any act to plaintiffs Nos. 2 to 4, 6 and 8 nor does he refer to their presence there. Defendant No. 2 examined as D. W. 7 and defendant No. 3 examined as D. W. 8 also do not implicate the aforementioned five plaintiffs. No doubt, in cross-examination, D. W. 6 has stated that plaintiff No. 6 along with plaintiff No. 1 brought a ladder to break the thatch of the tea stall but there is no corroboration of plaintiff No. 6's participation from any other witness. Further, when the roof of the tea stall had been burnt, the occasion for breaking the thatch could not have arisen.

Defendant No. 4 examined as D. W. 9 has implicated only plaintiffs Nos. 1, 9 and 10 as persons engaged in damaging the wall. He, no doubt, mentions that plaintiffs Nos. 3, 4 and 8 entered the tea stall, but was confronted with his deposition in the criminal Court where he did not mention their names. Even defendants Nos. 1 to 4 whose evidence cannot be considered disinterested substantially implicate only plaintiffs Nos. 1, 9 and 10 in the alleged commission of

acts of damaging the wall during the course of occurrence. D. W. 1 arrived at the spot much later and is not competent to speak about the actual participants in the occurrence. D. Ws. 2 and 3 are disinterested persons. D. W. 2 while saying that he saw plaintiff No. 7 shouting that the wall should be demolished when some persons were removing the furniture from the stall and others were engaged in digging the wall, has expressed his inability to remember the names or to identify any of the plaintiffs as persons engaged in the commission of the acts.

D. W. 3 who arrived at the spot while the occurrence was going on has expressed his inability to name or identify any of the persons engaged in breaking the wall. He has, however, identified plaintiff No. 4 as one of the persons who was standing inside the tea stall while different acts were being committed, though he says that he did not see plaintiff No. 4 doing anything. His evidence shows that plaintiff No. 4 was among the persons who had entered the tea stall. Admittedly, plaintiff No. 4 is a member of the Brahmin Nijjog. When some members of the Nijjog were engaged in the commission of various acts and plaintiff No. 4 was also found there, the impression or honest belief of defendant No. 1 that he was one of the miscreants in those circumstances cannot be said to be unreasonable. Therefore, though there is no evidence that plaintiff No. 4 was actually engaged in the commission of some acts, the accusation by defendant No. 1 implicating him in the participation of acts cannot be said to be without any reasonable and probable cause.

So far as D. W. 5 is concerned, his evidence has been challenged as interested. Even apart from it, he only names plaintiff No. 1 as among the persons who were making Golmal. Thus, taking the evidence adduced on the side of defendants at its best, all it purports to show is that defendant No. 1 had reasonable and probable cause for levelling accusations against plaintiffs Nos. 1, 4, 9 and 10. As regards the other four plaintiffs Nos. 2, 3, 6 and 8, neither defendants Nos. 1 to 4 nor D. Ws. 2, 3 and 5 speak anything about their participation in the commission of the acts complained of nor their presence inside the tea stall when the occurrence took place. Therefore, when defendant No. 1 included these four plaintiffs in the category of accused alleging that he witnessed them participating in the commission of various offences and they were acquitted after trial on merits, and in the absence of any evidence before the civil Court that any of them took any part in the commission of the alleged offences, it

cannot be said that there was reasonable and probable cause for levelling accusations against them and implicating them in the role of accused. In these circumstances, our finding is that though there was reasonable and probable cause for making the report about the occurrence which took place on that day, and making accusations against some of the other plaintiffs Nos. 1, 4, 9 and 10, there was no reasonable and probable cause in making accusations against plaintiffs Nos. 2, 3, 6 and 8.

25. Coming to the question of malice, it is an element that can be established by inference from circumstances and cannot be proved by direct evidence. 'Malice' means the presence of some improper and wrongful motive, that is to say, an intent to use the legal process in question for some other than its legally appointed or appropriate purpose. As already stated, bad blood existed between defendant No. 1 and members of the Brahmin Nijog. Plaintiffs Nos. 2, 3, 6 and 8 are admittedly members of the Brahmin Nijog. Therefore, when defendant No. 1 found that some members of the Brahmin Nijog were responsible for committing certain acts in relation to his properties, it is not unlikely that he availed of the opportunity of implicating others even though they were not present and did not participate in any of the acts. Levelling of accusations of commission of different offences against plaintiffs Nos. 2, 3, 6 and 8 is Ex. 4 about whose participation or presence in the various acts alleged there is absolutely no evidence, is in the circumstances indicative of improper and wrongful motive and the necessary inference is that it was malicious. Therefore, we find that so far as plaintiffs Nos. 2, 3, 6 and 8 are concerned, there was absence of reasonable and probable cause and the prosecution was malicious. As such, they will be entitled to damages.

26. Regarding the quantum of damages, the assessment made by the trial Court is Rs. 200/- for plaintiff No. 2 and Rs. 150/- for each of the plaintiffs Nos. 3, 6 and 8 for loss of reputation, physical pain and mental agony; Rs. 50/- each for loss of occupation, besides a consolidated amount of Rs. 750/- towards legal expenses incurred in defending themselves in the Criminal Court. We accept the assessment of damages made by the trial Court under the two heads, i.e., loss of reputation, physical pain and mental agony and loss of occupation. Regarding the legal expenses incurred in defending themselves in the criminal Court, the assessment was made at Rs. 75/- for defence of all the ten plaintiffs. As only four of them are entitled

to damages, we reduce the amount to Rs. 300/-.

27. In the result, the appeal by plaintiffs Nos. 1, 4, 7, 9, 10, 11 and 12 (appellants Nos. 1, 4, 6 and 8 to 11 respectively) fails and is dismissed. The appeal by plaintiffs Nos. 2, 3, 6 and 8 (appellants Nos. 2, 3, 5 and 7 respectively) succeeds in part. Appellant No. 2 is entitled to a decree for Rs. 250/-; each of the appellants Nos. 3, 5 and 7 to a decree for Rs. 200/- and all the four jointly to a decree for a consolidated amount of Rs. 300/- towards legal expenses. As each of the parties has partially succeeded in this appeal, each party will bear his costs incurred throughout.

28. ACHARYA, J.:— I agree.

Order accordingly.

AIR 1970 ORISSA 100 (V 57 C 37)

B. K. PATRA AND S. ACHARYA JJ.
Chintamani Das and others, Appellants
v. The State, Respondent.

Criminal Appeal No. 96 of 1967, D/- 2-9-1969, from Order of S. J., Balasore, D/- 24-7-1967.

(A) Evidence Act (1872), Section 33 — Applicability — Requirements — Right and opportunity to cross-examine — Effective exercise of right not necessary — Opportunity is sufficient — AIR 1923 Oudh 726, Diss. from.

One of the requirements for application of Section 33 is that the adverse party in a proceeding should have the right and opportunity to cross-examine. It does not say that the opportunity should have been availed of or the right should have been exercised. If opportunity for cross-examination was offered, but the party did not avail himself of the right and opportunity, the deposition would be clearly admissible. Once the evidence is admissible what weight should be attached to that evidence is a different matter and must necessarily depend upon other facts and circumstances of the case. To say that the evidence of such a witness, who was not cross-examined in spite of the right and opportunity being there, should not be accepted without due corroboration, is to import into Section 33 a limitation which is not there. AIR 1952 Mad 165, Foll.; AIR 1925 Oudh 726, Diss. from.

(Para 6)

There cannot be any objection to act on evidence of such witness alone, but when the accused persons are being tried on a serious charge like murder, the Court should seek for some corroboration to the evidence given by such single eye-witness.

(Para 9)

KM/KM/F255/69/CWM/R

(B) Evidence Act (1872), Sections 17, 18 and 30 — Charge under Section 302/149 and Section 120-B, I. P. C. — Statement by accused under Section 164, Criminal P. C. — Accused exculpating himself but only admitting his presence at the place of occurrence — It can only be treated as admission of the fact of his presence — Statement does not amount to confession and what is stated by accused against co-accused cannot be used as evidence against other co-accused.

(Para 7)

(C) Evidence Act (1872), Section 5 — Credibility of witness.

There is nothing unusual, having regard to the habits of Adibasis in their conduct in not disclosing the occurrence until questioned by the police. There is a natural tendency on the part of such people not to get mixed up in such matters.

(Para 7)

Cases Referred: Chronological Paras

- (1952) AIR 1952 Mad 165 (V 39) = 6
 1952 Cri LJ 344, In re Bora Narasimhulu
 (1936) AIR 1936 Pat 34 (V 23) = 6
 17 Pat LT 101, Mt. Horil Kuer v. Rajab Ali
 (1925) AIR 1925 Mad 497 (V 12) = 6
 ILR 48 Mad 1, Maharaja of Kolhapur v. Sundaram Ayyar
 (1925) AIR 1925 Oudh 726 (V 12) = 6
 26 Cri LJ 1236, Sarju Singh v. Emperor

H. Kanungo and R. N. Mohanty, for Appellants; U. K. Nanda for Government Advocate, for Respondent.

PATRA, J.:— The five appellants along with three others who have been acquitted were placed on trial before the Sessions Judge, Balasore on charges under Sections 302/149 and 120-B, I. P. C. on the allegation that they conspired to murder one Ramchandra Choudhury and that in pursuance of the said conspiracy they on the 24th November, 1965 formed an unlawful assembly with the common object of committing the aforesaid murder and did in furtherance of the common object commit murder. Eight other persons were also charged for conspiracy but they were also acquitted. Of the 16 accused thus placed on trial, the five appellants alone were found guilty on both the charges and convicted and sentenced to imprisonment for life under Section 302/149, I. P. C. No further sentence was imposed on them for their conviction under Section 120-B, I. P. C.

2. The deceased Ramchandra Choudhury was practising as an Advocate at Nilgiri but was residing in his ancestral house in mouza Narayanpur which is at a distance of about 12 miles from Nilgiri. He used to come daily on his bicycle

from his village to attend the Court at Nilgiri and return home in the evening. The appellants are all inter-related, and there is evidence to show that their relationship with the deceased was far from cordial. Many incidents have been proved to show that misunderstandings had existed between the deceased and some or all of the accused persons. Some of the appellants cultivated lands under him and it is stated that the deceased used to harass them in many ways. The last of such disputes was a proceeding under Section 145, Criminal P. C. initiated by the Police at the instance of the deceased on 21-11-1965 against the appellant No. 5 Nityananda Bagh. It is against this background that the occurrence in this case took place.

3. The prosecution case is that on 24-11-65, the deceased left his house at about 10 A. M. on a cycle (M. O. XII) for Nilgiri. The road from his village to Nilgiri passes through a jungle called Bhalukasuni jungle. When the deceased Ramchandra reached that point of the road, appellant No. 1 Chintamani, Goutam (A/2) and Nityananda (A/5) suddenly appeared on the road. Nityananda assaulted the deceased on his head with a bamboo lathi and Goutam pushed his cycle to one side of the road as a result of which the deceased fell down on the ground. Thereafter Bhikari Bhuyan (A/3), Sanatan Bhuyan (A/4) and three others, namely, Kangali Bhuyan, Bansidhar Bhuyan and Narayan Bhuyan, since acquitted dragged the deceased into the said jungle and threw him in a Nala where appellant Goutam Bhuyan, Bhikari Bhuyan, Nityananda Bag and Bansidhar Bhuyan crushed the head of the deceased with boulders resulting in his instantaneous death. P. W. 13 Narendra Nayak who shortly afterwards was coming from Naranpur towards Balasore found the cycle (M. O. XII), hat (M. O. XIV) and handkerchief (M. O. XIII) belonging to the deceased lying by the side of Naranpur—Bhalukasuni road. He informed about it to P. W. 7 Pratap Chandra Behera and Pratap accompanied by Kailas Chandra Panda went to the spot and having found the said articles went to Nilgiri and reported about the missing of the deceased at the P. S. On the basis of this information a Station Diary entry was made by the Police. P. W. 6 Surendranath Behera, who is the brother-in-law of the deceased on coming to know that the cycle, hat etc., of the deceased were found lying on the road went to the spot and discovered the dead body inside the Nala, and lodged F. I. R. (Ext. 2) at the Police Station at about noon that day. The police proceeded to the spot, held the inquest, sent the dead body for post-mortem examination

and seized the cycle, hat and the handkerchief and also three pairs of slippers (M. Os. III, IV and V) which were lying on the road at the spot. In the course of investigation, the houses of some of the accused persons were searched and certain articles which were found to be blood-stained were seized. Appellant No. 1 Chintamani Das was arrested on 5-12-1965 and while in custody he made a statement to the Police in consequence of which a black shirt (M. O. XVII) and a knife (M. O. XXII) were recovered from his house. On 7-12-65, his confessional statement was recorded by the S. D. M., Nilgiri. P. W. 12, the Medical Officer in charge of Nilgiri hospital held the post-mortem examination on the dead body of Ramchandra Chowdhury at 9.30 A. M. on 25-11-65 and found as many as 12 external injuries on his person, of which injuries nos. 6 to 12 mentioned below were in the region of the head.

"(6) One ante-mortem lacerated wound 5" X 3" breadth cranial cavity found over vault of skull. The brain matter was found protruding out.

(7) One lacerated ante-mortem wound 3½" X 3" cranial cavity was found over left frontal region.

(8) One ante-mortem lacerated wound 1½"x1" over bridge of nose.

(9) One ante-mortem lacerated wound 2"x1" cranial cavity was found extending from outer angle of left eye. The eye-ball was seen pushed inwards into cranial cavity.

(10) One ante-mortem lacerated wound 2½"x2" cranial cavity was seen over outer side of left fronto-temporal region.

(11) One ante-mortem wound 2½"x2"x scalp deep was found over right parietal temporal region.

(12) One ante-mortem lacerated wound 1"x½" skin deep was found over left side of chin".

On dissection, he found the following:

(1) One comminuted fracture in occipital bone. A piece of bone length 1½"x1" was seen pushed inwards pressing the brain matter.

(2) Longitudinal fracture was seen on left parietal bone antero-posteriorly extending from the injury No. 1.

(3) The comminuted fracture was seen in frontal bone and the bone was found crushed into pieces.

(4) Communitated fracture was seen in left temporal left zygomatic and nasal bones and the bones were found broken into pieces.

(5) The left maxillary bone was found fractured into two halves. The central incisor tooth found broken and dislocated.

(6) Fracture of mandible was seen in body of left side and the bone was found into two halves.

(7) The meninges and the brain matter extensively lacerated and the contour lost and half of its portion was found absent.

(8) Extensive dark clotted blood under the skin and subcutaneous tissues under the injuries Nos. 6, 7, 8, 9, 10 and 11".

In his opinion, the external injuries Nos. 6 to 12 with their corresponding internal injuries could have been possibly caused by boulders, although in cross-examination it was elicited from him that these external injuries Nos. 6 to 12 could also be caused by heavy, blunt and hard laths and iron rods. He stated that internal injuries 3 and 4 especially were more likely to have been caused by boulders. On the requisition of the Police, the doctor (P. W. 12) also took nail scrapings of appellant Goutam Bhuyan which on examination by the Serologist were found to contain blood.

4. After completion of the investigation, the accused persons were put on trial. All the accused persons pleaded not guilty and denied their complicity in the alleged conspiracy and the murder of the deceased. The learned Sessions Judge after a careful examination of the evidence on record found the five appellants guilty, relying mainly on (1) Ext. 31, the deposition of Panchu Majhi, who was examined in the Court of the Magistrate but died before he could be examined in the Court of Session; (2) the confessional statement of appellant Chintamani Das which the learned Judge treated not as a confession but as an admission; (3) motive for the alleged crime; and (4) certain circumstantial evidence.

5. That the deceased Ramchandra Choudhury was brutally murdered on 24-11-65 while he was on his way to Nilgiri does not admit of any dispute and has been satisfactorily established, and that he died as a result of shock, haemorrhage and coma on account of the head injuries that he had received. The only question is whether the appellants had taken part in the commission of the murder. There are two eye-witnesses—Burundu Nayak (P. W. 18) and Panchu Majhi. Panchu Majhi was examined in the Court of the committing Magistrate and this is what he had deposed:

"I know deceased Ram Chandra Choudhury. He died in the month of last Margasir. On that day when he died at about 9 A. M. in the morning I had been to Tinkosia jungle to collect herbs. While I was coming on the road after collecting some tooth sticks I heard a sound "Ho" from the direction of the village Sardiha. At that time deceased Rambaboo was coming on the road from that side. Village Naranpur also lies in that side. He was coming on a cycle.

While he was coming suddenly three persons appeared on the road from the eastern side. They were accused Nitya Bag, one man wearing black dress, and accused Gautam Bhuyan (identified accused Nitya Bag and accused Goutam Bhuyan and Chintamani Das saying that Chintamani Das was his man wearing black dress in dock). Accused Nityananda Bag dealt a lathi blow on the head of Ram Baboo. Accused Goutam Bhuyan caught hold of the back side of the cycle of Ram Baboo and pushed to one side of the road. Ram Baboo fell down on the ground. Deceased Ram Baboo removed his shoe from his right leg and with it assaulted to the head of accused Nitya Bag. Except the above three accused persons, five others also came and were on the left side of the road. Those five were accused Bansi Bhuyan, Naran Bhuyan, Bhikari Bhuyan, Kangali Bhuyan and Sanatan Bhuyan (identifies accused persons Bansi, Narayan and Sanatan in dock and also identifies accused Kangali as Bhikari and Bhikari as Kangali in the dock). These five persons dragged Rambaboo down the road to a nala and threw him. Accused persons Goutam Bhuyan, Bansi, Nityananda Bag and Bhikari crushed the head of Ram Baboo with stone boulders (patharare Chhechi Munda Chepa Kari-gele). First of all Ram Baboo was crying "Rakshya Kara, Rakshya Kara" and was groaning "Gan, Gan" before his death. Ram Baboo died at the spot. After Rambaboo died, accused Nitya Bag ran towards Bhalukasuni, Narayan Bhuyan and the accused wearing black dress ran towards Naranpur. These three accused persons fled away with cycle. Rest of the accused persons present there having no cycle ran towards jungles. I ran also to my house. Out of eight accused persons, two had lathis. When the first lathi blow was dealt by accused Nityananda Bag on the head of the deceased, his hat fell down being struck by lathi.

(Cross-examination on behalf of all the accused persons declined).

Before he was examined in the Sessions Court he died and under Section 33 of the Evidence Act his deposition was admitted in evidence and is marked Ext. 31. His evidence, if accepted, implicates not only all the five appellants in the murder, but also three other persons who have been acquitted.

6. Mr. K. Kanungo appearing for the appellants contends that although in view of Panchu's death his previous deposition is admissible in evidence, it should not be acted upon without due corroboration in material particulars. According to him, this should be so because the witness had not been cross-

examined. One of the requirements for application of Section 33 of the Evidence Act is that the adverse party in a proceeding should have the right and opportunity to cross-examine. It does not say that the opportunity should have been availed of or the right should have been exercised. If opportunity for cross-examination was offered, but the party did not avail himself of the right and opportunity, the deposition would be clearly admissible. Once the evidence is admissible what weight should be attached to that evidence is a different matter and must necessarily depend upon other facts and circumstances of the case. To say that the evidence of such a witness, who was not cross-examined in spite of the right and opportunity being there, should not be accepted without due corroboration, is to import into Section 33 a limitation which is not there. In support of his contention, Mr. Kanungo relies upon a decision of the Patna High Court in AIR 1936 Pat 34, (Mt. Horil Kuer v. Rajab Ali). Rowland, J. who decided the case quoted with approval a dictum of Kumaraswami Sastri, J. in ILR 48 Mad 1 = (AIR 1925 Mad 497), *Maharaja of Kolhapur v. Sundaram Ayyar*. The question that was raised in the Madras case was as to the admissibility of the deposition of a witness who was ill when she was examined in chief and her examination was closed after a few sentences in cross-examination were recorded and she died before the cross-examination could be resumed. Referring to that evidence, Kumaraswami Sastri, J. observed:

"I do not think that the evidence can be rejected as inadmissible though it is clear that evidence untested by cross-examination on a question like present can have no value. I think the correct rule is that the evidence is admissible but that the weight to be attached to such evidence should depend on the circumstances of each case and that though in some cases the Court may act upon it, if there is other evidence on record, its probative value may be very small and may even be disregarded".

While observing that the law on the subject has been correctly stated in the above passage, Rowland, J. was careful to add what he understood the observations to mean—

"I do not understand the observations of the learned Judge to mean that there is any hard and fast rule that the probative value of such evidence is small, and in my view there is no such rule. The weight to be attached to the evidence depends on the circumstances and the Court should look at the evidence carefully to see whether there are indications

that by a completed cross-examination the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached".

The question for consideration in the Patna case was regarding the evidence of one Jallal Pandey who being too ill to come to Court was examined on commission. He was examined in chief and cross-examined in part. The cross-examination was adjourned and the witness died before the cross-examination could be resumed. Nonetheless, it was relying on the evidence of this witness that the case was decided. Reliance is also placed on Sarju Singh v. Emperor, AIR 1925 Oudh 726, where the learned Additional Judicial Commissioner referring to the evidence of one Chodi who was examined in the committing Magistrate's Court and was not cross-examined but who died before he was examined in the Court of Session stated that in the absence of cross-examination the evidence is of little or no value. The learned Judge however, did not elaborate this point and gave no reasons in support of his conclusion. As against this we have a Bench decision of the Madras High Court in Re: Bora Narasimulu, AIR 1952 Mad 165. In that case the only eye-witness was a young boy who was the son of the deceased and had seen the occurrence in which both his parents were murdered. He was examined at the time of the preliminary enquiry but subsequently he could not be traced. In spite of the diligent searches made by the police authorities. After being satisfied that he was not traceable, his evidence was admitted under Section 33 of the Evidence Act but it was assailed on the ground that he was not cross-examined effectively. The learned Judges did not accept this plea and acted on the evidence of the boy saying that what is contemplated under Section 33 is an opportunity to cross-examine and not an effective use of it. With great respect we are in complete agreement with this view.

7. We should therefore consider the evidence of Panchu Majhi in the same manner as it would have been considered had he given evidence before the Sessions Judge. It may be that after such examination, we may not accept it but that would not be on the ground that he was not cross-examined in the committing Magistrate's Court. Now the question is whether there is anything inherently improbable in the story given by Panchu Majhi or whether it suffers from any other defect which warrants its rejection. There is nothing to show that he had any motive to depose against the appellants. As a matter of fact, he belongs to a village different from the

one to which the appellants belong. Excepting appellant Nityananda Bag and Goutam he did not even know the other culprits by name and only identified them in Court out of the 16 persons who were present in the dock. He described appellant Chintamani Das as a man wearing a black dress and Chintamani Das after his arrest made a statement in consequence of which a black shirt M. O. XVII was recovered from his possession. It is next argued that the fact that Panchu Majhi did not disclose about what he had seen till he was examined by the Police on 29-11-65, is a circumstance which throws considerable doubt on the veracity of his testimony. Panchu Majhi is an Adibasi by caste and there is nothing unusual, having regard to the habits of such people, in their conduct in not disclosing the occurrence until questioned by the Police. There is a natural tendency on the part of such people not to get mixed up in such matters. A part of his testimony regarding the presence of appellant Chintamani Das at the place of occurrence receives corroboration from the latter's statement recorded by the Magistrate under Section 164 Cr. P. C. It was next argued that his evidence in some particulars differs from the statement made by Chintamani before the Magistrate. Chintamani's statement before the Magistrate being exculpatory in nature was rightly held by the Sessions Judge as not amounting to a confession; but it was treated only as an admission of Chintamani Das about his presence at the spot. What Chintamani stated against the other accused persons cannot therefore be used as evidence against them. That being the position, we cannot compare certain statements made by Chintamani against the other accused persons with Panchu's statement regarding those accused persons and point out infirmities in the latter's testimony. We may at the same time make it clear that even if such comparison is permissible in law, still the little difference that is there is not in any material particulars sufficient to discredit Panchu's testimony. We are therefore, satisfied that Panchu's evidence is not only admissible in evidence but is also acceptable.

8. The other eye-witness to the occurrence is P. W. 18 Burundi Nayak aged about 52 years. He is a resident of Mouza Matiali. He stated that on the date of occurrence he was going to the house of his father-in-law Jagu Biswal (P. W. 32) situate in Mouza Kusumia. One going from Matiali to Kusumia has to pass along the Naranpur-Bhalukasuni road. He stated that while he was proceeding on the road, the deceased Ramchandra Choudhury came on a cycle from behind him and went ahead of him.

As there was a curve ahead on the road, he could not thereafter see the deceased. But shortly afterwards he heard a groaning sound and found the cycle of the deceased and his hat lying on the road at a distance of about 200 feet. He then saw that seven persons had caught hold of the deceased and were dragging him towards the jungle and another person holding a lathi was following them. Out of fear, he ran towards the jungle situated on the other side of the road and proceeded to village Kusumia and narrated what he saw to his father-in-law. His evidence receives some corroboration from that of his father-in-law (P. W. 32) who says that on reaching the house, his son-in-law Burundi informed him that while he was coming on the Naranpur-Bhalukasuni road, he saw eight persons dragging Ramchandra towards the jungle. P. W. 18 stated in Court that out of the eight persons he saw, he knew by name only appellant Nityananda Bag and one Narayan Bhuyan who was acquitted, and that he could identify the rest whose names he did not know. But standing in the witness box he was however unable to identify any of those accused persons who were standing in the dock at a distance of 12 feet from the witness box. He had to go near them and identified some of the accused persons. He admitted in Court that his eye sight was weak since about 2 years. The learned Judge therefore, thought, and in our opinion rightly, that it could not have been possible for this witness to identify the accused persons on the date of occurrence from a distance and therefore, rejected his testimony. Nothing however has been elicited from him in cross-examination to show that he has got any motive to depose against the accused. It may be that having seen the occurrence he thereafter drew heavily on his examination regarding the identification of the accused persons, but we see no reason why we should disbelieve his testimony, that he saw the deceased being dragged by eight persons towards the jungle. To that extent it corroborates the testimony given by Panchu and is corroborated by Panchu's evidence. That immediately after the incident he mentioned about it to his father-in-law lends further assurance to his testimony that eight persons had taken part in the occurrence.

9. We now take up the evidence available against each of the appellants.

(a) Appellant No. 1 — Chintamani Das: The evidence of Panchu Majhi shows that this appellant who was wearing a black shirt came to the scene of occurrence along with Nityananda Bag and Goutam Bhuyan and was all along present at the spot till the deceased was killed. A black shirt (M. O. XVII) was recovered

from his possession and in his examination under Section 342, Cr. P. C. he admits it to be his. In a statement recorded by the Magistrate under Section 164, Cr. P. C. on 7-12-1965 (Ext. 10) he admits his presence at the place of occurrence where the deceased was killed. The statement made by this accused before the Magistrate was however retracted in the Sessions Court where he stated that he was severely assaulted by the Police and was coerced to make the statement. He also alleged that he was detained in the Thana for 5 days and pressure was put on him to make the statement. This was denied by the Investigating Officer P. W. 35. The I. O. however admitted in cross-examination that Chintamani Das was brought to the Police Station on 1-12-1965 and 2-12-1965 and that he was arrested on the 5th. Even if it is assumed that he was being interrogated from 1st to 5th it would not follow therefrom that the statement made by him before the Magistrate subsequently was involuntary. The Magistrate who recorded his deposition has deposed that he gave Chintamani sufficient caution and time for reflection and was satisfied that the statement made by him was voluntary. We are, therefore, satisfied that the conclusion of the learned Sessions Judge that the statement made by Chintamani before the Magistrate was voluntary is correct. We are therefore, satisfied that Chintamani along with his associates had taken part in the murder of the deceased.

(b) Appellant No. 2 — Goutam Bhuyan: Panchu Majhi has implicated him as one of the three persons who first appeared at the scene of occurrence along with Nityananda Bag and Chintamani Das, and Panchu also stated that it is this appellant who caught hold of the cycle of the deceased and later struck him with a stone. During the search of his house, the I. O. recovered the shirt (M. O. XIX) which was found stained with human blood. True it is that the brothers of the appellant also reside in that house and the appellant also disowned the ownership of the shirt, but he did not take the plea that it belongs to one of his brothers. P. W. 23 who is a resident of Mouza Narayanpur was present at the time the house of the appellant was searched and the shirt (M. O. XIX) was seized. He stated that he had seen this appellant wearing the shirt (M. O. XIX). The mere fact that during the examination by the Police P. W. 23 did not make any statement regarding the ownership of the shirt cannot be a ground to reject his evidence regarding the identification of the shirt. The nail cuttings (M. O. XXV) of this accused which the doctor had taken were found stained with

blood on chemical analysis. It is true that in the absence of any finding that it was human blood and that it belongs to the same group as that of the deceased, this evidence is not decisive but in the absence of any explanation, it is a circumstance which taken in conjunction with the other evidence against this appellant has its own significance. We are, therefore, satisfied that this appellant is one of the assailants of the deceased.

(c) Appellant No. 3 — Bhikari Charan Bbuyan: The only acceptable evidence against him is that of Panchu which has already been discussed. Another piece of evidence against him on which the prosecution relies is the recovery of a pair of slippers (M. O. IV) from the place of occurrence. P. W. 4, a resident of Mouza Narayanpur has identified the pair of slippers as belonging to the appellant Bhikari. He however admits that such types of slippers are sold in thousands in the market and that there is no special mark of identification in M. O. IV. It is also admitted by him that on the day following the occurrence, Police had shown the slippers to him in the School house at Narayanpur. No test identification parade had been held in respect of the slippers. In these circumstances, the evidence of P. W. 4 regarding the identification of slippers does not in our opinion carry any weight and cannot be considered to be an incriminating circumstance against the appellant. The position therefore, is that excepting the evidence of Panchu, there is no other evidence against this appellant. Legally, there cannot be any objection to act on Panchu's evidence alone, but when the appellants are being tried on a serious charge like murder, the learned Sessions Judge took the precaution, and in our opinion, rightly to seek for some corroboration to the evidence given by a single eye-witness. The only circumstance which the learned trial Judge considered to afford corroboration to Panchu's testimony, is not in our opinion worthy of acceptance. In these circumstances, this appellant is entitled the benefit of doubt.

(d) Appellant No. 4 — Sanatan Bhuyan: Panchu has implicated this appellant in the commission of the crime. Seeking for corroboration of Panchu's evidence, the learned Sessions Judge relied on the evidence of P. W. 30 who stated that at about 8.40 A. M. on the date of occurrence he had gone to appellant Chintamani Das who was the tax collector of the Grama Panchayat for obtaining cycle licence and saw Sanatan sitting with Chintamani. This appellant's presence with Chintamani at the latter's house shortly before

the occurrence took place is relied upon as a circumstance to corroborate Panchu's evidence. We fail to understand how this can be so, Chintamani, it is said is the tax collector of the Gram Panchayat. Just as P. W. 30 had been to Chintamani it is not unlikely that this appellant also had gone to him for some such purpose. The meeting of this appellant with Chintamani was in the latter's house whereas the occurrence took place at an entirely different place. Therefore, we find in the case of this appellant also that the evidence given by Panchu against him is not corroborated. This appellant therefore, is also entitled to the benefit of doubt.

(e) Appellant No. 5 — Nityananda Bagz Panchu has implicated him in the commission of the offence. P. W. 15 is an agricultural overseer at Balasore. In the year 1955 he had sold a piece of land to this appellant. P. W. 15 says that on 24-11-65 at about 3 P. M. Nityananda met him at the Kutcheri and requested him to tell the year of his purchase. It seems, he took him to a Moharir and applied for a certified copy. The next day the appellant again approached P. W. 15 and requested him to persuade the Moharir to say that he (appellant) had come to Balasore at 10 A. M. on the previous day i.e., 24-11-65. P. W. 15 asked him the reason as to why he was making the request and it seems that the appellant told him that he was apprehending that the Police might arrest him. P. W. 15 refused to comply with the request. It was rightly argued on the prosecution side that this is a circumstance which shows that the appellant was attempting to create evidence for an alibi. There is evidence to show that after this occurrence, the appellant disappeared from his village and it is only on 2-2-1966 that he could be arrested. The appellant admits having left the village after the occurrence but his explanation is that out of fear for Police torture he was staying in a relative's house in village Khanta in the district of Mayurbhanj and ultimately surrendered himself before the Police. There does not appear to be sufficient reason why if he is innocent of the crime he should have been afraid that the Police would arrest and torture him. This circumstance coupled with the testimony given against him by Panchu appears to be significant and taken together with his attempt to create an alibi lends considerable support to Panchu's direct testimony against him. We are satisfied that his complicity in the crime has been established beyond all reasonable doubt.

10. It is clear from the evidence of Burundi P. W. 18 that 8 persons had taken part in the murder of the deceased.

ed, although according to our finding Burundi could not identify who the culprits were due to his defective eye-sight. The complicity of the appellants Chintamani Das, Goutam Bhuyan and Nityananda Bag in the crime has been established beyond doubt. It therefore, follows that these three persons along with five others whose identity could not be established, had formed an unlawful assembly with the common object of murdering Ramchandra Choudhury and in pursuance of their common object committed the murder. These three persons are therefore, rightly convicted under Section 302/149, I. P. C.

11. So far the charge under Sec. 120-B is concerned, evidence was let in in the prosecution side against not only the five appellants but also the 11 other persons who were put on trial but who have since been acquitted. The evidence let in against all of them relating to the charge of conspiracy is practically common. As the learned Judge was unable to accept the evidence of conspiracy against the 11 other accused persons, it would be unsafe to rely on the very testimony to convict the present appellants on that charge. We would, therefore, set aside the conviction of all the appellants on the charge under Section 120-B, I. P. C.

12. In the result, we would uphold the conviction of appellants Chintamani Das, Goutam Bhuyan, and Nityananda Bag under Section 302/149, I. P. C. and the sentence of imprisonment for life imposed upon them. We would set aside the conviction of appellants Bhikari Charan Bhuyan and Sanatan Bhuyan under Section 302/149, I. P. C. and the sentence imposed on them and direct that they be set at liberty forthwith. The conviction of all appellants under Section 120-B, I. P. C. is also set aside.

13. ACHARYA, J.— I agree.
Order accordingly.

AIR 1970 ORISSA 107 (V 57 C 38)

B. K. PATRA, J.

State, Petitioner v. Balaram Singh and another, Opposite Parties.

Criminal Revn. No. 235 of 1967, D/- 26-9-1969, against order of Addl. Dist. Magistrate (Judl.) Cuttack, D/- 1-4-1967.

Criminal P. C. (1898), S. 159 — Investigation of cognizable offence already taken up by police — Magistrate cannot direct police to stop investigation and order magisterial enquiry — Observation in (1963) 29 Cut LT 164 Diss. from.

In a case falling under sub-section (1) of Section 157 Cr. P. C. where the police has already taken up an investigation of

a cognizable offence a Magistrate cannot direct the police to stop investigation and substitute a magisterial enquiry by himself or by his subordinates. AIR 1945 P. C. 18 and AIR 1949 Lah. 204 and AIR 1963 SC 447 and AIR 1956 Pat. 528 Rel. on; Observation in (1963) 29 Cut LT 164 Diss. (Para 4)

The word "direct" which means "command" would only signify that something which was not being done should be done and in Section 159 Cr. P. C., the word "direct" would connote that the Police are not engaged in investigation and the Magistrate orders them to do so. The word "direct" therefore would be meaningless in relation to the investigation by the Police which is already in progress. The Police themselves are doing a thing and no direction from the Court to do that which has already been done would be necessary or called for. The occasion to "direct an investigation" would therefore arise where the investigation is not done by the Police as in a case covered by Proviso (b) to Section 157 Cr. P. C. (Para 4)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 447 (V 50) =

1963 (1) Cri LJ 341, State of W.

B. v. S. N. Basak

5

(1963) 29 Cut LT 164 = ILR (1962)

Cut 830, Kashinath Misra v.

6

Achyutananda Das

(1956) AIR 1956 Pat 528 (V 43) =

1956 Cri LJ 1425, State of Bihar

v. Baijnath Sharma

5

(1949) AIR 1949 Lah 204 (V 36) =

50 Cri LJ 965, Crown v. Moham-

mad Sadiq Niaz

5

(1945) AIR 1945 PC 18 (V 32) =

46 Cri LJ 413, Emperor v.

Khawaja Nazir Ahmad

5

N. V. Ramdas, for Govt. Advocate, for Petitioner; S. Mohanty, for Opposite Parties.

ORDER: The short point that arises for consideration in this case is whether a Magistrate acting under Section 159 Cr. P. C. has got the power to stop investigation by the Police of a cognizable offence while the investigation is already in progress, and to order a magisterial enquiry.

2. Opposite party no. 1 was at the relevant time the Sub-Inspector of Police in charge of the Atgarh Police Station and opposite party no. 2 was the Sub-Inspector of Police in charge of Motor Vehicles in the office of the Superintendent of Police, Cuttack. A first Information Report was lodged against them in the Vigilance Police Station accusing them of having committed offences under Section 161 I. P. C. and section 5 (2) (4) of the Prevention of Corruption Act, 1947 (Act 2 of 1947) and the investigation was taken up by the Deputy Superintendent

of Vigilance, Cuttack. While the matter was pending investigation by the Vigilance Police, opposite party no. 1 filed an application under Section 159 Cr. P. C. before the Additional District Magistrate (Juddl.), Cuttack for staying investigation by the Vigilance Police and for directing magisterial enquiry into the case. The learned A. D. M. (Juddl.) by his order dated 1-4-67 allowed the application and directed the Vigilance Police to stop further investigation and ordered the Sub-divisional Magistrate, Atgarh to make magisterial enquiry into the matter. The correctness and legality of this order is challenged by the State.

3. Chapter XIV of the Code of Criminal Procedure deals with information to the Police and their powers to investigate. When an information is given to an Officer in charge of a Police Station of the commission within the limits of such station of a non-cognizable offence, the Police Officer has no power to investigate into that offence without specific orders from a Magistrate (Section 155 Cr. P. C.). Where, however, information relating to the commission of a cognizable offence is given at a Police Station, the Officer-in-charge of the Station is empowered under Section 156 Cr. P. C. to investigate into it without the orders of a Magistrate. Section 157 Cr. P. C. provides that if from the information received or otherwise, an Officer-in-charge of a Police Station has reason to suspect the commission of an offence which he is empowered under the Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report, and shall then proceed in person, or depute one of his subordinate officers to proceed to the spot to investigate the facts and circumstances of the case. Then follow the two provisos. Proviso (a) says that when any information as to the commission of such offence is given against a person by name and the case is not of a serious nature, the officer-in-charge of a Police Station need not proceed in person or depute a subordinate officer, to make investigation on the spot. Proviso (b) says that if it appears to the officer-in-charge that there is no sufficient ground for entering on an investigation, he shall not investigate the case. Section 159 which is material for our purpose reads thus:

"159. Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code."

It may be noticed that Section 159 Cr. P. C. which confers power on the Magis-

trate either to proceed or to depute a subordinate Magistrate to proceed to the spot to hold a preliminary enquiry into the case does not expressly confer upon him the power to stop investigation by the Police which is already in progress.

4. It is, however, contended on behalf of the opposite parties that when under Section 159 Cr. P. C. power is given to the Magistrate to direct the Police to make an investigation, it is implied that he has also the power to direct the Police to stop investigation. The point for consideration therefore is what are the occasions when the Magistrate can "direct an investigation". The word "direct" which means "command" would only signify that something which was not being done should be done and in Section 159 Cr. P. C., the word "direct" would connote that the Police are not engaged in investigation and the Magistrate orders them to do so. The word "direct" therefore would be meaningless in relation to the investigation by the Police which is already in progress. The Police themselves are doing a thing and no direction from the Court to do that which has already been done would be necessary or called for. The occasion to "direct an investigation" would therefore arise where the investigation is not done by the Police as in a case covered by Proviso (b) to Section 157 Cr. P. C. The real difficulty would arise in a case falling under sub-section (1) of Section 157 Cr. P. C. where the police has already taken up an investigation of a cognizable offence and the question is whether in such a case a Magistrate can direct the Police to stop investigation and substitute a magisterial enquiry by himself or by his subordinates.

5. The leading case on the subject is *Emperor v. Khwaja Nazir Ahmad*, AIR 1945 P. C. 18. That was a case where the District Magistrate under the orders of the Chief Justice of the Lahore High Court ordered the Police to stop investigation into a cognizable offence. Their Lordships while holding that the Court has no power to do so made the following observation:

"In their Lordships' opinion however, the more serious aspect of the case is to be found in the resultant inference by the Court with the duties of the Police. Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India

as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court."

Following this decision, the Lahore High Court in the Crown v. Mohammad Sadiq Niaz AIR 1949 Lah 204 held that S. 159 does not empower a Magistrate to restrain police investigation and order Magisterial enquiry where investigation of a cognizable offence by the Police is already proceeding. The Supreme Court in State of West Bengal v. S. N. Basak AIR 1963 SC 447, has held that Section 154 Cr. P. C. deals with information in cognizable offences and S. 156 Cr. P. C. with investigation into such offences and under these sections the police has the statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and this statutory power of the police to investigate cannot be interfered with by the exercise of power under Section 439 Cr. P. C. or under the inherent power of the Court under S. 561 Cr. P. C. when there was no case pending at the time excepting that the person against whom the investigation has started had appeared before the Court, had surrendered and had been admitted to bail. The same view was emphasized by a Bench of the Patna High Court in the State of Bihar v. Baijnath Sharma, AIR 1956 Pat. 528. In that case a complaint was filed and registered under Section 420 I. P. C. and proceedings were started against the accused and simultaneously police inquiry into the matter was going on with the help of the C. I. D., as the case was of inter-provincial nature and on application of the complainant the Magistrate had ordered withdrawal of the police investigation. The Court held that if both things were allowed to continue simultaneously and if the police comes to the conclusion after completion of their investigation that the complaint is false and submit a report for prosecution of the complainant and if, in the meantime, the cognizance taken by the Magistrate is allowed to stand, two contradictory cases will be pending trial at one and the same time. The resultant position would be that in one case the complainant would be called upon to prove his case and in another the prosecution would be called upon to prove that the complainant's case is false. The Court therefore ordered that the Police investigation should be allowed to continue, and, the order summoning the

accused be quashed. Their Lordships further observed that after the completion of the police investigation, when the police will submit a report to the Magistrate, it will be open to him, after consideration of the Police report and the documents which have been filed by the complainant, to reconsider the whole matter and then to decide what should be done in the circumstances of the case. The point to be emphasized here is that the order of withdrawing the police investigation was quashed.

6. In support of their contention that the Additional District Magistrate had the power to stop investigation and direct an enquiry to be made by a Magistrate, the opposite parties placed reliance on an observation of Narasimham, C. J. in Kasinath Misra v. Achyutananda Das, 29 Cut LT 164. The facts of that case are these: The opposite party lodged information at the Athgarh police station against the four petitioners and two other persons including the then Sub-divisional Officer of Athgarh alleging that at the instigation of the Sub-divisional Officer the other persons trespassed into his compound, broke down a stone wall which he had constructed and put up a new boundary wall after encroaching into his area. The Police registered a case and took up investigation, but as the Sub-divisional Officer himself was named as one of the accused the Superintendent of Police rightly thought that the matter should be reported to the District Magistrate. Further investigation by the Police was therefore stopped and the help of the District Magistrate was sought. The District Magistrate directed the A. D. M. (Executive) to hold a judicial enquiry which was done and he reported that there was a bona fide boundary dispute between the petitioners and the opposite party. The District Magistrate accepted that report and directed the Police to submit final report—mistake of fact or mistake of law. Subsequently on the information of the opposite party, two other cases were registered against the petitioners by the Police and in both of them they filed final reports. Thereupon, the opposite party filed three protest petitions before the S. D. M. (Judl.) challenging the submission of final report by the Police. The S. D. M. treated these petitions as complaints, but without examining the complainant on solemn affirmation and without even discussing the reasons given by the A. D. M. in his enquiry in the previous case, he straightway issued summons against the petitioners observing that the order of the District Magistrate directing the A. D. M. (Executive) to hold a judicial enquiry and the judicial enquiry held by the latter were both illegal in view of the alloca-

tion of functions made between the Judiciary and the Executive in the Executive Instructions issued by Government. His Lordship while pointing out that the Executive Instructions cannot have the effect of amending the Criminal Procedure Code itself held that so long as the District Magistrate functions as "District Magistrate" and the A. D. M. (Executive) also exercises functions as "Additional District Magistrate" under the Code, their action cannot be held to be illegal. It would be manifest from the report that the question whether the Magistrate has got power to stop Police Investigation did not at all arise for consideration in that case. Indeed from the recital of facts it would appear that it is the Superintendent of Police who stopped further investigation by the Police and sought the help of the District Magistrate to get the matter enquired by a Magistrate. But unfortunately in paragraph 5 of the judgment, the following passage occurs:

"5. Thus when the Superintendent of Police reported the matter to the District Magistrate mainly because the Sub-divisional Officer himself was implicated as an accused the District Magistrate had undoubted jurisdiction under Section 159 Criminal Procedure Code to stop investigation and direct an enquiry to be made by a fairly senior officer above the rank of Sub-divisional Officer. He rightly chose the A. D. M. (Executive) for that purpose. There is nothing illegal in his action in ordering an enquiry to be made by the Executive A. D. M. or in latter holding such an enquiry. Similarly, on receipt of his report, the District Magistrate was justified in ordering the Police to submit final report."

The aforesaid statement does not fit in with the statement made in paragraph 2 of the judgment to the following effect that—

"... as the Sub-divisional Officer himself was named as one of the accused Superintendent of Police rightly thought that the matter should be reported to the District Magistrate. Further investigation by the Police was therefore stopped and the help of the District Magistrate was sought. The District Magistrate directed the A. D. M. (Executive) to hold a judicial enquiry."

It therefore appears to me to be clear from the aforesaid statements that the Officer who stopped further police investigation was the Superintendent of Police and not the District Magistrate. The observation of the learned Chief Justice therefore that the District Magistrate had undoubted jurisdiction under section 159 Cr. P. C. to stop investigation and directing an enquiry to be made by a Magistrate was, if I may say so with respect,

unnecessary for the decision of that case, apart from it being not in conformity with law.

7. In the result, I would hold that the order of the learned Additional District Magistrate (Judicial) ordering the Vigilance Police to stop further investigation is clearly illegal. I would therefore allow this application and quash the impugned order dated 1-4-1967 passed by him.

Application allowed.

AIR 1970 ORISSA 110 (V 57 C 39)

G. K. MISRA, C. J. AND

R. N. MISRA, J.

Digambar Panda, Petitioner v. Additional District Magistrate, Dhenkanal, Opposite Parties

O. J. C. No. 174 of 1966, D/- 23-9-1969.

(A) Arms Act (1959), S. 17 (3) (b) — Revocation of licence under — Revoking Authority relying on police report, coming to the conclusion that licensee is rowdy element and threatened to kill some of his opponents with the gun and also suspecting his complicity in some arson cases — Authority, stating that it is undesirable to permit licensee to hold gun in view of his "anti-social activities" — Expression "anti-social activities" clearly includes threat to the security of public peace and public safety — Authority's order cannot be said not containing the reasons in support of his satisfaction within the meaning of S. 17.

(Para 6)

(B) Constitution of India, Art. 226 — Revocation of licence under Arms Act — Speaking order passed by revoking authority — Appeal against revocation dismissed — Appellate order cannot be interfered with in writ petition merely on the ground it does not furnish any reasons for upholding revoking authority's order.

(Para 7)

(C) Arms Act (1959), S. 17 — Order under, revoking licence — Order passed without giving the licensee an opportunity to show cause — Order liable to be quashed being in violation of principle of natural justice, even though Section makes no specific provision for hearing party. AIR 1969 Assam & Nagaland 50 (FB) & AIR 1954 Raj. 264 & AIR 1960 Madh Pra 157 Dissented from.

Where, prior to the cancellation of a licence, under S. 17 (3) (b), no reasonable opportunity is given to the licensee to show cause, then order revoking the licence is liable to be quashed as having been passed in violation of the principles of natural justice. AIR 1957 Mad 692 & AIR 1966 All 265 & AIR 1967 Mys 238.

LM/AN/G25/69/MLD/M

Rel. on; AIR 1969 Assam & Nagaland 50 (FB) & AIR 1954 Raj 264 & AIR 1960 Madh Pra 157 Dissented from.

(Para 16)

No doubt that S. 17 makes no provision for hearing the party. But the aim of the rules of natural justice is to secure justice, or, to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law of the land but supplement it. AIR 1970 SC 150 Rel. on.

(Paras 12, 13)

Moreover, that the principle of natural justice should be followed in revoking the license is also apparent from the provision of Section 18 (5) under which no appeal can be disposed of unless the appellant has been given a reasonable opportunity of being heard. The right of appeal will be wholly illusory and husk if the delinquent had no opportunity of placing materials before the revoking authority on the strength of which the order appealed against could be assailed. Otherwise, if the original revoking authority is careful enough to pass a reasoned order in support of his subjective satisfaction, the right of appeal has no value.

(Para 14)

Cases Referred: Chronological Paras

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| (1970) AIR 1970 SC 150 (V 57) = | |
| (1969) 1 SCA 605, A. K. Kraipak v. Union of India | 12 |
| (1969) AIR 1969 Assam & Nagaland 50 (V 56) (FB), Hassan Ali v. Commr. Plains Division | 12 |
| (1967) AIR 1967 Mys 238 (V 54) = 1967 Cri LJ 1666, Nanappa v. Divisional Commr. Bangalore Division | 15 |
| (1966) AIR 1966 All 265 (V 53) = 1965 All LJ 994, Jairam Rai v. District Magistrate Azamgarh | 15 |
| (1960) AIR 1960 Madh Pra 157 (V 47) = 1960 Cri LJ 613, Moti Miyan v. Commr. Indore Division | 15 |
| (1957) AIR 1957 Mad 692 (V 44) = 1967 Cri LJ 1282 (1), Ponnambalam v. Saraswathi | 15 |
| (1954) AIR 1954 Raj 264 (V 41) = 1954 Cri LJ 1672, Kishore Singh v. State of Rajasthan | 15 |
| G. M. Mohanty, for Petitioner; Standing Counsel, for Opposite Parties. | |

G. K. MISRA, C. J.: The petitioner had one S. B. M. L. gun with license. On 11-9-63 the Additional District Magistrate, Dhenkanal cancelled the license by passing the following order:

"Discussed with the Sub-divisional Officer. The licensee Sri Digambar Panda is reported to be a rowdy element. He is reported to be threatening to kill some of his opponents with his gun. He has

also been suspected in some arson cases and has been removed from the Naib Sarpanchship of Chandrasekharprasad Grama Panchayet on charge of misappropriation of (and?) forgery. S. P. has recommended cancellation of his license. It is undesirable to permit him to hold a gun in view of his anti-social activities.

His license is therefore cancelled."

Against this order, M. A. No. 4 of 1965 was filed before the Revenue Divisional Commissioner who dismissed the appeal on 9-2-66. The substantive part of the appellate order runs thus:

"I find that the order dated 11-9-63 of the Additional District Magistrate, Dhenkanal, is self-explanatory. It shows clearly that possession of a gun license by the petitioner (who?) adduced no evidence to disprove the allegations. The appeal is dismissed.

Sd/. D. D. Surk."

2. The writ application has been filed under Article 226 of the Constitution for quashing the aforesaid two orders.

3. Mr. G. B. Mohanty for the petitioner advanced the following contentions:—

(i) Neither the revoking authority nor the appellate authority recorded reasons for revoking the petitioner's gun license. The orders should have been a speaking order.

(ii) The order is mala fide.

(iii) No reasonable opportunity was given to the petitioner to show cause prior to the cancellation of the license. The order is therefore liable to be quashed as having been passed in violation of the principles of natural justice.

4. We do not find any substantial reason for holding that the order was mala fide. The second contention is accordingly rejected.

5. In order to appreciate the first contention, the relevant provisions of Sections 17 and 18 of the (new) Arms Act, 1959 (Act 54 of 1959) may be noticed.

"17 (3) The licensing authority may, on the application of the holder of a license by order in writing suspend a license for such period as it thinks fit or revoke a license—

x x x x x x x

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the license.

(5) Where the licensing authority makes an order varying a license under sub-section (1) or an order suspending or revoking a license under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the license on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will

not be in the public interest to furnish such statement."

"18. Appeals : (1) Any person aggrieved by an order of the licensing authority refusing to grant a license or varying the conditions of a license, or by an order of the licensing authority or the authority to whom the licensing authority is subordinate, suspending or revoking a license, may prefer an appeal against that order to such authority (hereinafter referred to as the appellate authority) and within such period as may be prescribed:

Provided that no appeal shall lie against any order made by, or under the direction of, the Government.

(5) In disposing of an appeal the appellate authority shall follow such procedure as may be prescribed:

Provided that no appeal shall be disposed of unless the appellant has been given a reasonable opportunity of being heard.

(7) Every order of the appellate authority confirming, modifying, or reversing the order appealed against shall be final."

6. The first contention urged on the basis of section 17 (3) (b) is that the licensing authority must have the satisfaction that the revocation of the license was necessary for the security of the public peace and or public safety, and in support of such satisfaction he shall record, in writing, the reasons. Mr. Mohanty contends that the order of the Additional District Magistrate dated 11-9-63 does not furnish reasons in support of his conclusion that the cancellation of the license was necessary for securing public peace and public safety.

We are unable to accept this contention. The Additional District Magistrate relied on the Police report and came to the conclusion therefrom that the petitioner was rowdy element and had threatened to kill some of his opponents with his gun. His complicity in some arson cases was also suspected. Ultimately, the Additional District Magistrate says that it is undesirable to permit the petitioner to hold a gun in view of his anti-social activities. The expression "anti-social activities" clearly includes threat to the security of public peace and public safety. The contention that ex facie the Additional District Magistrate's order does not contain the reasons in support of his satisfaction cannot be sustained.

7. There is, however, considerable force in the contention that the appellate order is perfunctory and does not furnish any reason why the conclusion of the revoking authority was upheld. But as the order of the revoking authority is a speaking order and the appeal was dis-

missed, we are not inclined to interfere with the appellate order in the facts and circumstances of this case merely because the appellate authority has not given its reasons in detail.

8. We would accordingly reject the first contention of Mr. Mohanty.

9. The third contention is that the petitioner was not given a reasonable opportunity to show cause against the cancellation of the license. Section 17, sub-section (3) (b) and sub-section (5), do not prescribe that notice of the reason for cancellation is to be issued to the petitioner and he is to be called upon to show cause against cancellation and to give evidence in support of his case. Section 18 (1) prescribes a forum of appeal. Sub-section (5) indicates the procedure to be followed in disposing of appeals, and lays down that the appeal shall not be disposed of unless the appellant has been given a reasonable opportunity of being heard.

10. Mr. Mohanty urges that the right of appeal would be illusory unless at the stage of revocation the petitioner gets a reasonable opportunity of establishing that the materials on the basis of which the revoking authority proposes to act are without foundation; and further as the petitioner had the right to possess the gun revocation of the license affects his fundamental right to hold property and unless reasonable opportunity is given to plead and prove that no case is made out for cancellation of the license, such cancellation would be ultra vires.

11. On this question there seems to be divergence of authority.

The exponents of one view hold that as the statute makes no provision for framing of charge and issue of notice and giving of opportunity to the holder of the license to destroy the materials placed before the cancelling authority, there is no violation of the principles of natural justice when the cancelling authority, acts on materials placed before him, without giving the affected party a hearing provided the authority has the subjective satisfaction and records his reasons in writing.

The rival view is that as the cancellation would infringe the right of a citizen to hold a gun, that right cannot be destroyed or extinguished without giving him an opportunity of showing that there was no justification for cancelling the license.

12. The first view has been advocated in *Hassan Ali v. Commr. Plains Division*, AIR 1969 Assam & Nagaland 50 (FB). Their Lordships observed that when there are no two parties excepting the authority proposing to do the act and the subject opposing it, the obligation to decide judicially is still there if, from the sta-

for the petitioner has submitted is that the report of the police is not a report under Section 173 of the Code of Criminal Procedure, but only a report under Section 11 of the Essential Commodities Act and as such application of Section 251-A of the Code of Criminal Procedure is not attracted. That is to say, according to him procedure as engrafted in Section 251-A has to be followed only in a case instituted on a charge-sheet submitted by the police under Section 173 of the Code of Criminal Procedure. There does not appear any substance in this contention as well.

Section 251-A of the Code of Criminal Procedure runs as follows:—

"When, in any case instituted on a police report, the accused appears, or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in Section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished....."

That is to say, the procedure under Section 251-A is applicable to a case instituted on a police report which need not be a charge-sheet under Section 173 of the Code of Criminal Procedure. Cognizance is taken by a Magistrate either on receipt of a complaint of facts constituting an offence or upon a report in writing of such facts made by a Police Officer or upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion that such offence has been committed. Section 190 does not speak of a report under Section 173 which is technically called a charge-sheet. The whole meaning of Section 190 (1) (b) is that the report of the facts must be in writing made by any Police Officer. When a Police Officer submits a charge-sheet stating the facts relating to the commission of an offence under Section 7 of the Essential Commodities Act it is a report of the Police Officer within the meaning of Clause (b) of Section 190 (1) at the same time fulfilling the condition laid down in Section 11 of the Essential Commodities Act. If a charge-sheet fulfils the condition of Section 11 of the Essential Commodities Act it does not cease to be a report by a Police Officer. There is no contradiction in terms. A report by a public servant can at the same time be a report by a Police Officer if that public servant happens to be a police officer. It cannot be considered as a complaint as defined in Section 2 of the Code of Criminal Procedure. The prosecution in this case is therefore, on a police report, as such the requirement of Section 251-A is also fulfilled. The requirement of that section

is that the case should be instituted on a police report. Therefore, in my opinion the procedure which was to be followed in this case should have been under Section 251-A of the Code of Criminal Procedure and that has been done. Therefore, the trial is not vitiated. In support of this view a reference can be made to an observation of this Court in a Bench decision in *A. K. Jain v. Govt. of India*, 1968 BLJR 197, which is as follows:—

"If it is a case instituted on a police report within the meaning of Cl. (b) of sub-section (1) of Section 190 fulfilling at the same time the conditions laid down in the 11th section of Act 10 of 1955, the procedure prescribed in Section 251-A of the Code has to be followed. If it is a case instituted otherwise than on a police report within the meaning of Clause (a) or (c) of sub-section (1) of Section 190 again fulfilling at the same time the requirement of Section 11 of Act 10 of 1955, procedure prescribed in Section 252 of the Code will have to be followed".

6. In the case of *Pravina Chandra v. State of Andhra Pradesh*, AIR 1965 SC 1185 a contention was raised that by the words 'police report' in Section 251-A of the Code of Criminal Procedure, is meant the report under Section 173 which the Police Officer makes to a Magistrate in respect of offences investigated by him under Chap. XIV and that by the 'police report' in Section 190 (1) (b) is meant the charge-sheet under Section 173 of the Code and since the report in writing which the Police Officer makes under Section 11 of the Essential Commodities Act is not a charge-sheet under Section 173 of the Code it must be equated to a complaint of facts under Section 190 (1) (a). Repelling the contention the Supreme Court observed as follows:—

"In our judgment the meaning which is sought to be given to a 'police report' is not correct. In Section 190, a distinction is made between the classes of persons who can start a criminal prosecution. Under the three clauses of Section 190 (1), to which we have already referred, criminal prosecution can be initiated (i) by a police officer by a report in writing, (ii) upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion, and (iii) upon receiving a complaint of facts. If the report in this case falls within (i) above, then the procedure under Section 251-A, Criminal Procedure Code, must be followed. If it falls in (ii) or (iii) then the procedure under Section 252, Criminal Procedure Code, must be followed. We are thus concerned to find out whether the report of the police officer

in writing in this case can be described as a "complaint of facts" or as "information" received from any person other than a Police Officer. That it cannot be the latter is obvious enough because the information is from a Police Officer. The term "complaint" in this connection has been defined by the Code of Criminal Procedure and it "means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer". ...

"....It, therefore, follows that S. 252, Criminal Procedure Code, can only apply to those cases which are instituted otherwise than on a police report, that is in say, upon complaints which are not reports of a police officer or upon information received from persons other than a police officer"

This decision is complete answer to the contention raised here that Section 251-A has no application because the case is not instituted on a police report as contemplated by that section. This decision has been followed in a Full Bench decision of Madhya Pradesh High Court in *Ashiq Miyan v. State of Madhya Pradesh*, AIR 1966 Madh Pra 1.

7. The learned Counsel for the petitioner has, however, relied upon an unreported decision of a Single Judge of this Court in Criminal Rev. No. 1235 of 1967 (Orissa), *Basudeo Prasad v. State of Bihar*. Facts of that case were similar to those of the instant case. A question as to validity of procedure adopted in the trial of that case was raised. While dealing with the point, the learned Judge referred to some discussion in a decision of the Supreme Court in AIR 1965 SC 1185 mentioned above. The observation in that case was that a report of a Police Officer in such a case could not be taken as a charge-sheet under Section 173 of the Code of Criminal Procedure. In view of such observation, the learned Judge held that the case under consideration before him should be treated as a complaint in writing by a public servant and not a real charge-sheet and that in such a case the trial should be conducted under Sections 252 to 259 of the Code and not according to the provisions of Section 251-A of the Code. The learned Judge has referred to the aforesaid observation made in the case of *A. K. Jain*, 1968 BLJR 197. He has not relied upon the observation in that case on the ground that in his opinion this point was not in issue before the Court and it was only a casual observation. With respect, if I may say so, the learned Judge missed to take a note of the proposition of law enunciated by the Supreme Court in the

above quoted observations made in the case of *Pravin Chandra*, AIR 1965 SC 1185.

8. In my opinion, therefore, the procedure followed in the trial of this case was quite correct and the trial is not vitiated on that account.

9. Next contention of the learned Counsel for the petitioner is that there is no proof that the bags contained imported wheat as defined in the Imported Food Grains (Prohibition of Unauthorised Sale) Order 1958. 'Imported foodgrains' has been defined as follows:—

"2 (b) — 'Imported foodgrains' means foodgrains imported from outside India by the Central Government and supplied by that Government, either directly or through a State Government to authorised dealers for sale to the public'. It has, therefore, been contended that there being no evidence that the wheat in question was imported from outside India by Central Government, it cannot be said that it was imported wheat so as to attract the application of Sec. 3 of the aforesaid order. It is true that there is no evidence that the wheat in question was imported from outside India by Central Government. But the point is that the prosecution led evidence that it was imported wheat. It was so said in the evidence of witness No. 2 for the defence as well. He is the Block Development Officer. He has said that the wheat seized was the imported wheat. The statements of the prosecution witnesses in this connection were never challenged in the cross-examination. In view of such circumstances it cannot be said that the finding of the appellate Court that the wheat in question was imported wheat was without any evidence simply because the source of knowledge about the wheat being imported was not traced out. The finding that the wheat in question was imported wheat has, therefore, to be accepted.

10. The next contention of the learned Counsel for the petitioner *Stayadeo Sah* is that he is an authorised dealer and therefore there has been no contravention of Clause 3 of the Imported Food Grains (Prohibition of Unauthorised Sale) Order 1958. That clause runs as follows:

"Prohibition of unauthorised sale of imported foodgrains — No person other than an authorised dealer shall sell, or store or offer for sale, imported foodgrains in any quantity, either split or unsplit or mixed with other grains".

This clause, prohibits possession of imported foodgrains by any person other than the authorised dealer. Therefore, if an authorised dealer is found in possession of imported foodgrains, this clause

has got no application. It is not disputed that Satyadeo Sah is an authorised dealer as defined in Clause 2 of the aforesaid order. Therefore, Satyadeo Sah cannot be held liable for contravention of the provisions of Clause 3 of the aforesaid order. The charge against him is of possessing the imported wheat in contravention of Clause 3 of the aforesaid order. The charge is not for dealing with the imported wheat in contravention of the terms of the license given to him as an authorised dealer. Since as an authorised dealer he was not prevented from possessing any imported wheat, there is no question of contravention of Cl. 3 of the aforesaid order. In this view of the matter the charge against Satyadeo Sah must fail.

11. So far Sukhdeo Singh is concerned, he was only a cart-man. There is neither any allegation nor any evidence to show that he was in conscious possession of this imported wheat. Therefore, the conviction of Sukhdeo Singh also for being in conscious possession of the imported wheat cannot stand.

12. The result is that both the revision applications are allowed and the order of conviction and sentence passed against both the petitioners are set aside.

Revisions allowed.

AIR 1970 PATNA 163 (V 57 C 26)

N. L. UNTWALIA
AND B. N. JHA, JJ.

K. C. Thomas, Petitioner v. R. L. Gadeock and another, Respondents.

Civil Writ Jurisdiction Case No. 453 of 1968, D/- 7-4-1969.

(A) Societies Registration Act (1860), Ss. 6, 8 and 3 — Society registered under the Act — Legal character of — It enjoys the status of legal entity apart from the members constituting it — It can sue and be sued.

Section 6 of the Societies Registration Act is an enabling provision and the Society registered under the Act can sue and be sued in its own name. Once a society is registered, it enjoys the status of a legal entity apart from its members constituting the same and is capable of suing or being sued. Case law discussed. (Para 8)

A society registered under the Act may not be a body corporate, quite distinct from its members, yet it has got a separate existence for many purposes. It has its own identity, personality or entity which, for all purposes is not identical with that of the members constituting it. A society when registered comes into

existence as a registered society and has properties of its own. Although legal title in the properties may vest in the trustee or Board of Governors, yet the equitable title vests in the Society.

(Paras 6, 8)

(B) Societies Registration Act (1860), S. 6 — Constitution of India, Art. 311 — Registered society — Can sue and be sued — Person serving under registered society is an employee of society under control of the Board of Governors — His service conditions are regulated by rules and regulations framed by Society — He must be deemed to hold post under the Society and not to hold any civil post either under the Union or State — Protection under Art. 311, cannot be claimed.

A person serving under the Society or in any of the institutions started by the Society in accordance with its objects is an employee of the Society under the control of the Board of Governors. His service conditions are regulated by the rules and regulations framed by the Society. (Para 7)

Position of registered Societies or unregistered Societies cannot be on the same footing. A registered Society can sue and be sued in its own name can own its own property and can employ its own servants. Any person agreeing to serve under the Society or in any of its institutions must be deemed to hold the post under the Society and not to hold any civil post either under the Union or the State, even if its management is by the Government, and cannot get the protection of Art. 311 of the Constitution.

(Paras 8, 9)

(C) Constitution of India, Art. 226 — Petitioner an employee of Sainik Schools Society registered under Societies Registration Act — Dismissal by Principal of the School of the Society — Petitioner not holding any civil post — Principal also an employee of that Society — Remedy of writ against the Principal, held, not an appropriate remedy — (Societies Registration Act (1860), S. 3). (Para 11)

Cases Referred: Chronological Paras

(1969) AIR 1969 Cal 95 (V 56) =
1969 Lab IC 142, Ranjit Kumar
v. Union of India 7

(1962) AIR 1962 SC 458 (V 49) =
1962 Supp (1) SCR 156, Board of
Trustees Ayurvedic and Unani
Tibia College v. State of Delhi 8

(1959) AIR 1959 Madh Pra 172
(V 46) = 1959 MPLJ 301, Radha-
soami Satsang Sabha v. Hans-
kumar 8

(1958) AIR 1958 Andh Pra 773
(V 45) = (1958) 2 Andh WR 580.
P. B. N. College Committee v.
Govt. of Andhra Pradesh 8

(1957) AIR 1957 Pat 10 (V 44) =
1956 BLJR 513, Subodh Ranjan v.
Sindhri Fertilisers and Chemicals
Ltd.

(1956) AIR 1956 Pat 398 (V 43)=
ILR 34 Pat 412, Lachmi v. Mill-
itary Secy. to the Govt. of Bihar

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ER 518, Bonsor v. Musician's
Union

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antalankar v. Arya Samaj, Bombay

(1941) AIR 1941 Bom 312 (V 28)=
ILR (1941) Bom 497, A. S. Krish-
nan v. M. Sundaram

(1901) 1901 AC 426 = 70 LJKB
905, Taff Vale Rly. Co. v. Amal-
gamated Society of Rly. Servants

S. P. Srivastava, for Petitioner; S. Sar-
war Ali and Shashi Kumar Sinha, for
Respondents.

UNTWALIA, J.: There is only one petti-
tioner in this case. The two respondents
are — (i) Principal, Sainik School,
Tilaiya, district Hazaribagh and (ii) the
Chairman, Board of Governors, Sainik
School Society, Central Secretariat, New
Delhi. The petitioner's case is that the
Sainik School Society was formed in 1961
and was registered under the Societies
Registration Act, 1860 (Act 21 of 1860
hereinafter called the 'Act'). The control of
the Society is vested in the Board of
Governors. The purpose of the Society
is to run a type of public school for pre-
paring boys for entry into the National
Defence Academy and other walks of
life. The Society aforesaid started the
Tilaiya Sainik School in September, 1963.
On 1st October, 1965, the petitioner was
appointed as an Upper Division Assistant
in the Tilaiya Sainik School by the then
Principal of the School. The appoint-
ment was in a permanent staff of proba-
tion for one year or more at the discre-
tion of the Principal and it was with effect
from 8th October, 1965. The petitioner's
case in the sixth paragraph of the petti-
tion is that he was appointed in accord-
ance with the letter dated 1st October,
1965, enclosed with which was a typed
copy of the service conditions as an
appendix. The petitioner accepted the
same and signed appendix B. The letter
of appointment along with the enclosures
is annexure 1 to the writ application; The
petitioner was confirmed in due course
after expiry of the period of one year's
probation and was appointed Office
Superintendent on a permanent basis
which post he held until he was dismiss-
ed by the first respondent by the impug-
ned order dated 13th June, 1968, a copy of
which is annexure 6 to the writ applica-
tion. The petitioner has stated various

facts in his petition to show that respon-
dent No. 1 has wrongly dismissed him
from service in violation of the rules of
the Society governing the service condi-
tions of the Tilaiya Sainik School and in
a mala fide prejudicial manner. It is not
necessary to go into the details of those
facts as, in my opinion, this application,
for the reasons to be stated hereinafter,
has to fail on a short point.

2. In his petition the petitioner no-
where claimed that he was holding any
civil post under the Union or a State or
that he was a member of the Civil Ser-
vice of the Union or a State nor did he
claim that he had the protection of
Article 311 of the Constitution of India.
By attacking the order of dismissal made
by respondent No. 1 on several other
grounds, the prayer in the petition was to
quash the impugned order (annexure 6)
by grant of a writ of certiorari.

3. A counter affidavit was put in by
respondent No. 1 challenging the various
facts and grounds of attack on the dis-
missal order made by him against the
petitioner. As I have not thought it
necessary to refer to those facts in any
detail, I do not propose to state the facts
stated in the counter affidavit either. An
affidavit in reply was filed by the peti-
tioner. In the fifteenth paragraph of the
affidavit in reply, the statement made by
the petitioner is—

"That the Sainik School is founded and
managed by a Board formed by the
members of the Central Government and
the Government of Bihar and the Chair-
man of the Board of Governors is the
Defence Minister of India and the finance
for the running of the School is supplied
by the Central Government and the Gov-
ernment of Bihar and the employees are,
according to the School authorities them-
selves, amenable to rules of Civil Service
Conduct Rules and the deponent is there-
fore, entitled to the protection of Arti-
cle 311 of the Constitution of India and
the contentions made in paragraph No. 35
of the counter affidavit is not correct."

4. Mr. S. P. Srivastava, learned
counsel for the petitioner, stressed in
the first instance that the petitioner was
holding a civil post under the Union and
was entitled to the protection of Arti-
cle 311 of the Constitution. The proce-
dure prescribed in that Article was not
followed and, therefore, he submitted
that the order must be quashed. In the
alternative, his submission was that even
if he is not able to go to the extent of
seeking protection of Article 311 of the
Constitution, the order of the first re-
spondent being in violation of the Rules
of the Society governing the Tilaiya
Sainik School, being in violation of prin-
ciples of natural justice and being mala

fide, should be quashed by an appropriate writ because the first respondent or his order is amenable to our writ jurisdiction. Although the memorandum of association along with rules and regulations of Sainik Schools Society was not annexed to the writ application or to any affidavit, learned advocate for the petitioner produced it for our perusal. As is the case of the petitioner, Sainik School Society was registered under the Act. Section 1 of the Act provides that any seven or more persons associated for any literary, scientific, or charitable purpose may, by subscribing their names to a memorandum of association and filing the same with the Registrar of Joint-Stock Companies (leaving aside the various State amendments in this regard) form themselves into a Society under this Act. Under section 2, the memorandum of association has to contain the name of the Society, the objects of the Society, the names, addresses and occupations of the governors, council, directors etc. or other governing body to whom, by the rules of the Society, the management of its affairs is entrusted. A copy of the rules and regulations of the Society has got to be filed with the memorandum of association.

5. The Society is registered under section 3 of the Act. Certain consequences follow to distinguish it from an unregistered Society. Section 5 says that the properties belonging to a Society registered under the Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such Society. The matter as to how suits can be filed by and against a Society has been provided in the sixth section of the Act. It enables the filing of a suit by or against the Society in the name of certain office bearers or trustees as may be determined by the Rules and Regulations of the Society or in the name of such person as may be appointed by the governing body for the Society. For the purpose of emphasising the point which I am going to decide, I think it necessary to refer only to one more section, i.e., the eighth of the Act and to no other. That section provides that if a judgment is obtained against a person or officer named on behalf of the Society, such judgment cannot be put in force against the property or against the body of such persons or officer but can be put in force against the property of the Society.

6. The names and addresses of the members of the governing body to whom the management of the Society was entrusted as required by section 2 of the Act, were given in Article 4 of the memorandum of association. It shows that almost all the

members of the Central Government or ministers or secretaries of various State Governments. The names of members were also given in Article 5 who having associated themselves for the purpose described in the memorandum of association agreed to subscribe their names to the memorandum. In the Rules and Regulations provision was made as to who would be the members of the Society and that again would show that most of the members were either ministers and secretaries of the Central Government or State Governments. Some of the outsiders were to be nominated by the Chairman who was the Union Minister of Defence.

7. The question as to what is exactly the legal character of a Society registered under the Act has been the subject matter of consideration in several decisions with reference to relevant decisions of the English Court under Friendly Societies Act or the Trade Union Act. The gist of those decisions is that a Society registered under the Act is not body corporate or a corporation having a distinct legal entity from the members constituting it in the sense a company incorporated under the Indian Companies Act has or a Society registered under the Co-operative Societies Act has, yet it has its own identity, personality or entity which, for all purposes is not identical with that of the members constituting it. A Society when registered comes into existence as a registered Society and has properties of its own. Although legal title in the properties may vest in the trustees or Board of Governors yet the equitable title, to use the English Phraseology, vests in the Society.

A person serving under the Society or in any of the institutions started by the Society in accordance with its objects is an employee of the Society under the control of the Board of Governors. His service conditions are regulated by the rules and regulations framed by the Society which undisputedly in this case, empowered respondent no. 1 to appoint the petitioner and under certain circumstances, to dismiss him by following certain rules. Nowhere it is suggested by the petitioner that the rules governing his service conditions were those framed in accordance with Article 309 of the Constitution. Had I been able to say that the society is a full-fledged corporate body or a corporation, numerous decisions were there to say that in such a situation, even if the ownership of the corporation or the control of its management was in the Government, an employee of the corporation cannot be an employee of the Union or the State. In this connection, I may only refer to the case of Subodh Ranjan v. Sindri Ferti-

Users and Chemicals Ltd. AIR 1957 Pat 10 and Ranjit Kumar v. Union of India, AIR 1969 Cal 95 in which various other cases have been discussed.

8. The difficulty in applying the ratio of all those cases on all fours is that the Society registered under the Act is not a body corporate as held by the Supreme Court in Board of Trustees, Ayurvedic and Unani Tibia College v. State of Delhi AIR 1962 SC 458. In many cases decided by various High Courts, a view had been taken that section 6 of the Act is an enabling provision and the Society registered under the Act can sue and be sued in its own name: vide A. S. Krishnan v. M. Sundaram, AIR 1941 Bom 312, Satyavart Sidhantankar v. Arya Samaj, Bombay, AIR 1946 Bom 516, P. B. N. College Committee v. Govt. of Andhra Pradesh, AIR 1958 Andh Pra 773 and Radhasoami Satsang Sabha v. Hans Kumar, AIR 1959 Madh Pra 172. In none of those cases, however, there was any occasion for decision of the question as to whether a registered Society registered under the Act is distinct in all respects from the members constituting it or whether all the members in their own names could file the suit or be sued in respect of a matter relating to the Society. Bhagwati, J., if I may say so with respect, discussed this point elaborately in the Bombay case, referred to above: AIR 1943 Bom 516. His Lordship took the view that once a Society is registered under the Act, "the Society enjoys the status of a legal entity apart from its members constituting the same and is capable of suing or being sued."

In the Tibia College case, AIR 1962 SC 458 the Supreme Court does not seem to have either approved this view or disapproved it. What it laid down was that the Bombay decision did not proceed to the extent of saying that the Society registered under the Act is a corporation in the sense of being incorporated as the term is legally understood. Yet I am inclined to think that in the limited sense of possessing a different legal entity the view of Bhagwati, J. finds ample support from the decision of the House of Lords in Bonsor v. Musician's Union 1956 AC 104, a case which has been noticed by the Supreme Court in the Tibia College case. Lord Morton of Henryton and Lord Porter in their speeches had clearly opined that a registered trade union though not an incorporated body, was capable of entering into contracts and of being sued as a legal entity distinct from its individual members. Lord Keith of Avonholm, who had agreed with the majority view in some respects, did not dissociate from the view of Lord Morton of Henryton and Lord Porter in this regard, rather,

he was inclined to think that a registered trade union, though not an incorporated body, may be called a separate legal entity while, at the same time, remaining an unincorporated association of individuals which, as the majority view was, is not distinguishable at any moment of time from the members of which, it was at that time composed.

S. K. Das, J. (as he then was) delivering the leading judgment on behalf of the Court in the Tibia College case, referred to the majority view expressed in 1956 A. C. 104 only for the purpose of showing that a society registered under the Act is not a body corporate but is still an unincorporated body of persons. The problem has got to be viewed differently in different context. A Society registered under the Act may not be a body corporate, quite distinct from its members. But without going into the debatable question as to whether it would have its own legal entity or not, suffice it to say that yet it has got a separate existence for many purposes. It is no doubt true, as is the case of the petitioner, that most of the members constituting the Society were ex officio holders of office in the Central Government or various State Governments, yet, when they agreed to form a Society they brought into existence a new body called the Sainik Schools Society to raise funds either from the Government as the memorandum of article shows or from other sources to start Sainik Schools, to control its management through the Board of Governors, as also through the local Board of Governors and not to leave the control in the hands of either the Central Government, or the State Governments.

The very fact that Chief Ministers of various States had combined with the Defence Minister of the Centre to form a Society, indicates that the control or management of the Society or its institutions was not to be left in the hands of any Government either the Central or of any one State. It could not be so left. And that is the reason that for the purposes of establishing institutions like Sainik Schools, a new body was formed in the shape of a registered Society under the Act. As soon as that new body was formed, any person agreeing to serve under the Society or in any of its institutions must be deemed to hold the post under the Society and not to hold any civil post either under the Union or the State.

9. Adverting once more to the decision of the House of Lords in the case of 1956 AC 104 referred to above it is to be noticed that none of the English cases discussed therein had gone to the extent of saying that a registered Society of the kind with which we are concerned in this case

was a corporate body. Even short of that, the earlier case decided by the House of Lords in the Taff Vale Rly. Co. v. Amalgamated Society of Rly. Servants, 1901 A C 426 was interpreted to mean that such a Society was a legal entity by three of the Noble and Learned Lords while the remaining two of their Lordships said that it has used that expression for the purpose of deciding the suability only. One thing is clear to me that position of registered Societies or unregistered Societies cannot be on the same footing. There cannot be any doubt that a registered Society can sue and be sued in its own name, can own its own property and can employ its own servants. In such a situation, if I may draw an analogy from the case of partnership, as was done by the House of Lords in Bonsor's case for deciding the point at issue, it may be said that the Governor, acting on behalf of a State, through his authorised officer, may enter into a partnership with A and B, say to carry on a business. Although the partnership firm will have no separate legal entity, yet, it will have its separate existence, owning its property separately and employing its servants separately. It is difficult to imagine that the servants of such a partnership will be civil servants under the State getting the protection of Art. 311 of the Constitution.

10. Applying the tests laid down by a Bench of this Court in Lachimi v. Military Secy. to the Government of Bihar, AIR 1956 Pat 398 it is also to be noticed that the petitioner, in no sense, can be said to be holding a civil post under the Union or a State. I, therefore, hold that the main argument put forward on behalf of the petitioner must fail. It is accordingly, rejected.

11. The impugned order is the order of the Principal of the Sainik School. On a parity of reasons which I have discussed for holding that the petitioner is not holding a civil post under the Union or any State, it is manifest that the Principal is also an employee of the Sainik School established by the Sainik Schools Society, registered under the Act. The remedy of writ sought for by the petitioner against him is not an appropriate remedy. Moreover, he has filed his appeal against the order of the Principal before the authorities of the governing body. Before any reasonable time elapsed to enable the authorities to dispose of his appeal on merits, in hurry he seems to have rushed to this Court and filed the present writ application on 5th July, 1968. I do not think it necessary or advisable to say any word in regard to the merit of the petitioner's case challenging the order of dismissal passed by respon-

dent No. 1 as that may prejudice either party, either in the appeal filed by the petitioner or in a suit, if the petitioner is advised to file one.

12. In the result, this writ application fails and is dismissed but there will be no order as to costs.

13. B. N. JHA, J.: I agree.

Petition dismissed.

AIR 1970 PATNA 167 (V 57 C 27)

ANWAR AHMAD AND

M. P. VERMA, JJ.

Sanwarmal Agarwalla, Appellant v. Benoy Krishna Mukherjee and another, Respondents.

A. F. O. D. No. 459 of 1963, D/- 19-5-1969, from decision of Sub. J. IIInd Court, Dhanbad, D/- 22-5-1963.

(A) Debt Laws—Bihar Money-Lenders (Regulation of Transactions) Act (7 of 1939), Section 4 — Registration as money-lender — Provisions not applicable where money-lending is casual — Professional money-lender — Test of.

The bar of S. 4 to maintainability of a suit is not applicable where the plaintiff is not a professional money-lender. It is well settled that where money-lending is casual, then the provisions regarding registration as a money-lender do not apply. AIR 1949 Pat 400, Rel. on.

(Para 7)

The business of money-lending imports a notion of system, repetition and continuity, and that is a test of determining whether the plaintiff is a professional money-lender. Occasional loans to relatives, friends or acquaintances do not make the lender a professional money-lender. There must be more than occasional and disconnected loans to justify a finding that the plaintiff is a professional money-lender so as to apply the bar of the section. 1959 BLJR 145 and AIR 1963 Pat 350, Rel. on.

(Para 7)

(B) Debt Laws — Bihar Money-Lenders (Regulation of Transactions) Act (7 of 1939), Section 4 — Maintainability of suit without registration — Onus to prove is on plaintiff. AIR 1969 Pat 294 (FB), Rel. on.

(Para 8)

(C) Debt Laws — Bihar Money-Lenders (Regulation of Transactions) Act (7 of 1939), Sections 2 (f), 4 — Loan — Definition of — Lessee unable to pay salami amount — Lessee mortgaging the lease property — Mortgage deed executed in favour of lessor — Transaction is not 'loan' within the meaning of the section — Provisions of Section 4 not attracted.

LM/AN/G306/69/MLD/P

Where a lessee, being unable to pay the salami amount, mortgages the lease property by executing a mortgage bond in favour of the lessor in consideration of the said amount, agreeing to pay the mortgage money on a prescribed date and in default thereof to pay interest from the next day of that prescribed date then the transaction itself cannot be said to be a loan so as to attract the provisions of the Act. Both the lease and the mortgage bond being contemporaneous documents and as the mortgage bond, not bearing any interest for a number of years, is not executed "in respect of past liability", the amount mentioned in the mortgage bond cannot be said to be a "loan". (Para 9)

Such transaction may be said to be a 'debt' at best and every "debt" is not a "loan". AIR 1941 Cal 538, Rel. on. (Para 9)

(D) Mines and Minerals (Regulation and Development) Act (1948), Sections 4, 5 — Rules under Section 5 — Mineral Concession Rules (1949), Rules 37 and 48 — Mines and Minerals (Regulation and Development) Act (1957), Section 4 — Mining lease — Lease created in 1950, in violation of Rule 37 — Validity — 1948 Act repealed by 1957 Act — Rules made under 1948 Act deemed to have been made in 1957 Act — Provisions of 1957 Act do not say that such lease shall be void altogether — Lease will not be void and ineffective. (Para 10)

(E) Civil P. C. (1908), Sections 100, 101 — Mining lease — Mortgage of leased property — Mortgage decree creating charge on mortgaged property — Question as to effect on lease because of the provisions of the Bihar Land Reforms Act — Question being purely a question of law can be raised for the first time in appeal. (Para 12)

(F) Bihar Land Reforms Act (30 of 1950), Sections 4, 10 — Mining lease — Lease property mortgaged — Vesting of estates in State under Section 4 — Effect of, on lease — Old lease comes to an end and new statutory lease comes into effect — Remedy of mortgagee is not to enforce mortgage bond but to follow compensation. AIR 1967 SC 801, Rel. on. (Para 12)

Cases Referred: Chronological Paras

- (1969) AIR 1969 Pat 294 (V 56) =
1969 Pat LJR 51 (FB), Smt.
Fula Devi v. Mangtu Maharaj 8
(1967) AIR 1967 SC 801 (V 54) =
1967 BLJR 331, Raj Kishore Prasad
Narayan Singh v. Ram
Pratap Pande 12
(1967) AIR 1967 SC 887 (V 54) =
1967-1 SCR 707, Bihar Mines
Ltd. v. Union of India 10, 11

- (1963) AIR 1963 Pat 350 (V 50) =
1963 BLJR 361, Lakhi Narayan
Sao v. Sm. Bhagwati Kner 7
(1959) 1959 BLJR 145 = ILR 38
Pat 538, Dwarkadas Marwari v.
Kalipada Dey 7
(1949) AIR 1949 Pat 400 (V 36) =
ILR 27 Pat 77, Bhutnath Kumar
v. Nilkantha Narain Singh 7
(1941) AIR 1941 Cal 538 (V 28) =
45 Cal WN 734, Saradindu Sekhar
Bannerjee v. Lalit Mohan Mazumdar 9
(1921) AIR 1921 Pat 150 (V 8) =
5 Pat LJ 715, Tilakdhari Singh
v. Gour Narain 10
M/s. Lalnarayan Sinha and Lalit
Mohan Sharma, for Appellant; G. C.
Mukherjee, M. N. Banerjee, P. C.
Verma and P. C. Das, for Respondents.

M. P. VERMA, J.:— This appeal has been directed against the preliminary decree passed by the Second Subordinate Judge, Dhanbad, in Title (Mortgage) Suit No. 16 of 1962 decreeing the plaintiff's suit with costs on contest against defendant No. 2 and ex parte against defendant No. 1. He directed the defendants to pay a sum of Rs. 33,882.88 paise to the plaintiff on or before the 22nd August, 1963, failing which the mortgaged property, or a sufficient portion thereof, was to be sold to satisfy the decree.

2. The case of the plaintiff, shortly stated, was that coal lands measuring 50 bighas lying in village Baromesia, P. S. Baghmara, in the district of Dhanbad, as described in Schedule "A" of the plaint, belonged to the plaintiffs. On the 31st December, 1949, both the defendants took settlement of those coal bearing lands from the plaintiff under a registered Indenture of Mining Lease, together with all inclines, quarries, houses, tools, machineries etc. This colliery was then known as "Central Sindhi Colliery", which name was subsequently changed into "South Muraidih Colliery. The defendants agreed to pay a salami of Rs. 18,000/- but they were not in a position to pay so much in cash and so they executed a registered mortgage bond on the same date in favour of the plaintiff in consideration of the said amount of Rs. 18,000/-. Under this mortgage bond, the defendants hypothecated, by simple mortgage, the very same 50 bighas of coal lands as described in Schedule "A" of the plaint. They further agreed to pay the mortgage money to the plaintiff on or before the 30th June, 1950; and, in default thereof, the defendants made themselves liable to pay interest on the same amount at 6 p. c. p. a. from the 1st July, 1950 till realisation. In spite of repeated demands and notice, the defendants mortgagors did not pay any amount to the plaintiff, and so the plaintiff had to bring

the suit for recovery of the principal amount of Rs. 18,000/-, together with interest at 6 p. c. p. a. from the 1st July to June 1962, amounting to Rs. 12,960.00. The plaintiff prayed that a mortgage decree for the above mentioned sum, together with costs and interest, pendente lite and further, be granted in his favour, and the said decretal amount be declared a charge on the leasehold coal lands. The plaintiff further prayed that, if the defendants fail to pay the decretal dues within the time fixed by the Court, the mortgaged property be put to sale and, should the sale proceeds be insufficient to satisfy the decretal dues, a personal decree be passed against the defendants.

3. Both the defendants filed separate written statements. But at the time of hearing only defendant No. 2 contested the suit, and the lawyer for the defendant No. 1 endorsed "no instruction". In the written statement filed on behalf of defendant No. 1, it was contended that defendant No. 2 was never his adopted son; rather he was the karta of his joint family. He, along with defendant No. 2, purchased the lands in suit from one Satyaprasad Chatterjee under a registered deed of sale dated the 15th December, 1949; but when the defendants, along with other members of their families, entered into possession of the property in suit, the plaintiff represented that he had interest in the property, and advanced a claim in respect of the said property. So, in order to buy peace and under the coercion of the plaintiff, the defendants were forced to execute the mining lease in question. The mortgage in question is without consideration, inasmuch as the very same property was also charged under the mining lease in question. According to defendant No. 1, defendant No. 2 had deceived him because he stopped sending return about the income etc., in respect of the colliery in question since after May, 1949, and for this he (defendant No. 1) had brought Title Suit No. 29 of 1960 against defendant No. 2. Another plea taken was that the plaintiff was not a registered money-lender, and so the suit was not maintainable.

4. In the written statement filed on behalf of defendant No. 2, practically the same averments were made. This defendant also contended that the mortgage bond was without consideration and was executed under undue influence and coercion. He also made out a case of payment of Rs. 11,000/- in several instalments to the plaintiff.

5. The learned Subordinate Judge came to the conclusion that the suit was not barred by Section 4 of the Bihar Money-Lenders Act (Bihar Act VII of 1939); that the mortgage bond was for consideration and that the mortgage

money was realisable from the defendants. As against this judgment and decree, the present appeal has been filed.

6. In this Court, two additional grounds were taken on behalf of the appellant (i) that the impugned mortgage, being in violation of Rule 37 of the Mineral Concession Rules, 1949, was inoperative; and (ii) that, after the vesting of the estates and tenures in the State of Bihar, under the provisions of the Bihar Land Reforms Act, on the 1st January, 1956, the entire interest in the estate in question, including the interest of the plaintiff-respondent and the defendant-appellant, vested in the State of Bihar absolutely and free from encumbrance and, as such, a mortgage decree for sale was illegal.

7. I shall first take up the point whether the suit itself is barred under Section 4 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939 (Bihar Act VII of 1939). The relevant portion of that section reads as follows:—

"4. Suit for recovery of loan only maintainable by registered money-lenders — No Court shall entertain a suit by a money-lender for the recovery of a loan advanced by him after the commencement of this Act unless such money-lender was registered under the Bihar Money-Lenders Act, 1938 (Bihar Act 3 of 1938) at the time when such loan was advanced"

Two important things are to be considered for the application of this section. The first thing is whether it is a suit for a money-lender; and secondly, whether it is for recovery of a loan. In the present case, no money was actually advanced by the plaintiff. He had to take a salami of Rs. 18,000.00 from the defendants, and the defendants had no ready money to pay the same. They, therefore, executed the mortgage bond in respect of this salami money. It is not argued on behalf of the appellant that the plaintiff is a professional money-lender. It has been held in several cases that where money-lending is casual, then the provisions regarding registration as a money-lender do not apply. vide AIR 1949 Pat 400, Bhutnath Kumar v. Nilkantha Narain Singh.

The business of money-lending imports a notion of system, repetition and continuity, and that is a test of determining whether the plaintiff is a professional money-lender. Occasional loans to relatives, friends or acquaintances do not make the lender a professional money-lender. There must be more than occasional and disconnected loans to justify a finding that the plaintiff is a professional money-lender so as to apply the bar of section 4 of Bihar Act VII of 1939. Vide Dwarkadas Marwari v.

Kalipada Dey, 1959 BLJR 145 and Lakhi Narayan Sao v. Sm. Bhagwati Kuer, AIR 1963 Pat. 350.

8. The next point which arises for consideration in this connection is as to which party has to establish that the bar of Section 4 of the Bihar Act VII of 1939 is not applicable to the present suit. Generally speaking, the onus lies on the party which asserts a particular fact or an exception to the general rule; and the learned Additional Subordinate Judge has referred to some of the cases decided by this Court in paragraph 7 of his judgment. I need not refer to and critically examine those references; because, so far as this Court is concerned, the point is settled by a decision of the Full Bench in *Srimati Fula Devi v. Mangtu Maharaj* 1969 Pat LJR 51 = (AIR 1969 Pat 294 (FB)). After a review of various decisions concerning this point, their Lordships observed that it must be held that the onus to prove, as a matter of law, that the suit is entertainable without registration, is on the plaintiff, in view of the bar under the first paragraph of Section 4. In view of this decision, it has to be examined whether this initial onus has been discharged by the plaintiff. Of course, in the plaint it was not stated that the plaintiff is not a professional money-lender, nor that for this transaction no registration under this Act was necessary. But, in his own evidence, the plaintiff (P. W. 2) has stated that he had no money-lending business. Learned counsel for the appellant has criticised this statement by advancing an argument to the effect that the plaintiff did not specifically say that, at the time when the mortgage bond was executed, he had no money-lending business. This statement he made on the 11th May, 1963, whereas the bond was executed on the 31st December, 1949. In my opinion, such a narrow interpretation cannot be put to this statement. The plaintiff was making this averment with reference to the objection raised on behalf of the appellant in paragraph 2 of his written statement. As a matter of fact, the defendant did not lead any oral evidence whatsoever on this point. Nobody on his behalf came to say that the plaintiff was a professional money-lender, so as to require registration under the Act. I therefore, feel no hesitation in holding that for the transaction in question the plaintiff need not have been registered under this Act.

9. Apart from this consideration, there is also another point in favour of the plaintiff-respondent. It has been argued on his behalf that this transaction does not represent a loan so as to attract the provisions of the Bihar Money-Lenders Act. The term loan has been de-

fined in S. 2 (f) of the Act, and the relevant portion runs as follows:—

"'loan' means an advance, whether of money or in kind, on interest made by a money-lender, and shall include a transaction on a bond bearing interest executed in respect of past liability and any transaction which, in substance, is a loan"

Here also, the "advance" must be made by a "money-lender". It has already been held that the plaintiff is not a money-lender in the sense so as to attract the provisions of Section 4 of the Act. Any way, the transaction itself cannot be said to be a "loan". This mortgage bond did not bear any interest for a number of years, and then it was not executed "in respect of past liability". Both the lease and the mortgage bond were contemporaneous documents. So this amount as mentioned in the mortgage bond cannot be said to be a "loan". In the case of *Saradindu Sekhar Bannerjee v. Lalit Mohan Mazumdar*, AIR 1941 Cal 533, it was held that such a transaction may be said to be a "debt" at best, and further that every "debt" is not a "loan". So, on this ground also, I do not think the provisions of the Bihar Money-Lenders Act, 1939 are attracted in the present case. In agreement with the decision of the learned Additional Subordinate Judge, it must, therefore, be held that the suit by the plaintiff is not hit by Section 4 of the Bihar Money-Lenders Act, 1939.

10. The second point urged by learned counsel for the appellant is that the lease itself, being in violation of Rule 37 of the Mineral Concession Rules, 1949, was void and ineffective. In my opinion, this argument does not carry any weight. *Prima facie*, if the lease is held to be void or inoperative, the appellant must give up possession under this lease and the property demised must revert to the lessor. It is nobody's case that any such controversy had ever arisen between the parties before the institution of this suit. Learned Counsel for the appellant has argued that this lease was created in violation of Rule 37 of the Mineral Concession Rules, 1949 (hereinafter referred to as the "1949 Rules"). This rule lays down that "the lessee may, with the previous sanction of the State Government transfer his lease or any right, title or interest therein. "to a person holding a certificate of approval on payment of a fee of Rs. 100 to the State Government. . . " In 1954, a proviso was added to this rule, and it is to the effect that "no mining lease or any right, title or interest therein in respect of any mineral specified in schedule IV, shall be so transferred except with the previous approval of the Central Govern-

ment." This lease was executed, as already stated, on the 31st December, 1949. The 1949 Rules came into force on and from the 25th October, 1949; but they had not been extended to the Chotanagpur area. So, when the lease was initially executed, there was no necessity for a lessee or a sub-lessee, as in this case, to hold a certificate of approval. It has been shown to us that, under Notification No. 480-iiW-271/R, dated the 16th January, 1950 the provisions of Mines and Minerals (Regulation and Development) Act (hereinafter referred to as the "1948 Act") were extended to Chotanagpur Division, under the provisions of section 92 of the Government of India Act, 1935. Learned counsel has argued that at least from that date the lessee must conform to the provisions of rule 37 of the 1949 Rules. He has further argued that this lease was registered in March, 1950, and till registration no title could pass to the lessee. He has drawn our attention to the case of Tilakdhari Singh v. Gour Narain, 5 Pat LJ 715 = (AIR 1921 Pat. 150) where it was observed that where an instrument which purports to transfer title to property requires to be registered the title does not pass until registration has been effected. Learned counsel for the plaintiff-respondent has argued that this question raises investigation of facts and ought to have been raised at the earliest stage when the suit was brought in the trial court. The plaintiff could have then secured evidence to show that he had not violated the provisions of rule 37 of the 1949 Rules. He further pointed out that rule 37 occurs in Chapter IV of the Rules which deals with the "Grant of Mining Lease in respect of land in which the minerals belong to Government", and, in his opinion, if any rule was to be made applicable to this transaction, it must be Rule 48, which occurs in chapter V dealing with "Grant of mineral concessions by private persons." So far as the present point is concerned, both these rules are practically the same. His further argument was that it was neither a prospecting licence nor a mining lease but is a sub-lease, so to say. In my opinion, the term, "lease" also includes a "sub-lease" as discussed in various case laws. But the matter is not free from doubt. I may further refer to the definition of "lease" in Section 2 (1) of the Bihar Land Reforms Act, 1950, which prescribes that "Lease" in relation to mines and minerals shall include a sub-lease or prospecting lease and an agreement to lease and sublet . . ." Under section 4 (1) of the 1948 Act (Act 53 of 1948), no mining lease was to be granted after the commencement of this Act, otherwise than in accordance with the rules made under

this Act. Sub-section (2) of Section 4 provides that any mining lease granted contrary to the provisions of sub-section (1) shall be void and of no effect. The law on the subject of mines and minerals has developed from time to time in the light of experiences gained. In 1957, another Act, namely, the Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957), was enacted. Under section 4 (1) of this Act, "No person shall undertake any prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a prospecting licence or, as the case may be, a mining lease, granted under this Act and the rules made thereunder: Provided that nothing in this subsection shall affect any prospecting or mining operations undertaken in any area in accordance with the terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which is in force at such commencement." Sub-section (2) lays down that "no prospecting licence or mining lease shall be granted otherwise than in accordance with the provisions of this Act and the rules made thereunder". So, clearly, this Act does not lay down that any mining lease in contravention of this section shall be void altogether. Under section 21 of this Act penalty has been provided, and it lays down that "(i) whoever contravenes the provisions of sub-section (1) of section 4 shall be punishable with imprisonment which may extend to six months. . ." I may further point out that, under section 5 of the 1948 Act powers were given to the Central Government to make rules for regulating the grant of mining leases in respect of any minerals or in any area. The Mineral Concession Rules were made by the Central Government in exercise of its power under section 5 of the 1948 Act. Argument of learned counsel for the appellant is that when the lease in question was registered in March, 1950, the 1949 Rules were extended to Chotanagpur Division and so if the lessee had no certificate of approval, the lease in his favour was void. From the discussion made above, it is clear that this Act was followed by another Act on the same subject in 1957 in which no such stringent consequences were to follow, if the lease was not in conformity with the provisions of rule 37 or rule 48 of the 1949 Rules. Moreover, under section 31 of the 1957 Act, the Central Government was authorised to relax the rules in special cases. No doubt, by section 29 of the 1957 Act, all rules made or purporting to have been made under the Act of 1948 were to be deemed to have been made in the 1957 Act and which were not inconsistent therewith. In other words, all existing

rules were to continue when the 1957 Act came in force, though the 1948 Act was repealed by the 1957 Act (Vide paragraph 6 of the judgment of the Supreme Court in the Bihar Mines Ltd. v. Union of India AIR 1967 SC 837). On a consideration therefore, of these various rules and the provisions of the 1948 and 1957 Acts, referred to above, I am not inclined to hold that this plea, which has been raised on behalf of the appellant, is available to him.

11. The third argument advanced on behalf of the appellant is that, with the vesting of the estate, in which these mineral areas lie in the State of Bihar, the old lease came to an end and a new statutory lease came into being, as provided under section 10 of the Bihar Land Reforms Act. If the mines were worked directly by the intermediary when the Bihar Land Reforms Act, 1950 came into force, the provisions of section 9 of the Act would apply. This question came up for consideration before the Supreme Court in the case of AIR 1967 SC 837. There was a difference of opinion amongst the learned Judges, but the majority view was that the old lease came to an end and a new statutory lease came into effect. I may quote the following lines (P. 891).

"The effect of the estate being deemed to be leased by the State Government is that the erstwhile lessee of the intermediary becomes actually the lessee of the State Government for all purposes from the date of the vesting of the estate in the State. He cannot be deemed to be a lessee of the intermediary whose title is lost under the original lease."

In that case the point at issue was whether the Mining Leases (Modification of Terms) Rules, 1956 were applicable to the mining leases in question. Of course, the minority view was that section 10 continues the lease which was subsisting on the date of vesting. The terms and conditions of the lease are modified and the Government is substituted as lessor in place of the proprietor or tenure-holder. In other respects the old lease continues. Anyway, following the majority view, it must be held that the old lease which was created on the 31st December, 1949, came to an end on the date of vesting of the estate in the State of Bihar and a new statutory lease came into effect.

12. Learned counsel for the plaintiff-respondent has argued that this is a new point which has been taken for the first time in this court in appeal and so it should be left out of consideration. In my opinion, this argument cannot be allowed to prevail, because, to resolve this question, no additional evidence, either documentary or oral, was required. It is pure-

ly a question of law, namely, the effect on the lease because of the provisions of the Bihar Land Reforms Act. This question relates to that part of the decree which indicates that a charge shall be created on the mortgaged property which shall be sold for the liquidation of the debt and that the plaintiff would be also entitled to a personal decree if the charged property proved insufficient to satisfy the dues. Under section 4 (a) of the Bihar Land Reforms Act estates and tenures shall, "with effect from the date of vesting, vest absolutely in the State free from all incumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provision of this Act." The interests of the proprietor or tenure-holder in all sub-soils, including any rights in mines and minerals, are to vest in the State Government. In this view of the legal position, the remedy available to the plaintiff is not to enforce the mortgage bond and secure satisfaction of his debt by sale of the mortgaged property. His remedy is to follow the compensation in the first instance and then look forward as to what consequences would follow in future. As held in the case of Rajkishore Prasad Narayan Singh v. Ram Pratap Pandey, 1967 B. L. J. R. 331 = (AIR 1967 SC 801) the remedy of such a mortgagee is to follow the compensation as well as the non-vested property of the proprietor for the satisfaction of his mortgage dues.

13. No other point was raised before us.

14. In the result, the judgment and decree of the court below are upheld and the appeal is dismissed with this modification only that the decretal dues will not be a charge on the mortgaged property and the same shall not be sold for the satisfaction of the mortgage dues. In the circumstances of the case, the parties shall bear their own costs of this Court.

15. ANWAR AHMAD, J.: I agree.

Appeal dismissed.

AIR 1970 PATNA 172 (V 57 C 28)

TARKESHWAR NATH AND K. K. DUTTA, JJ.

The Bihar Co-operative Motor Vehicles Insurance Society Ltd., Appellant v. Rameshwar Raut and others, Respondents.

A. F. O. D. No. 334 of 1964, D/- 16-5-1969, from decision of Claims Tribunal (Dist. J.) Bhagalpur, D/- 11-9-1963.

LM/BN/G256/69/KSE/M

(A) Motor Vehicles Act (1939), Ss. 110F and 110 — Jurisdiction of Claims Tribunal — Claims arising before its constitution cannot be entertained — Tribunal when constituted is a question of fact — Notification constituting Tribunal — Cancellation by subsequent unpublished notification — First notification remains effective — Objection to jurisdiction of Tribunal to entertain claim subsequently accruing — Onus of proof.

If a Motor Accidents Claims Tribunal has not been constituted under S. 110 when the cause of action for claiming compensation under S. 110F arises, the remedy of the aggrieved party is to institute a civil suit for compensation. The Claims Tribunal even if subsequently constituted has no jurisdiction to entertain the claim. But the question as to when the Claims Tribunal has been constituted has to be decided on the facts and circumstances of each case. AIR 1964 Madh Pra 133 and AIR 1964 Madh Pra 136, Rel. on. (Paras 7, 8)

Where the Claims Tribunal had been constituted by a notification dated 28-4-1959 which was subsequently cancelled by an unpublished notification dated 12-8-1959, the cancellation had no effect and the first notification dated 28-4-1959 must be deemed to be in force and the Claims Tribunal would be competent to entertain a claim arising out of accident on 1-9-1959. The burden is on the opposite party who objects to the jurisdiction of the Tribunal that even the first notification dated 28-4-1959 was not published. If he fails to discharge the onus the award given by the Tribunal cannot be said to be without jurisdiction. (Para 8)

(B) Motor Vehicles Act (1939), S. 110A (3) — Application for compensation filed within limitation of sixty days of occurrence but no action taken for two years due to absence of Rules under S. 111A — Tribunal's direction to file fresh application in proper form according to rules framed — Filing of fresh application in accordance with direction must be deemed to be by way of amendment so as to preclude bar of limitation. (Para 9)

(C) Motor Vehicles Act (1939), S. 110C — Power of Claims Tribunal to allow amendment of pleadings — Tribunal should not allow amendment of claim petition for enhancing original claim after expiry of limitation so as to prejudice right accrued to opposite party — (Civil P. C. (1908), O. 6, R. 17).

In certain circumstances the Court or the Tribunal has the power to allow the amendment of the pleadings, but amendment should not be allowed if a valuable right has accrued in favour of the opposite party on account of the expiry of the period of limitation. No amendment

will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time. AIR 1967 SC 96, Rel. on. (Para 10)

Thus, a Claims Tribunal acting under the Motor Vehicles Act is not justified in allowing amendment of application for compensation by enhancing the claim after the expiry of limitation prescribed by S. 110A(3). Even if the Tribunal had wrongly allowed such amendment the claim should be restricted to that originally claimed. (Para 10)

(D) Motor Vehicles Act (1939), Ss. 110A and 110C — Claim petition under S. 110A filed by one of legal representatives of deceased — Other legal representatives who are also entitled to share in compensation ought not to be added as parties to petition after expiry of limitation prescribed by S. 110A(3) — *Petitioner is entitled to get entire compensation if he has applied as karta of joint Hindu family.* (Civil P. C. (1908), O. 1, R. 10).

(Para 11)

(E) Motor Vehicles Act (1939), S. 96(2) and S. 110A — Claim for compensation before Motor Accidents Claims Tribunal — Insurer impleaded as party whether can raise defence apart from those specified in S. 96(2) and plead that there was no negligence of driver of vehicle — (Quacre). AIR 1959 SC 1331 and AIR 1968 Mad 436, Ref. to. (Para 13)

(F) Motor Vehicles Act (1939), S. 110B — Award of Tribunal — Award disallowing claim against owner of vehicle but holding that insurer who was made party to application in accordance with rules was liable — Award only means that the sum awarded has to be actually paid by insurer and not owner — No error in Award. AIR 1967 Pat 342, Rel. on. (Para 13)

(G) Motor Vehicles Act (1939), S. 110D — Award of compensation by Claims Tribunal — Appeal — Appellate court is ordinarily disinclined to reverse findings of Tribunal as to amount of compensation unless it involved a question of principle — It will not interfere unless Tribunal applies a wrong principle of law or misdirects itself or amount awarded is too low or too high. (1935) 1 KB 354 and AIR 1966 Mad 466 and AIR 1969 Madh Pra 89 and 1951-2 All ER 448, Rel. on. (Para 15)

(H) Motor Vehicles Act (1939), S. 110D — Award of compensation has to be just and reasonable — Principles for determining laid down in 1941 AC 157, Reiterated — Accident resulting in death of claimant's mother aged 55 years and daughter aged 4 years — Held, that in the circumstances of case Rs. 3000 and Rs. 2000 should be awarded on account of death of mother and daughter respectively. (Para 17)

Cases Referred: Chronological Paras

- (1969) AIR 1969 Madh Pra 89 (V 56) =
1968 MPLJ 828, Madhya Pradesh
State Road Transport Corporation
Jabalpur v. Jahiram 15
- (1969) AIR 1969 Mad 180 (V 56) =
1969 ACJ 435, T. V. Gnanavelu v.
D. P. Kannayya 17
- (1968) AIR 1968 Mad 436 (V 55) =
ILR (1969) 1 Mad 16, K. Gopala-
krishnan v. Sankara Narayanan 22
- (1967) AIR 1967 SC 96 (V 54) =
1966 BLJR 340, A. K. Gupta and
Sons Ltd. v. Damodar Valley
Corporation 10
- (1967) AIR 1967 Pat 342 (V 54),
Vanguard Insurance Co. Ltd. v.
Foolchand Mandal 14
- (1966) AIR 1966 Mad 466 (V 53) =
79 Mad LW 271, Champalal Jain v.
B. P. Venkataraman 25
- (1964) AIR 1964 Madh Pra 133
(V 51) = 1962 MPLJ 876, Sushama
Mehta v. Central Provinces Trans-
port Services Ltd. 7
- (1964) AIR 1964 Madh Pra 136
(V 51) = 1964 MPLJ 525,
Dr. Omprakash Mishra v. National
Fire and General Insurance Co.
Ltd. 7
- (1963) AIR 1963 Punj 214 (V 50) =
ILR (1962) Punj 887, Nand Singh
Virdi Chandigarh v. Punjab
Roadways Amritsar 12
- (1962) AIR 1962 SC 1 (V 49) = (1962)
1 SCR 929, Gobald Motor Service
Ltd. v. Veluswami 15
- (1962) AIR 1962 Mad 309 (V 49) =
75 Mad LW 156, Krishna Gounder
v. Narasingam Pillai 16
- (1962) AIR 1962 Punj 540 (V 49) =
64 Pun LR 448, Shri Ram Pratap
v. General Manager, Roadways
Ambala 22
- (1959) AIR 1959 SC 1331 (V 46) =
(1960) 1 SCR 168, British India
General Insurance Co. Ltd. v.
Captain Itbar Singh 22
- (1959) AIR 1959 Punj 297 (V 46) =
ILR (1959) Punj 714, Vanguard Fire
and General Insurance Co. v.
Sarla Devi 22
- (1951) 1951-2 All ER 448 = 1951
AC 601, Nance v. British Columbia
Electric Rly Co. Ltd. 25
- (1942) 1942 AC 601 = 111 LJKB
418, Davies v. Powell Duffryn
Associated Collieries Ltd. 15
- (1941) 1941 AC 157 = 1941-1 All ER 7,
Berham v. Gambling 16
- (1937) 1937 AC 826 = (1937) 3 All
ER 359, Rose v. Ford 16
- (1935) 1935-1 KB 354 = 104 LJKB
199, Flint v. Lovell 15

TARKESHWAR NATH, J.: This appeal by the insurer under Section 110D of the Motor Vehicles Act, 1939, is directed against the judgment and award of the Claims Tribunal (District Judge).

2. Respondent No. 1 filed an application under Section 110-A of the afore-said Act for compensation on account of the death of his mother, Kalawati Rautine aged about 55 years, and his daughter, Bimla Rautine aged about 4 years, which took place in an accident on 1-9-1959 at 4.30 p.m. The said respondent stated in that application that the jeep bearing No. BRR 2222 owned by Shyama Prasad Singh (respondent No. 6) was being driven by Brajendra Prasad Singh on 1-9-1959. The said jeep was coming from Dhanbad and was going to Deoghar, but when it reached Sarsa More near Palajori it dashed against Kalawati Rautine and Bimla Rautine who were standing by the side of the Jamtara Dumka Road and grazing a cow. They sustained injuries and both of them died at the spot. He alleged that the jeep was coming in speed and the driver did not blow the horn. The cow which was pregnant lost her back putha and she also died after a few days. It was due to the rash and negligent act of Brajendra Prasad Singh that those lives were lost. The said jeep was insured with the appellant which was responsible for risk to the third party. The claim for compensation was to the extent of Rs. 6000. The said petition was filed on 30-9-1959. No action was taken for a period of about two years on this petition, but on 17-7-1961 the Tribunal registered that application and noted that the said application was not in the form prescribed by the Bihar Motor Vehicles Accidents Claims Tribunals Rules, 1961, and hence it directed the applicant (respondent No. 1) to file a fresh application in proper form accompanied by the requisite fee by 17-8-1961. In compliance with that order a fresh petition for compensation was filed by respondent No. 1 on 17-8-1961, and he was examined on solemn affirmation on the following day. In that petition respondent No. 1 claimed Rs. 3000 in respect of the death of his mother and the same amount in respect of the death of his daughter.

3. On 18-5-1963 the claimant (respondent No. 1) filed an application for the amendment of the claim petition and increased the amount of compensation to the extent of Rs. 10,000 in respect of the death of his mother and the same amount in respect of the death of his daughter. In other words, he claimed Rs. 20,000 in all. He stated that the amount of compensation claimed previously was very low. The Tribunal passed an order on the same date allowing the amendment asked for, subject to limitation. On the same

Sunit Kumar Choudhuri, for Appellants
Brajeshwar Mallik (for Nos. 1 to 5) and
L. K. Choudhuri and Bimal Bhushan Sen
(for No. 6), for Respondents.

date respondent No. 1 filed a petition for adding his two brothers, Babulal Raut and Kodo Raut (respondents 2 and 3, respectively) as parties to the claim petition. The Tribunal acceded to this prayer and added them as petitioners Nos. 2 and 3. They also filed an application that the amount of compensation might be paid to respondent No. 1. On 26-8-1963 Rudi Rautine and Jamani Rautine (respondents 4 and 5, respectively) filed an application for being added as parties to the said claim petition as they were the daughters of Kalawati Rautine and were entitled to compensation. On the same date they filed another application stating that they had no objection if the entire amount of compensation be given to their brother (respondent No. 1). On this date the Tribunal passed an order adding them as applicants subject to limitation if any.

4. The owner of the car (respondent No. 6) showed cause stating that the petition was barred by time and the jeep in question was running in normal speed and the driver, Brajendra Prasad Singh was blowing the horn. At that time it was drizzling and the road was slippery. The driver, in order to save Kalawati and the child, tried to stop the jeep, but it was so close to them that the accident could not be avoided. According to him, there was no negligence on the part of the driver and, in any event, he was not liable at all to pay any compensation, inasmuch as the said vehicle was insured with the appellant. The appellant also filed an objection stating that the claim was barred by limitation and the amount claimed was exaggerated. There was a further plea that the insured himself being liable to pay the compensation, the insurer was not liable at all.

5. The main issues framed by the Tribunal were whether the claim was barred by limitation (issue No. 2) and whether the petitioners were entitled to claim damages and, if so, "for what amount?" (issue No. 3). Respondent No. 1 examined himself to support his case, but the appellant as well as the owner did not adduce any oral evidence. The Tribunal held that the application was not barred by limitation and the appellant was liable to pay a sum of Rs. 10,000 as total compensation, including costs, to the applicants (respondents 1 to 5). It directed that each of the five respondents would be entitled to get Rs. 1000 as compensation on account of the death of Kalawati and respondent No. 1 alone would get a sum of Rs. 5000 on account of the death of his daughter, Bimla. In other words, respondent No. 1 would get a sum of Rs. 6000 and respondents 2 to 5 would get Rs. 1000 each. In this manner, the ap-

plication was allowed in part against the appellant, but the claim against the owner (respondent No. 6) was disallowed without costs. Being aggrieved by the said judgment and award, the insurer has filed this appeal.

6. The first point urged by learned counsel for the appellant was that the Tribunal had no jurisdiction to entertain the petition dated 30-9-1959, inasmuch as the Motor Accidents Claims Tribunal was constituted much later on 28-5-1960 under Section 110 of the Motor Vehicles Act. The rules under Section 111A of the said Act were framed still later, on 5-4-1961, and the publication thereof was on 7-4-1961. He thus pointed out that there was no Tribunal at all on 30-9-1959, and the only remedy of the claimants (respondents 1 to 5) was to institute a suit in case they wanted to claim any compensation. This objection was not taken before the Tribunal and as such this could not be the subject-matter of discussion. But learned counsel placed reliance on the provisions of Section 57(7) of the Evidence Act which provides that the Court shall take judicial notice of the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette. Learned counsel referred to the provisions of Section 110F of the Motor Vehicles Act which reads thus:

"Where any Claims Tribunal has been constituted for any area, no Civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claim for compensation shall be granted by the Civil Court".

He submitted that, according to Section 110F, the Civil Court will not have jurisdiction to entertain any question referred to in that section after the constitution of the Claims Tribunal, but prior to the constitution of the Claims Tribunal the Civil Court alone had the jurisdiction to entertain Claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of Motor Vehicles.

7. Learned counsel relied on *Sushma Mehta v. Central Provinces Transport Services Ltd.*, AIR 1964 Madh Pra 133 to support his contention referred to above. In the decision relied upon four cases were dealt with together, and the case numbers, the dates of accidents and the dates of filing the claims were as follows:

"Case No.	Date of accident.	Date of filing claim.
M. A. No. 59/61 } & M. A. No. 60/61 }	13.9.1959	12.11.1959
M. A. No. 58/61	12.8.1959	23.9.1959
M. A. No. 86/61	24.1.1959	23.1.1959.

Sections 110, 110A to 110F were introduced in the Motor Vehicles Act, 1939, by the Motor Vehicles (Amendment) Act, 1956 (100 of 1956) providing for the constitution of one or more Motor Accidents Claims Tribunals for the purpose of adjudicating upon claims for compensation in respect of accidents involving death or bodily injury. On 18-9-1959 a notification was published in the Madhya Pradesh Gazette bearing the date 7-8-1959 under which a Tribunal was constituted at Jabalpur for several districts including the places where the accidents in the four cases occurred. In the first two cases the accident had occurred after the date of the notification but before its publication, and in the other two cases the accidents occurred before the constitution of the Tribunal. The question arose, whether the petitions lay before the Tribunal. The Claims Tribunal had held that the petitions were not maintainable and as such they were returned for presentation to the Civil Court, and four appeals were filed against those orders. Their Lordships considered the provisions of Section 110F as well and observed that the sentence "no Civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area" made it clear that the two remedies could not exist side by side, and the moment the Claims Tribunal had jurisdiction to entertain the claim, necessarily the jurisdiction of the Civil Court was ousted. Moreover, the Civil Court having jurisdiction to try claims in respect of causes of action which accrued earlier to the publication of the notification, it was not possible to hold that the Tribunal also had jurisdiction to try the claims relating to those causes of action in view of the express provision of that section. The view taken by the Tribunal was affirmed: In the same volume there is another decision. See Dr. Omprakash Mishra v. National Fire and General Insurance Co. Ltd., AIR 1964 Madh Pra 136. Relying on the case of Sushma Mehta, AIR 1964 Madh Pra 133, it was held if the cause of action for compensation arose prior to the constitution of the Tribunal the party injured had the remedy of filing a suit, and the Tribunal had no jurisdiction to entertain an application for granting compensation.

8. There cannot be any dispute about the proposition of law that if the Claims Tribunal was not constituted when the cause of action arose, the remedy of the

aggrieved party was to institute a suit for compensation. But the question as to when the Claims Tribunal was constituted has to be decided on the facts and circumstances of each case. Learned counsel has referred to Notification No. A2-301/60 T-22 dated 28th May, 1960 (published in the Extraordinary issue of the Bihar Gazette dated 30-5-1960), according to which a Motor Accidents Claims Tribunal consisting of the District Judge, Bhagalpur, was constituted for the area comprised within the limits of the jurisdiction of Bhagalpur Division for the purpose of adjudicating upon the claims for compensation in respect of persons arising out of the use of Motor Vehicles. This notification, however, itself refers to the earlier Notification No. A2-301/59 T 38 dated 12th August, 1959, in respect of the same subject and points out clearly that the notification dated 12th August, 1959, was not published in the Gazette. The notification dated 12th August, 1959, (a copy of which is available in the Court's office) also refers to still another earlier Notification No. A2-301/59 T, 19 dated 28-4-1959 and says that that notification may be treated as cancelled. The said notification of 28th April, 1959 (a copy of which is in the Court's office) reads thus:

"In exercise of the powers conferred by sub-section (1) of Section 110 of the Motor Vehicles Act, 1939 (IV of 1939), the Governor of Bihar is pleased to constitute for each of the areas comprised within the limits of the jurisdictions of the Patna, Bhagalpur, Ranchi and Muzaffarpur divisions, a Motor Accidents Claims Tribunal consisting of the District Judge posted at the Headquarters station of the Division, for the purpose of adjudicating upon the claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of Motor Vehicles".

Copies of this notification were forwarded to the various departments of the Government, other officers and also to all District and Sessions Judges, including the Judicial Commissioner of Chota Nagpur. The position thus was that there was a notification under Section 110 of the Motor Vehicles Act, 1939, even on 28-4-1959. The accident in question took place on 1-9-1959 and the claim petition was filed by respondent No. 1 on 30-9-1959. It is thus clear that a Motor Accidents Claims Tribunal was already constituted prior to the filing of the said claim petition. This notification having been pointed out to learned counsel for the appel-

lant, he submitted that this notification as well might have remained unpublished and as such it could not be deemed to be in force. It is, however, not at all sufficient for the learned counsel to suggest that an inference of non-publication should be drawn in favour of the appellant, inasmuch as the burden lay on the appellant to establish satisfactorily that the Claims Tribunal had no jurisdiction to entertain the claim petition. I have already indicated that this objection was not taken before the Tribunal. It is true that the notification dated 28-4-1959 was cancelled by the notification dated 12-8-1959, but the latter notification not having been published, the cancellation itself had no effect and the notification dated 28-4-1959 must be deemed to be in force. The onus was on the appellant to establish that the notification dated 28-4-1959 had no effect and that it was not published, but that burden had not been discharged. I am thus of the opinion that the claim petition was rightly filed by respondent No. 1 on 30-9-1959 before the Motor Accidents Claims Tribunal, Bhagalpur Division (District Judge, Bhagalpur). It is true that that application came to be dealt with long after, but the reason for the delay seems to be that the rules had not been framed till then. The rules were ultimately framed in April, 1961, and then the Tribunal passed an order on 17-7-1961 (referred to above). In this view of the matter, the Claims Tribunal had the jurisdiction to entertain the petition dated 30-9-1959 and the award given by it cannot be said to be without jurisdiction.

9. The second point of learned counsel for the appellant was that the fresh petition for compensation filed on 17-8-1961 was barred by time, inasmuch as, according to Section 110A(3) of the Motor Vehicles Act, no application for compensation under Section 110A could be entertained unless it was made within sixty days of the occurrence of the accident. There is, however, no merit in this contention, inasmuch as the Tribunal itself has pointed out that the application for compensation was filed on 30-9-1959, i.e., within 30 days of the date of the occurrence; but no action was taken on that petition because the rules to be framed under Section 111A were not published. The application filed on 30-9-1959 must be deemed to be an application for compensation, and the "fresh application" was filed on 17-8-1961 only with a view to comply with certain rules which came to be framed long after the filing of the original application. In other words, by the filing of the "fresh application", the original application must be deemed to have been amended, but the compensation was claimed on 30-9-1959 and not on 17-8-1961. The position thus is that the petition for compensation was not barred by limitation.

10. The third point raised by learned counsel for the appellant was that the Tribunal had grossly erred in allowing the amendment of the claim petition so far as the amount of compensation was increased from Rs. 6000 to Rs. 20,000. His main objection was that after the expiry of the period of limitation it was not open to the claimants to amend the petition and make a claim for a higher amount. In the petition filed on 30-9-1959 respondent No. 1 claimed a sum of Rupees 6000 only as compensation and the same amount was claimed by him in the petition filed on 17-8-1961 as well. The petition to amend the claim and increase the amount of compensation was filed on 18-5-1963. There can thus be no doubt that the claim for a sum in excess of Rs. 6000 was a very belated one and by that time the period of limitation for the making of the claim had expired. It is true that in certain circumstances the Court or the Tribunal has the power to allow the amendment of the pleadings, but amendment should not be allowed if a valuable right has accrued in favour of the opposite party on account of the expiry of the period of limitation. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time. This latter observation was made by Sarkar, J., in *A. K. Gupta and Sons Ltd. v. Damodar Valley Corporation*, 1966 BLJR 340 = (AIR 1967 SC 96). For instance, if a person institutes a suit for recovery of money based on a handnote, but he does not claim in the plaint the entire amount to which he is entitled and gives up his claim to a certain extent, it would not be open to him to make a further claim in respect of the amount already given up after the expiry of the period of limitation. The same would be the position in the case of a suit instituted for the recovery of the dues based on a mortgage bond. These matters have not been carefully considered by the Tribunal, and at the hearing of the claim case the Tribunal held the amendment already allowed to be proper on the ground that it was required in the interest of justice. The prejudice caused to the other side has been completely ignored. In the circumstances of the present case, the claimant (respondent No. 1) ought not to have been allowed to amend the claim petition. The discretion has been wrongly exercised by the Tribunal and the claim must be limited to Rs. 6000.

11. Learned counsel for the appellant further urged that the Tribunal ought not to have added respondents 2, 3, 4 and 5, inasmuch as the petition to add respondents 2 and 3 as petitioners 2 and 3 was filed on 18-5-1963 and the petition of respondents 4 and 5 for being added was filed still later, on 26-8-1963. There is no

doubt that these petitions were filed long after the expiry of the period of limitation prescribed for the making of a claim, and the legal representatives of the deceased must seek their remedies within 60 days of the occurrence of the accident, according to Section 110A(3) of the Motor Vehicles Act. Respondent No. 1 filed a petition on 18-5-1963 for adding Babulal Raut and Kodo Raut (respondents 2 and 3) as parties stating that they also were the sons of Kalawati Rautine and it was necessary that proceedings should be carried on in their presence to avoid any objection. He further stated that those two persons also were entitled to a share in the amount of compensation; but apart from it, he mentioned that he had made the application as legal representative and Karta of the Joint Hindu family consisting of himself and his two brothers and there was no clash of interest. The ground given for adding those two persons as parties at that stage is not at all cogent and sufficient and they ought to have made the claim themselves at the earliest stage within the prescribed period of limitation. It was open to respondent No. 1 to ask them to join in the petition filed on 30-9-1959, but that step was not taken, and there is absolutely no satisfactory explanation for that omission. The same is the position with regard to the petition filed by respondents 4 and 5 for being added as parties. These respondents (2 to 5), however, filed petitions before the Tribunal that the entire amount of compensation might be paid to Rameshwar Raut, respondent No. 1 (petitioner No. 1 in the claim case) and they would have no objection to that course being adopted. In fact, it was noted by the Tribunal itself in the orders dated 18-5-1963 and 26-8-1963. I am of the opinion that respondents 2 to 5 ought not to have been added as parties in the claim case and as such they are not entitled to get any share in the amount of compensation; but that would not stand in the way of respondent No. 1's getting the entire amount of compensation which would be determined in this appeal.

12. The fourth point urged by learned counsel for the appellant was that the claimants had failed to prove that there was any negligence on the part of the chauffeur who was driving the said jeep and as such they were not entitled to claim any compensation. He relied on *Shri Ram Pertap v. General Manager, Punjab Roadways, Ambala*, AIR 1962 Punj 340 and *Nand Singh Viridi, Chandigarh v. Punjab Roadways, Amritsar*, AIR 1963 Punj 214. He submitted that the evidence of the solitary witness, Rameshwar Raut, respondent No. 1 (witness No. 1 for the petitioners) that the said jeep was coming at a great speed should not be

believed, inasmuch as he frankly admitted in cross-examination that he was at his house at the time of the occurrence and that he went to the place of occurrence 10 minutes after the occurrence. This witness was examined thrice before the Tribunal, firstly, on 18th April, 1963, secondly, on 10th August, 1963, and, thirdly, on 3rd September, 1963. It is quite clear that he was not present at the time of the occurrence and hence he was not at all competent to say about the speed of the said jeep at the time of the accident. In these circumstances, the contention was that there was no evidence of negligent driving, if any, and there was no finding that the jeep was being driven rashly and negligently. A question arose in course of the argument as to whether such a defence was open to the insurer in view of the provisions of Section 96(2) of the Motor Vehicles Act. Learned Counsel for respondents 1 to 5 relied on *British India General Insurance Co. Ltd. v. Captain Iltar Singh*, AIR 1959 SC 1331 to support his contention that it was not open to the insurer to urge that there was no negligence on the part of the driver. It was held by their Lordships that an insurer was entitled to oppose the claim for compensation only on the grounds enumerated in Section 96(2) and not on others. Learned counsel for the appellant, however, pointed out that the appeals before the Supreme Court arose out of the two suits which were filed for recovery of damages and there was no appeal arising out of a proceeding under the Motor Vehicles Act. In other words, according to him, Section 96(2) was not a bar to the insurer, so far as the above-mentioned defence was concerned, if a notice to the insurer was given to appear in a proceeding under the said Act. He relied on a Division Bench decision of the Madras High Court in *K. Gopalakrishnan v. Sankara Narayanan*, AIR 1968 Mad 436. The decision of the Supreme Court referred to above was considered and their Lordships observed as follows:

"It should be noted that Section 96 of the Act was introduced several years before the constitution of the Claims Tribunal by the present Section 110 of the Act. At the time when Section 96 of the Act first came into force there was no claims tribunal. Section 96 was introduced in order to enforce the duty of insurers to satisfy judgments against persons insured in respect of third party risk by giving them notice after judgment obtained by third party against persons insured in respect of third party risk. It is only in such cases the defences open to the insurer are restricted to the grounds mentioned in Section 96(2) of the Act. A reading of Section 96 would clearly show that it was not intended to govern en-

quiry before a claims tribunal. Section 96 contemplates proceedings in a Court and not a proceeding before a Tribunal. It contemplates notice being given to the insurer which may be before or after judgment is obtained against the person who had effected insurance for third party risk. The insurer is no doubt entitled to be made a party and defend the action on the grounds mentioned in that Section. But in the proceedings before a Claims Tribunal the insurer is a party. The decision in *Vanguard Fire and General Insurance Co. v. Sarla Devi*, AIR 1959 Punj 297 and AIR 1959 SC 1331 holding that an insurer is not entitled to take any defence which is not mentioned in sub-section (2) of Section 96 of the Act are all decisions in which the insurers were given notice in proceedings by way of suit as contemplated under the provisions of Section 96 of the Act. It has been rightly pointed out in those decisions that apart from the statute, an insurer has no right to be made a party to the action by the injured person against the insured causing the injury and that the rights open to the insurer are therefore governed by those provided in the section. The decisions do not relate to proceedings before a Claims Tribunal where the insurers are made parties and the scope of the defences which they were to put forward has not in any way been restricted."

13. In my opinion, it is not at all necessary to go into the question as to whether the provisions of Section 96(2) are attracted and there is any bar to the insurer taking the plea that there was no negligence on the part of the driver, inasmuch as this defence had not been at all taken by the insurer in the objection or the show cause filed before the Tribunal. On the other hand, it was stated in the objection filed by the insurer (Opposite Party) that "since the insured is liable for the accident, if any, this opposite party is not liable to pay the claim". In these circumstances, the question raised is only academic and it is not necessary to deal with it in the present appeal. It is true that the owner (respondent No. 6) stated in his show cause that the Jeep was running in a normal speed, but he had not raised that plea before us as the Tribunal has directed the insurer (appellant) to pay the amount of compensation. Moreover, the claimant (respondent No. 1) had alleged in the petition filed on 30-9-1959 that there was a rash and negligent act on the part of the driver, Brajendra Prasad Singh, but this version was not denied by the appellant. I would further point out that the appellant has not called for the policy of insurance issued by it in respect of the aforesaid jeep and as such the terms of that policy are not known. In case the appellant could be liable, accord-

ing to the terms of the policy, to pay the compensation only on the proof of negligence on the part of the chauffeur, it was incumbent on the appellant to prove those terms.

14. The fifth point urged by learned counsel for the appellant was that the Tribunal having disallowed the claim against the owner, Shyama Prasad Singh, there could be no liability on the appellant, and in this respect also the award of the Tribunal was erroneous in law. Section 110B of the Motor Vehicles Act provides that on receipt of an application for compensation made under Section 110A, the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an enquiry into the claim and may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid; and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer. The Tribunal seems to have the provisions of this section in view while directing the insurer (appellant) to pay the amount of compensation to the applicants. Rule 6 of the Bihar Motor Vehicles Accidents Claims Tribunals Rules, 1961, provides that if the application is not dismissed under Rule 5, the Claims Tribunal shall send to the owner of the motor vehicle involved in the accident and its insurer, a copy of the application together with a notice of the date on which it will hear the application and may call upon the parties to produce on that date any evidence which they may wish to tender. Thereafter, there is a further provision even for the insurer to file a written statement (see Rule 7). The position thus is that the insurer (appellant) was a party to the claim case, and, after the conclusion of the proceeding, the award in question was given by the Tribunal. The expression 'disallowing the claim against the owner' used by the Tribunal must be held to mean that the actual payment has to be made by the insurer, as if it were the judgment-debtor, as the jeep was insured at the time of the accident on 1-9-1959. A similar contention was raised in *The Vanguard Insurance Co. Ltd. v. Foolchand Mandal*, AIR 1967 Pat 342 but it was overruled.

15. The last point urged by learned counsel for the appellant was with regard to the quantum of damages, and he submitted that there was absolutely no basis for awarding a sum of Rs. 10,000 in all as compensation. He further submitted that the evidence to prove the quantum of compensation was very meagre and the Tribunal was entirely wrong in taking into account only the means and status of the family of the claimants for the purpose of determining

the amount of compensation. Ordinarily, the appellate Court is disinclined to reverse the finding of the Claims Tribunal as to the amount of compensation. The relevant observations in this connection are the following in *Flint v. Lovell*, (1935) 1 KB 354 at p. 360:

"In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled".

These observations were referred to and relied upon in *Champalal Jain v. B. P. Venkataraman*, AIR 1966 Mad 466. In *Madhya Pradesh State Road Transport Corporation, Jabalpur v. Jahiram*, AIR 1969 Madh Pra 89, it was held, relying on *Nance v. British Columbia Electric Rly. Co. Ltd.*, 1951-2 All ER 448 that an appeal upon the quantum of damages will not be allowed unless either (i) the Tribunal had applied a wrong principle of law, or, misdirected itself or (ii) the amount awarded either was so inordinately low or was so inordinately high that it must be held as erroneous. The normal rule, therefore, was that no appeal lay on the quantum of damages unless it involved a matter of principle. The principles and criteria for ascertaining the amount of compensation have not been laid down in the Motor Vehicles Act, but the Claims Tribunal can make an award determining the amount of compensation which appears to it to be just and reasonable, and it has to specify the person or persons who shall be paid and the amount as well which shall be paid by the insurer. Learned counsel for the appellant, while developing this point, referred to *Gobald Motor Service Ltd. v. R. M. K. Veluswami*, AIR 1962 SC 1 which lays down the principles for determining the amount of damages. The passage relied upon by learned counsel occurs on page 5, and it reads thus:

"The scope of the corresponding provisions of the English Fatal Accidents Act has been discussed by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.*, 1942 AC 601. There Lord Russell of Killowen stated the general rule at p. 606 thus:

"The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well settled, namely, that any benefit accruing to a dependent by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependent by the death must be ascertained, the position of each dependant being considered separately."

Lord Wright elaborated the theme further thus at p. 611:

"The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered.....The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other any pecuniary advantage which from whatever source comes to him by reason of the death."

In that case their Lordships were dealing with the provisions of the Fatal Accidents Act, 1855 (XIII of 1855), and Section I of that Act entitled the party injured to maintain an action and recover damages in certain circumstances. That decision is not of any assistance to the appellant.

16. The guiding principles for fixing a reasonable amount by way of damages have been thoroughly discussed and laid down by the House of Lords in *Benham v. Gambling*, 1941 AC 157. Viscount Simon L. C. observed thus:

"I would rather say that before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award. It is significant that, at any rate in one case of which we were informed, the jury refused to award any damages under this head at all. As Lord Wright said in *Rose v. Ford*, 1937 AC 826 special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury, or at any rate as inflicting the same injury as in more normal cases. I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness; the test is not subjective and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects.

The main reason, I think, why the appropriate figure of damages should

be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects—having passed the risks and uncertainties of childhood and having in some degree attained to an established character and to firmer hopes—his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult, I see no reason why the proper sum to be awarded should be greater because the social position or prospects of worldly possessions are greater in one case than another. Lawyers and Judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status".

In that case a sum of Pounds 200 was considered as proper by way of damages in respect of the shortening of the life of an infant who was 2½ years old at the time of the accident.

This decision of the House of Lords was relied upon in *Krishna Gounder v. Narasingam Pillai*, AIR 1962 Mad 309. In the Madras Case the boy (since deceased) was seven years old at the time of the occurrence and was studying in the second class in an elementary school. He was healthy, clever and enthusiastic and had never fallen ill. According to his father, he would have at least earned Rs. 50 to Rs. 60 per month as a clerk. It was held that the award of Rs. 5000 as damages for the loss of expectation of life was not in any way excessive or extravagant. In *T. V. Gnanavelu v. D. P. Kannayya*, AIR 1969 Mad 180 the award of Rs. 4000 as damages for the death of a person at the age of 60 was not held to be excessive, inasmuch as that amount was reasonable under the head "loss of expectancy of life".

17. Turning to the facts of the present case, it appears that Rameshwar Raut (respondent No. 1) stated in his evidence that his mother was aged 55 years and she was looking after the domestic affairs of the family and on the date of the accident she along with the child had gone to tend cattle. The witness further stated that he had about 70 bighas of land and he was paying Rs. 30 or Rs. 35 as rent. The Claims Tribunal, while dealing with the quantum of damages, referred to this evidence and came to the conclusion that the insurer was liable to pay a sum of Rs. 10,000 as total compensation. To begin with, it was determining the quantum of compensation on the footing that the total claim made by respondents 1 to 5

was Rs. 20,000. I have already indicated that the claim must be limited to Rs. 6000, as the amendment was wrongly allowed. The Tribunal has not indicated the basis on which it arrived at the figure of Rs. 10,000 as total compensation. It is thus necessary to interfere with the award given by the Tribunal, and the total sum determined by it has to be reduced. The evidence, however, adduced by the claimants was ex parte and the appellant did not adduce any oral evidence in the instant case. The loss accrued on account of the shortening of the life of the mother and the child has to be taken into account. The mother, Kalawati Rautine, could be reasonably expected to have lived comfortably for a further period of 10 or 15 years, as her son had about 70 bighas of land. In other words, the circumstances for leading that kind of life were favourable, and there is nothing to suggest that the family was in wants. Having regard to these facts Rameshwar Raut (respondent No. 1) is entitled to a sum of Rupees 3000 as compensation on account of the death of his mother, Kalawati Rautine. So far as the child, Bimla Rautine, is concerned, she was aged about 4 years and there was a lot of uncertainty about her future. There cannot be any reliable estimate of her prospects and good fortune. She belonged to Kurmi Community and her father has not said in his evidence that he intended to send her to any school for being educated. I am of the opinion that on account of the shortening of her life by reason of the accident, Rameshwar Raut (respondent No. 1) is entitled to a sum of Rs. 2000 as compensation.

18. In the result, the appeal is allowed in part and the judgment and award of the Claims Tribunal are modified to this extent that Rameshwar Raut (respondent No. 1) alone is entitled to a sum of Rs. 3000 as compensation on account of the death of his mother, Kalawati Rautine, and a further sum of Rs. 2000 as compensation on account of the death of his daughter, Bimla Rautine. The appellant (insurer) is directed to pay these sums to Rameshwar Raut (respondent No. 1). The other claimants, respondents 2 to 5, are not entitled to get any sum as compensation. In view of the partial success of both the parties, they will bear their own costs throughout.

19. DUTTA, J.: I agree.

Appeal partly allowed.

AIR 1970 PATNA 182 (V 57 C 29)
TARKESHWARNATH AND K. K.
DUTTA, JJ.

M/s. Sobharam Jokhiram, Appellant v
 Union of India, Respondent.

A. F. A. D. No. 225 of 1966, D/- 16-5
 1969, against judgment of Dist. J. Santhal
 Parganas at Dumka D/- 19-1-1966

(A) Railways Act (1890) (Before its
 amendment by Act 39 of 1961), S. 74-A
 — No recording of defective packing in
 forwarding note — Section is not applic-
 able — Inapplicability of the section will
 not debar Railway from proving that the
 goods were defectively packed.

For the applicability of the provisions
 of S. 74A which exonerates the railway
 administration for any deterioration or
 leakage, wastage or damage to the con-
 signment except upon proof of negligence
 or misconduct, there should be not only
 a defective packing of the goods or pack-
 ing in a manner not in accordance with
 any general and special order issued under
 sub-section (2), but the fact of such defect-
 ive or improper packing must also be
 recorded by the sender or his agent in
 the forwarding note. Mere fact that one
 of the conditions for the applicability of
 the section, namely, the defective pack-
 ing of the goods, has been established can-
 not dispense with the other condition laid
 down in the section, namely, recording of
 such defective packing in the forwarding
 note itself by the sender or his agent.

(Para 6)

However it cannot be said that as the
 provisions of Section 74A are found to be
 inapplicable on account of the failure to
 bring on record and prove the forwarding
 note the defendant is debarred from prov-
 ing that the goods were defectively pack-
 ed. There is nothing in Section 74A
 which provides that the defective condi-
 tion of the packing can be proved only
 in cases to which the provisions of this
 section will apply and the only effect of
 failure of the defendant to prove the for-
 warding note will be that the consequen-
 ces as laid down in the last portion of sub-
 section (1) cannot follow. AIR 1960 Pat
 111, Distinguished.

(Para 7)

(B) Railways Act (1890) (Before its
 amendment by Act 39 of 1961), Ss. 74C (3),
 74D — Consignment booked at owner's
 risk rate — Damages to goods in transit
 — Responsibility of Railway — Negligence
 on the part of Railway administration or
 its servant must be proved — Disclosure
 as to how consignment was dealt with in
 course of transit — Railway is not bound
 to disclose where cls. (a) and (b) of
 S. 74D are not applicable.

Where consignment is booked at owner's
 risk rate S. 74C is applicable and the
 railway administration cannot be held to

be responsible for any loss, deterioration,
 destruction or damage to the goods from
 any cause whatsoever except upon proof
 that the same was due to the negligence
 or misconduct on the part of the railway
 administration or any of its servants.
 Under Section 74D, no doubt, the railway
 administration is bound to disclose to the
 consignor how the consignment was dealt
 with throughout the time it was in its
 possession or control, but this liability for
 disclosure arises only in the circumstances
 mentioned in clauses (a) and (b) of this
 section. Where neither clause (a) nor
 clause (b) of Section 74D applies to the
 facts of a case, there is no liability on
 the railway to make any disclosure to the
 consignor in accordance with the provi-
 sions of this section. As such where no
 disclosure has been sought for by the
 plaintiff it cannot be said that an adverse
 inference should be drawn against the de-
 fendant in accordance with Section 106 of
 the Evidence Act for the failure of the de-
 fendant to adduce evidence as to how the
 consignment was dealt with at the book-
 ing station or at any other place.

(Paras 9 & 10)

(C) Railways Act (1890) (Before its
 amendment by Act 39 of 1961), Ss. 74C,
 74D — Negligence on the part of Railway
 administration — Proof of — Consign-
 ment of tins of coconut oil — Rule 132 of
 Standing Order requiring wagons contain-
 ing cocoanut oil to be affixed with a label
 "not to be loose shunted" — Failure to
 comply with, will amount to negligence.
 AIR 1964 Andh Pra 172, Dissented from.

In respect of consignment of cocoanut
 oil, failure on the part of Railway adminis-
 tration, to affix the wagon with the label
 'not to be loose shunted' as directed by
 R. 132 of Standing Order, will clearly
 amount to negligence on their part. Al-
 though this rule is departmental rule and
 cannot be said to have any statutory force,
 it cannot be said that a breach of this rule
 by the railway servants cannot be constru-
 ed as amounting to negligence by them.
 As these rules have been framed for the
 guidance of the railway servants, it is
 their duty to obey these directions and
 if they fail to comply with such direc-
 tions, such non-compliance must be con-
 strued as amounting to negligence by
 them. AIR 1964 Andh Pra 172, Dissented
 from.

(Para 11)

Cases Referred: Chronological Paras
 (1964) AIR 1964 Andh Pra 172 (V 51).
 Union of India v. Eastern
 Match Co.

11

(1964) AIR 1964 Cal 362 (V 51).
 Textiles and Yarn (P) Ltd. v.
 Indian National Steamship Co.
 Ltd.

- (1964) AIR 1964 Punj 147 (V 51), Union of India v. Delhi Cloth and General Mills Co. Ltd. 10
 (1960) AIR 1960 Bom 344 (V 47)= 10
 ILR (1960) Bom 507, Ram Krishna Ram Nath Shop v. Union of India 10
 (1960) AIR 1960 Pat 111 (V 47), Bihar Agents Ltd v. Union of India 7
 (1948) AIR 1948 Pat 237 (V 35), Governor General in Council v. Rangalal Nandlal 10

B. P. Rajgarhia and Biswanath Agarwal, for Appellant; P. K. Bose, for Respondent.

DUTTA, J.: This appeal arises out of a suit for recovery of compensation on account of shortage in delivery out of a consignment of 696 tins of cocoanut oil, which were booked from Trichur station of the Southern Railway to Sahebganj station of the Eastern Railway on 30-3-60 under Railway Receipt No. 470341 Invoice No. 13. The consignment reached Sahebganj Railway station on 22-4-60 and, thereafter, open delivery was taken by the plaintiffs in whose favour the railway Receipt had been transferred. 289 tins of cocoanut oil were found to have become dented and leaky and out of these, 71 tins were found to be completely empty and the remaining 218 tins were partly empty and this had resulted in a shortage of 42 maunds 2 seers of cocoanut oil and aforesaid 289 tins were further alleged to have become completely unserviceable. The shortage, according to the plaintiff was caused by the negligence and misconduct on the part of the Southern Railway, South Eastern Railway and Eastern Railway and their servants. The plaintiff claimed to have duly issued notices under Section 77 of the Indian Railways Act and Section 80 of the Code of Civil Procedure to the General Managers of the aforesaid Railways, but they failed to satisfy the plaintiffs' claim. On these allegations, the plaintiff brought the suit out of which this appeal arises, claiming a sum of Rs. 3805/8/- on account of the value of 42 maunds 2 seers of cocoanut oil and a further sum of Rs. 433/8/- on account of the price of 289 tins besides some other amounts, the total claim being for Rs. 4700.

2. A written statement was filed in the suit by the Union of India as owner of the Eastern Railway and, subsequently, the same written statement was adopted by the Union of India as owner of the Southern Railway and South Eastern Railway also. The defendant challenged the plaintiff's allegation about the aforesaid loss being due to negligence or misconduct on the part of the Railway Administration concerned or their servants. The damage caus-

ed to the tins and the resulting shortage due to leakage therefrom were ascribed as being solely due to the failure of the consignors in packing the tins properly in cases or crates in accordance with the Tariff Rules and also due to their failure to provide sufficient dunnage in between the tins in consequence of which these could not stand the strain due to normal oscillation of the train in course of the long journey of over 1000 miles. The defendant further alleged that the consignments had been booked at the risk of the consignor and after booking the tins were loaded in Wagon No. 49588 of Northern Railway in presence of the senders' agent at Trichur and after loading the wagon was properly sealed and rivetted in his presence and subsequently the wagon reached Sahebganj with both sides original seals and rivets intact. The fact that on opening the wagon at Sahebganj in presence of the plaintiffs' agent, 71 tins were found to be entirely empty and 218 tins partly empty resulting in the total shortage of 42 maunds 2 seers of cocoanut oil was admitted. The defendant further denied the legality and validity of the service of notices under Section 77 of the Railways Act and Section 80 of the Code of Civil Procedure and the claim as made by the plaintiff was further alleged to be highly inflated and exaggerated. Pleas of limitation as well as non-maintainability of the suit as framed was also taken.

3. The issues regarding limitation and invalidity of the service of notices under Section 77 of the Railways Act and Section 80 of the Code of Civil Procedure and non-maintainability of the suit were decided against the defendant and the correctness of these findings was not challenged in the present appeal. The trial court further held that there was failure on the part of the Railway servants to affix the label not to be loose shunted on the wagon in which the consignment was carried and the damage to the tins of cocoanut oil, which had resulted in leakage therefrom, was caused on account of severe, jolting which took place in consequence of the loose shunting of the wagon in course of the journey. That court accordingly came to the finding that the damage was due to the negligence of the servants of the Railway Administration and the plaintiff was, therefore, held to be entitled to recover damage for the loss sustained by it. The entire amount of Rs. 3805/8/- as claimed by the plaintiff on account of the value of the cocoanut oil was allowed by that court, but the amount claimed on account of the price of the tins was reduced by allowing the same at the rate of ten annas per tin. Some further amounts were allowed on account of

incidental charges and profits at the rate of 5 per cent on the value of the oil and on account of costs on notices etc. and, in all, a decree for a total amount of Rupees 4192/2/- was passed by that court.

4. There was an appeal by the defendant and the lower appellate court disagreed with the finding of the trial court that the damage was caused on account of loose shunting and held that the possibility about damage to the tins having been caused as a result of toppling down and then tossing on the floor in course of the normal movement of the train could not be ruled out in the circumstances of the case. It was further held that there was no evidence to prove any negligence or misconduct on the part of the Railway Administrations and their servants in dealing with the consignment while in transit and the plaintiff was accordingly held to be not entitled to recover any amount as damage. The appeal was, accordingly, allowed and the decree as passed by the trial court was set aside. The present appeal has thereon been preferred by the plaintiff.

5. Before proceeding to discuss the points that were urged before us in the present appeal, it will be convenient to refer to certain facts which are not disputed. As already mentioned, the defence case was that the consignment was loaded at Trichur in a wagon which was duly rivetted and sealed and the same arrived at the destination, that is, Sahebganj with the seals and rivets intact. This version has not been challenged and it was admitted that the consignment had arrived at Sahebganj in the same wagon in which it had been loaded at Trichur and that the seals and rivets of that wagon were found to be intact. It is further admitted that the shortage was not due to any pilferage but was actually due to leakage from the tins in consequence of the tins having become dented and leaky as a result of toppling down and jolting in course of the journey from Trichur to Sahebganj. Hence the only point that has to be determined is whether the damage to the tins was caused on account of any negligence or misconduct on the part of the Railway Administrations or their servants.

6. The lower appellate court has come to the finding that the provisions of Section 74A (as the same stood prior to the amendment of the year 1961) were applicable to the case and, as such, the Railway Administrations could not be held liable for the loss and damage except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants. This section, as it stood prior to the amendment of 1961, was as follows:

"(1) When any goods tendered to a railway administration for carriage by railway—

(a) are in a defective condition as a consequence of which they are liable to deterioration, leakage, wastage or damage in transit, or

(b) are either defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under sub-section (2) and, as a result of such defective or improper packing, are liable to leakage, wastage or damage in transit,

and the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note, the railway administration shall not be responsible for any deterioration, leakage, wastage or damage, or for the condition in which such goods are available for delivery at destination, except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants.

(2) The Central Government may, by general or special order, prescribe the manner in which goods tendered to a railway administration for carriage by railway shall be packed."

It is thus manifest that for the applicability of the provisions of this section, which exonerates the railway administration for any deterioration or leakage, wastage or damage to the consignment except upon proof of negligence or misconduct, two conditions have to be satisfied, namely, (i) that the goods tendered to the railway administration for carriage were in defective condition in consequence of which they were liable to deterioration, leakage, wastage or damage or that they were either defectively packed or packed in a manner not in accordance with the general and special order, if any, issued under sub-section (2) and as a result of such defective and improper packing were liable to wastage or damage and (ii) that the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note. In the present case, it has been found by both the courts below that the tins of the coconut oil were not packed in cases or crates in accordance with the prescribed rules, but had been merely tied with some coir ropes and, as such, these were defectively packed and were liable to leakage, wastage or damage in course of the transit thereon. These findings are fully supported by the entries in the Railway Receipt as well as by the admissions of the plaintiff's witnesses. It appears, however, that the forwarding note has not been proved in this case with the result that the second condition for the applicability of these provisions regarding onus as incorporated in Section 74A, namely,

recording of the defective and improper packing by the sender or his agent has not been satisfied. It was contended on behalf of the respondent that the non-production of the forwarding note is not of any importance as the fact that the goods were defectively packed is admitted in the present case and, as such, the provisions of Section 74A regarding onus should be held to be applicable. This contention, however, cannot be accepted. According to the terms of this section, there should be not only a defective packing of the goods or packing in a manner not in accordance with any general and special order issued under sub-section (2), but the fact of such defective or improper packing must also be recorded by the sender or his agent in the forwarding note. The admissions as made by the plaintiff's witnesses merely prove that one of the conditions for the applicability of the section, namely, the defective packing of the goods, has been established, but that cannot dispense with the other condition laid down in the section, namely, recording of such defective packing in the forwarding note itself by the sender or his agent. Hence, the aforesaid contentions as made on behalf of the Respondent cannot be upheld and the view taken by the courts below that the provisions of Section 74A are applicable to this case cannot be accepted as correct. It follows, therefore, that this section, that is, Section 74A can have no bearing in determination of the point whether the damage in question was due to any negligence or misconduct on the part of the railway administration or its servants.

7. It was next contended on behalf of the appellant that the provisions of Section 74A being inapplicable to this case for reasons mentioned above, it was not open to the Courts below to arrive at any finding that the consignment was defectively packed. This contention, however, appears to be quite untenable, as there is nothing in Section 74A which provides that the defective condition of the packing can be proved only in cases to which the provisions of this section will apply. Reliance was placed on behalf of the appellant in this connection on a decision in *Bihar Agents Ltd. v. Union of India*, AIR 1960 Pat 111. This was a decision of a Single Judge of this Court and in this case there was pilferage from a consignment of a bale of cloths. The goods in this case had been booked at the owner's risk and after rejecting the contention of the Respondent about the applicability of section 74A, the following observations were made:

"In my opinion, therefore, the instant case is governed by section 74C of the Railways Act, and the bales must be deem-

ed to have been despatched at simply owner's risk rate, and cannot be held to have been despatched in a defective or improper packing. If it is a case of section 74C only, as in my opinion it is, the provisions of section 74D are clearly attracted and this was fairly conceded by Mr. Bose also. Then the obligation to disclose is there on the railway."

The question as to whether the defendant is debarred from proving that the goods were defectively packed in cases where the provisions of Section 74A are found to be inapplicable on account of the failure to bring on record and prove the forwarding note to show that there is no such defective packing therein does not appear to have been specifically raised or decided in the above case and, as such, it cannot be held to be an authority for this contention. As already mentioned, there is nothing in the section itself to support this contention and the only effect of failure of the defendant to prove the forwarding note would be that the consequences as laid down in the last portion of sub-section (1) could not follow. Hence, the contention that it was not open to the courts below to come to a finding about the goods having been, packed in defective condition is quite untenable.

8. Now although the provisions of section 74A are not applicable in view of the facts of the present case, there cannot be any doubt regarding the applicability of Section 74C, as it is admitted that the consignment was booked at the owner's risk rate and this position was fairly conceded by learned Counsel on behalf of the appellant also. This section provides as follows:

"(1) When any animals or goods are tendered to a railway administration for carriage by railway and the railway administration provides for the carriage of such animals or goods either at the ordinary tariff rate (in this Act referred to as the railway risk rate) or in the alternative at a special reduced rate (in this Act referred to as the owner's risk rate), the animals or goods shall be deemed to have been tendered to be carried at owner's risk rate, unless the sender or his agent elects in writing to pay the railway risk rate.

(2) Where the sender or his agent elects in writing to pay the railway risk rate under sub-section (1) the railway administration shall issue a certificate to the consignor to that effect.

(3) When any animals or goods are carried or are deemed to be carried at owner's risk rate, a railway administration shall not be responsible for any loss, destruction or deterioration of or damage to such goods from any cause whatsoever except upon

proof that such loss, destruction, deterioration or damage was due to negligence or misconduct on the part of the railway administration or of any of its servants." It is also necessary to refer to S. 74D in this connection which runs as follows:

"Notwithstanding anything contained in section 74C—(a) where the whole of a consignment of goods or the whole of any package forming part of a consignment carried at owner's risk rate is not delivered to the consignee and such non-delivery is not proved by the railway administration to have been due to any accident to the train or to fire, or

(b) where, in respect of any consignment of goods or of any package which had been so covered or protected that the covering or protection was not readily removable by hand, it is pointed out to the railway administration on or before delivery that any part of such consignment or package had been pilfered in transit,

The railway administration shall be bound to disclose to the consignor how the consignment or package was dealt with throughout the time it was in its possession or control, but if negligence or misconduct on the part of the railway administration or of any of its servants cannot be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor."

9. In view of the provisions of sub-section (3) of section 74C, as the consignment in this case was booked at the owner's risk rate, there cannot be any doubt that the railway administration cannot be held to be responsible for any loss, deterioration, destruction or damage to the goods from any cause whatsoever except upon proof that the same was due to the negligence or misconduct on the part of the railway administration or any of its servants. Under section 74D, no doubt, the railway administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control, but this liability for disclosure arises only in the circumstances mentioned in clauses (a) and (b) of this section that is, either when the whole of the consignment or whole of any package forming part of the consignment is not delivered and such delivery is not due to any accident to the train or to fire when there has been pilferage in transit in the circumstances mentioned in clause (b). In the instant case there is no question of applicability of clause (b) for, as already mentioned, it is admitted that the loss in this case was not due to any pilferage. Clause (a) also appears to be inapplicable in the present case, as there was neither any non-delivery of the whole consignment nor any non-delivery of the whole

of any package forming part of the consignment, as although some of the tins were found to be completely empty, the tins themselves also constitute parts of the packages concerned. If the railway had failed to deliver any of the tins containing coconut oil, the case would have been covered by clause (a), but as this was not the position, it cannot be said that there was any non-delivery of the whole of any of the packages forming part of the consignment. As neither clause (a) nor clause (b) of Section 74D applies to the facts of the present case, there was no liability on the railway to make any disclosure to the consignor in accordance with the provisions of this section.

10. It was, however, contended on behalf of the appellants that even if there was no liability on the part of the railway to make any disclosure under section 74D, the railway was bound to give evidence making disclosure as to how the consignment had been dealt with throughout the time it was in its possession in view of the provisions of section 106 of the Evidence Act, as these facts were within the special knowledge of the defendants. The decisions reported in *Union of India v. Delhi Cloth and General Mills Co. Ltd.*, AIR 1964 Punj 147, *Textiles and Yarn (P) Ltd. v. Indian National Steamship Co. Ltd.*, AIR 1964 Cal 362, *Ramkrishna Ramnath Shop v. Union of India*, AIR 1960 Bom 344 were relied upon in support of this contention and the decision in *Governor-General in Council v. Messrs. Rangalal Nandial*, AIR 1948 Pat 237 was also relied upon in this connection. The principle laid down in these cases is that if a material fact is within the special knowledge of a party, an adverse inference can be drawn against him if he fails to adduce evidence on that point and, similarly, an adverse inference can be drawn if a party fails to adduce some material evidence. In the present case, the plaintiffs did not call upon the defendant at any stage of the case to produce any particular evidence or to make any disclosure on any particular point. The only prayer for disclosure is contained in paragraph 7 of the plaint, which runs as follows:

"The plaintiff is unable to give particulars of negligence and/or misconduct on the part of the Railways and/or their servants until the defendant Union of India gives full disclosure as to how the suit goods were dealt throughout the time the same were in the possession and control of the Railways. The plaintiff hereby calls upon the defendant Union of India to give such disclosure." The disclosure that was sought for in this paragraph is evidently a disclosure as contemplated by Section 74D of the Railways Act and, as already mentioned, this

section has no application to the facts of the present case. It further transpires that in reply to paragraph 7 of the plaint, the defendant had disclosed in paragraph 11 of the written statement about the consignment having been booked at the risk of the consignor, and had further stated that after booking, the tins were loaded in wagon no. 49588 NR in the presence of the senders' agent at Trichur and after loading, the wagon was properly sealed and riveted in presence of the senders' agent and after this the wagon left Trichur for its destination and reached Sahebganj on 22-4-60 with both sides original seals and rivets intact. After these statements by the defendants, the plaintiff did not pray for any disclosure by the defendant on any further point and did not call upon the defendant to adduce any evidence on any particular point. As such, the contention that an adverse inference should be drawn against the defendant in accordance with Section 106 of the Evidence Act for the failure of the defendant to adduce evidence as to how the consignment was dealt with at the booking station or at any other place is quite untenable.

11. It would thus appear that in view of the provisions of Section 74C, already referred to above, the railway administration cannot be held liable for the loss in the present case unless it is proved that this loss was due to negligence or misconduct on the part of the railway administration or its employees. In the plaint itself, there is no allegation of any particular act of negligence or misconduct and, as already mentioned, in paragraph 7 of the plaint, the plaintiff expressed its inability to give any such particulars. The only negligence that was alleged during the hearing of the case was that there was failure on the part of the railway administration to affix to the wagon the label "not to be loose shunted" and it was in consequence of this failure that there had been loose shunting of the wagon in course of the journey and the damage took place due to that. The trial court accepted the plaintiff's case about no such label having been affixed to the wagon, but the lower appellate Court has not come to any definite finding on this point, as it was of the view that this was quite immaterial as no rule had been produced before that court to show that affixing of such label was necessary. Some of the rules, however, were placed before us and it appears that Rule 152 of the General Rules framed under section 47 of the Indian Railways Act provides as follows: "Vehicles containing passengers, explosives dangerous goods, or livestock shall not be loose shunted and no loose-shunting shall be made against such vehicles."

Another rule which is relevant in this connection is Rule 132 (B) which appears to be one of the rules issued under Standing Orders of the Operating Department and it runs as follows:

"Loose shunting of the following descriptions of wagons (among others) is strictly prohibited by G. R. and S. R. 152 (b):

* * * *

(12) Wagons loaded with ghee, vegetable oils (i.e. mustard, castor, mowha, til and linseed) methylated and denatured spirits and lubricating, groundnut and cocoanut oils.

* * *

Wagons containing the abovementioned consignments must be labelled prominently on both sides with a special label "Not to be loose shunted" printed in red, specifically provided for the purpose.

Station-Masters and Yard-Masters particularly at Stations with Hump-yards must see that wagons bearing the above label are not loose or fly-shunted under any circumstances."

It would thus appear that according to the aforesaid Rule 132 of the Standing Orders, wagons containing cocoanut oil are also required to be affixed with a label "not to be loose shunted", so that such wagons may not be loose shunted in any of the stations in course of the journey from the starting station to the destination. It was contended on behalf of the Respondent that although General Rule 152, referred to above, has statutory force, Standing Order Rule 132 has no such force and, as such, any failure to comply with the directions regarding affixing of label as given in Rule 132 of the Standing Order cannot be construed as amounting to any negligence on the part of the railway servants. It was also contended by him that so far as R. 152 of the General Rules is concerned, there is nothing to show that cocoanut oil is a dangerous goods and, as such, it cannot be held to come within the purview of this rule. As no materials have been placed before us to show that cocoanut oil has been classified or described as a dangerous goods, there appears to be some force in this contention that Rule 152 of the General Rules, which is a statutory rule, does not cover cocoanut oil. Rule 132 of the Standing Order, however, specifically prohibits shunting of a wagon containing cocoanut oil and also directs the affixing of the label, as mentioned above, to such wagon although this rule cannot be said to have statutory force, the contention that a breach of this rule by the railway servants cannot be construed as amounting to negligence by them, does not appear to be at all tenable. As these rules have been framed for the guidance of the railway servants, it is their duty to obey.

these directions and if they fail to comply with such directions, such non-compliance must be construed as amounting to negligence by them. In this connection, reliance was placed on behalf of the respondent on the decision in the case of *Union of India v. Eastern Match Co.* AIR 1964 Andh Pra 172 in which some observations have been made to the effect that no negligence can be inferred from the mere fact of non-observance of certain rules in the Red Tariff, which were held to be mere executive instructions. I am unable to agree with this view so far as Rule 132, referred to above is concerned, as although this rule was a departmental rule, the railway servants were bound to carry out the directions as contained therein and their failure to carry out the same would clearly amount to negligence on their part.

12. It would thus appear that if it is found that the plaintiff has been able to establish that no label of the description mentioned above was affixed to the wagon in question, it will have to be held that there had been some negligence on the part of the railway servants. In this case, evidence has been adduced by the plaintiff's witnesses to show that no such label was found affixed on the wagon after its arrival at the destination, that is, Sahebganj. On the other hand, one of the defence witnesses has deposed to the effect that such label was found affixed, but as observed by the trial court, he admitted that he did not remember about the fact but had made his statements to this effect merely because there was no mention about it in the D. D. which he sent to the higher railway authorities after arrival of the wagon. As against this, the version of the plaintiff's witnesses is supported by the entry (Ext. 6) as made in the Goods Delivery Book at the time of delivery of the consignment in which there is specific mention of the fact that the wagon did not bear any such label. It would thus appear that the trial court has come to a correct finding that there was no such label on the wagon when it arrived at the destination. The question, however, arises as to whether from this fact alone, an inference can be drawn that no such label had been affixed on the wagon even at the starting station, as required by the rules. The journey of the wagon covered a period of 23 days and a distance of over 1000 miles as mentioned in the written statement and the possibility about the label having become detached from the wagon during this long period cannot be excluded. No evidence has been adduced on behalf of the plaintiff by examining the consignors or their agent to show that no such label was affixed at the starting station. It is true that the defendant also has not adduced any evidence to show that any such

label was actually affixed on the wagon but the onus in the present case being on the plaintiff, it was incumbent upon the plaintiff to adduce evidence on the aforesaid point and in view of their failure to examine the consignors or their agent, it cannot be held to have discharged that onus. Besides, as I have already mentioned, no specific plea was taken in the plaint itself about any particular act of negligence and there was no allegation therein that there was no affixing of the label at the starting station or that the wagon did not bear any such label. In these circumstances, it would appear that the evidence is quite insufficient for coming to a finding that no such label was affixed on the wagon in question at the starting station and that there was negligence on the part of the Railway servants by non-observance of the rule relating to the affixing of such labels.

13. It was further incumbent upon the plaintiff to prove that the damage in question was caused as a result of loose shunting. There is no evidence to show that there was any such loose shunting, but an inference about such loose shunting is sought to be drawn from the condition in which the damaged tins from which the oil had partly or wholly leaked out, were found at the destination. It is not disputed that these tins had become dented and some of the joints thereof had burst and the tins had become open at places as a result of jolting. The question, however, arises as to whether the jolting was due to loose shunting or due to natural oscillation of the wagon in course of the journey coupled with the fact that the tins had not been packed in any cases or crates as prescribed by the rules and they could not stand the strain of such jolting. The trial court appears to have come to the finding that there was loose shunting merely on the basis of the aforesaid condition of the tins while the lower appellate court has observed that such inference cannot be drawn and this condition might have resulted from natural oscillation of the wagon in course of the long journey when the tins were not protected by being packed in the prescribed manner. In absence of any evidence to show that there was actually any loose shunting, the mere fact that the tins which were not packed in cases or crates were found in the aforesaid condition cannot necessarily lead to an inference that this was the result of severe jolting due to loose shunting and not due to natural oscillation of the wagon during the journey. It is a matter of common experience that the natural oscillation of the carriages during their movement along the railway line is particularly severe at the junction of different lines. In these circumstances, it would follow that the evi-

dence as adduced in this case is quite insufficient for establishing that the damage in question was caused due to any negligence on the part of the railway administration or its employees and, as such, the plaintiff's claim appears to have been rightly disallowed by the lower appellate court.

14. In the result the appeal is dismissed and the judgment and decree of the lower appellate court are hereby affirmed. The parties shall bear their own costs of this appeal.

15. **TARKESHWAR NATH, J.:** I agree.
Appeal dismissed.

AIR 1970 PATNA 189 (V 57 C 30)

N. L. UNTWALIA AND B. N. JHA, JJ.

Ramnik Lal Kothari, Petitioner v. Government of India, Ministry of Steel Mines and Metals (Department of Mines and Metals) and others, Respondents.

Civil Writ Jurisdiction Case No. 576 of 1967, D/- 14-3-1969.

Mines and Minerals (Regulation and Development) Act (1957), Ss. 30 and 5(2) — Mineral Concession Rules (1960), Rr. 54 and 55(3), (4) — Power of revision of Central Government under S. 30 — Is a quasi-judicial power — Order must be based upon record of the case — Revision application rejected on ground of not forming part of record — Opportunity of having his say in the matter not given to petitioner — Order held was illegal even assuming it to have been passed under Section 5(2).

The power of revision of the Central Government under Section 30 of the Act is a quasi-judicial power, irrespective of the fact whether the order of the State Government is sought to be revised suo motu by the Central Government or on an application made by an aggrieved party. The person who may be adversely affected by the order of revision has got to be given a reasonable opportunity to represent his case. In so far as the procedure which is to be followed on an application made by an aggrieved party, it is manifest on the language of Rules 54 and 55, specially sub-rules (3) and (4) of the latter, that the order of the Central Government is to be based upon the records of the case which consist of the application, the comments and the counter-comments of the party and the State Government, and upon no other material. If any further material is to be used against the person going to be adversely affected by the order, such a material cannot be used without giving an opportunity to the person concerned of having his say in the matter of that material. (Para 4)

Where the revision application was rejected on a ground which was not found in any of the papers forming part of the record of the revision before the Central Government.

Held, that even assuming that the order was passed in exercise of the power under Section 5(2) of the Act, the said power could not be exercised without giving an opportunity to the person concerned to have his say or to make his representation in regard to the facts stated in the order and which formed the sole ground for rejection of the revision application.

(Para 6)

The order of the Central Government in exercise of the power under S. 5(2) of the Act may be executive in character. Yet if the exercise of power under Section 5(2) of the Act and the order made thereunder adversely affects or prejudices a person, the trend of the decisions of the Courts in India as also in England is that such a person must be given an opportunity to have his representation or say in regard to the matter which is going to affect him adversely. The power may be executive, but it has to be exercised in accordance with the principles of natural justice which are generally applicable for the exercise of power in a judicial manner. AIR 1968 SC 718 and 1967 BLJR 212, Followed.

(Para 5)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 718 (V 55) = 1968-2

SCR 366, Union of India v. Anglo

Afgan Agencies

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(1967) 1967 BLJR 212, D. N. Roy and

S. K. Banerjee v. State of Bihar

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B. C. Ghose, Sarat Kumar Chattopadhyaya and Pralay Kumar Sinha, for Petitioner; S. Sarwar Ali and Shashi Kumar Sinha, for Government of India; Lakshman Saran Sinha, for State of Bihar; Sushil Kumar Muzumdar, for other Opposite Party.

UNTWALIA, J.: The petitioner has obtained a rule from this Court under Articles 226 and 227 of the Constitution of India against the Government of India, Ministry of Steel, Mines and Metals (Opposite party No. 1), the State of Bihar (Opposite Party No. 2) and others to show cause why the order of the Government of India contained in their letter dated the 27th June, 1967, a copy of which is Annexure "F" to the writ application, should not be quashed and opposite party No. 1 should not be directed to consider the application of the petitioner for a mining lease in accordance with law. Cause has been shown on behalf of the opposite party No. 1, by learned Government Pleader No. 1, and on behalf of opposite party No. 4, by Sri S. K. Mazumdar.

2. The petitioner's case is that he has a lease of coal mining and works over an extensive area in village Turiyo, in the

district of Hazaribagh. He raises coal of all grades in his colliery. He intended to extend the area of his operation and, therefore, applied on the 29th November, 1961, for mining lease for the adjacent area in village Turiyo. This application was rejected because of the pendency of some litigation wherein interim injunction had been made. When the interim injunction was vacated, the petitioner renewed his application on the 18th March, 1965, a copy of which application is Annexure C. No order was passed by the Government of Bihar on the said application within the time prescribed by the Mineral Concession Rules, 1960, hereinafter called the "Rules", framed under the Mines and Minerals (Regulation and Development) Act, 1957 (Act 67 of 1957), hereinafter referred to as the "Act". The petitioner, therefore, submitted an application in revision to the Government of India in accordance with Section 30 of the Act and Rule 54 of the Rules, a copy of the said application is Annexure "D". Several other persons also had applied for granting lease for the area for which the petitioner had made the application.

The Government of Bihar was asked to submit its comments on the revision application filed by the petitioner. It submitted its comments. Other interested parties were also given notice and they submitted their comments. The petitioner submitted counter comments, copies of which are Annexures "E", "E-1" and "E-2". The Government of India by its Impugned order dated 27th June, 1967, rejected the application filed by the petitioner on the ground that the area was reported to contain low grade coal, for which there was no demand, and any production of the grade of coal which could be found in the area for which mining lease had been asked for would be against the planned production of coal and against national interests. The petitioner feels aggrieved by this order. His only grievance is that the point on which his application in revision has been rejected was not taken in any of the comments filed by the Government of Bihar or the private parties and did not arise on the records of the revision before the Government of India. Rejection of the revision application on a new ground, without giving an opportunity to the petitioner to have his say, or of making his representation in that regard, was an order of rejection in violation of the principles of natural justice. The order should therefore, be quashed, and opposite party No. 1 should be directed to dispose of the matter afresh after giving opportunity to the petitioner to make his representation in regard to the ground on which the application in revision has been rejected.

3. The stand taken on behalf of the contesting opposite parties is that the petitioner was aware of the fact and had made his representation in his counter comments in relation to that, which facts form the basis of the rejection of his application in revision. In the alternative, it has been submitted on their behalf that the Central Government had power to reject the revision application on materials apart from those which were available before it in the comments and the counter comments and had power to withhold approval of the granting of a mining lease under Section 5 of the Act.

4. Section 30 of the Act says:

"The Central Government may, of its own motion or on application made within the prescribed time by an aggrieved party, revise any order made by a State Government or other authority in exercise of the powers conferred on it by or under this Act."

An application for grant of a mining lease has to be disposed of within nine months from the date of its receipt under sub-rule (1) of Rule 24 of the Rules, sub-rule (3) of which says:

"If any application is not disposed of within the period specified in sub-rule (1), it shall be deemed to have been refused."

A person aggrieved by any order made by the State Government can file an application in revision of the order under Rule 54 of the Rules. After providing for sending notice and copies of the application to the impleaded parties under sub-rule (2) of Rule 54, the procedure prescribed for passing order on revision application is to be found in Rule 55. Sub-rule (1) of Rule 55 requires that copies of the application shall be sent to the State Government and to all the impleaded parties calling upon them to make such comments as they may like to make. The applicant is to be provided with copies of such comments under sub-rule (2) of R. 55, calling upon him to make such further comments as he may like to make. Sub-rule (3) then says:

"The revision application, the communications containing comments and counter-comments referred to in sub-rules (1) and (2) shall constitute the records of the case."

According to sub-rule (4) of Rule 55 of the Rules "after considering the records referred to in sub-rule (3), the Central Government may confirm, modify or set aside the order or pass such order in relation thereto as the Central Government may deem just and proper". There is no scope for controversy as regards the view expressed by a Bench of this Court in *D. N. Roy and S. K. Banerjee v. State of Bihar*, 1957 BLJR 212 that the power of revision of the Central Government

under Section 30 of the Act is a quasi judicial power, irrespective of the fact whether the order of the State Government is sought to be revised suo motu by the Central Government or on an application made by an aggrieved party. In either view of the matter, the person who may be adversely affected by the order of revision has got to be given a reasonable opportunity to represent his case. In so far as the procedure which is to be followed on an application made by an aggrieved party, it is manifest on the language of rules 54 and 55 specially sub-rules (3) and (4) of the latter, that the order of the Central Government is to be based upon the records of the case which consist of the application, the comments and the counter-comments of the party and the State Government, and upon no other material.

If any further material is to be used against the person going to be adversely affected by the order, there cannot be any doubt that such a material cannot be used without giving an opportunity to the person concerned of having his say in the matter of that material.

4A. Feeling this difficulty, both the learned counsel for the opposite parties endeavoured to support the impugned order of the Central Government with reference to section 5 (2) of the Act, the relevant portion of which reads as follows:

"Except with the previous approval of the Central Government no prospecting licence or mining lease shall be granted—

(a) as respects any mineral specified in the First Schedule, or
(b) to any person who is not an Indian national."

5. Form 'K' appended to the Rules is a model form of mining lease. In one of the preambles of the Indenture of lease, as is apparent from the said form, the fact that the Central Government has approved the grant of the lease, has got to be stated. Reading the provision which has been extracted above from S. 5 of the Act with the form, it would be clear that in every case of a mining lease, the previous approval of the Central Government has got to be obtained. There are no rules providing any elaborate procedure for obtaining such an approval except rule 63, which reads:

"Where in any case the previous approval of the Central Government is required under the Act or these rules, the application for such approval shall be made to the Central Government through the State Government." The application for approval of the Central Government has to be filed through the State Government under rule 63 of the Rules for exercise of the power of the Central Government under section 5

(2) of the Act. The order of the Central Government in exercise of the said power may be executive in character, as contended on its behalf by the learned Government Pleader. Yet I am of the opinion that if the exercise of power under section 5 (2) of the Act and the order made thereunder adversely affects or prejudices a person, the trend of the decisions of the Courts in India as also in England is that such a person must be given an opportunity to have his representation or say in regard to the matter which is going to affect him adversely. To put it briefly, the power may be executive, but it has to be exercised in accordance with the principles of natural justice which are generally applicable for the exercise of power in a judicial manner. Reference in this connection may be made to a recent decision of the Supreme Court in the Union of India v. M/s Anglo Afghan Agencies, AIR 1968 SC 718. I do not mean to suggest that invariably in all cases, the power under section 5 (2) of the Act has got to be exercised by the Central Government keeping in view the principles for the exercise of a judicial power. But by and large it may affect or prejudice the rights or interest of a person; in all fairness, the person concerned must be given a reasonable opportunity to make his representation.

6. It is more so in the instant case where on the wordings of the order, as communicated in Annexure "F", the power was not exercised by the Central Government purporting to be expressly under section 5 (2) of the Act. The contents of Ext. F are as follows:

"I am directed to refer to your revision application dated the 5th May, 1966 on the subject mentioned above and to say that after careful consideration of the facts stated in the matter of your revision application, the Central Government in exercise of the powers conferred under rule 55 of the Mineral Concession Rules, 1960 and all the other powers enabling in this behalf, hereby reject your revision application on the ground that the area is reported to contain low grade coal for which there is no demand and any further production of this grade of coal will be against planned production of coal and against national interests."

The phrase "all the other powers enabling in this behalf" occurring in the above passage does not necessarily refer to the exercise of the power under section 5 (2) of the Act. On the face of the order, the revision application filed by the petitioner was being rejected on a ground which admittedly is not to be found in any of the papers forming a part of the record of the revision before the Central Government. Even if it be assumed, as

was argued on behalf of the Central Government, that the phrase aforesaid was comprehensive enough to refer to the exercise of the power under section 5 (2) of the Act, I am of the opinion that on the facts of this case, the said power could not be exercised without giving an opportunity to the petitioner to have his say or to make his representation in regard to the facts stated in the order and which forms the sole ground for rejection of the revision application.

7. This brings me to the consideration of the first submission made on behalf of the opposite party No. 1. In the counter affidavit filed on behalf of the Central Government, it has been said that in the report of the Coal Controller, a copy of which is Annexure "A" to the counter-affidavit, the Coal Controller had said:

"In any case the area contains Grade IIIA coal and there is no need of other parties to acquire some extra area for augmentation of production in this variety of coal. Technically speaking, from the information and plans available in our record it seems that the area can best be worked out if acquired by Kalyani Selected Kargali Colliery and not by any other mine. The need for this however does not exist at present."

The petitioner undoubtedly, as submitted on behalf of opposite party No. 1, was aware of this report as he himself relied on a portion of it, but this report was not an enclosure to any of the comments or counter-comments and did not form part of the record of the revision case before the Central Government. The last sentence in the passage extracted from this report does not state and bring out the facts which formed the basis of the impugned order. The petitioner in one of his counter-comments (Annexure E/1), which is dated 5-8-1966, referred to the extraction of coal from the area in respect of which mining lease was asked for, which was of Grade III-A and III-B, stating further that certain Thermal Power Stations consumed that grade of coal and hence national interest would be served by extracting that grade of coal from the said area. The report of the Coal Controller is dated 2nd of August 1966. The counter comment of the petitioner dated 5th of August 1966 could not possibly refer to that report. On the materials placed before us, therefore, I am not satisfied that the petitioner was aware of the facts stated in the impugned order (Annexure "F") and had an opportunity of making his representation in that regard.

The area in respect of which the mining lease was applied for contained low grade of coal. But the fact as to whether

there was any further production of that grade of coal would be against the planned production of coal or against national interests or not, ought not to have formed the basis of the impugned order, whether it be an order under Section 30 of the Act, pure and simple, or a composite order under section 30 read with S. 5 (2) of the Act, without giving an opportunity to the petitioner to make his representation in regard to those facts. It may well be that if such an opportunity was given to the petitioner, he could have satisfied the Central Government that there was demand for low grade of coal and further production would not be against planned production of coal or against national interests.

8. It may be stated here that the State Government in its comments had recommended for grant of mining lease in respect of the area in question to opposite party No. 4 and had not taken the stand that no mining lease ought to be granted to any person. In the comment and the counter-comments, various facts were stated by the parties to justify their respective claims for the grant of the mining lease. The Central Government does not seem to have gone into those facts and decided the matter, as it decided that no lease at all should be granted. Some endeavour was made on behalf of the opposite party no. 4 before us, with reference to the various facts, to show that the petitioner had no case for grant of a mining lease to him, while the case of opposite party No. 4 was much superior in that regard. We did not think it advisable or necessary to examine those facts for ourselves as it is for the Central Government to look into them when it decides to accord approval to the grant of a lease when the cases goes back to it.

9. For the reasons stated above I allow the application, quash the order of the Central Government as contained in its letter dated the 27th June, 1967 (Annexure "F") by grant of writ of certiorari and direct the said Government by a writ of mandamus to dispose of the revision application filed by the petitioner afresh, after giving him an opportunity to make his representation in regard to the facts referred to above in this judgment. I shall make no order as to costs.

10. B. N. JHA, J.: I agree.

Petition allowed.

AIR 1970 PATNA 193 (V 57 C 31)

S. C. MISRA, C. J. AND

S. WASIUDDIN, J.

The Imperial Tobacco Co. of India Ltd.,
Petitioner v. The State of Bihar and
others, Opposite Party.

Civil Writ Jurisdiction Case No. 146 of
1968, D/- 9-4-1969.

(A) Minimum Wages Act (1948), S. 27
and Preamble — 'Scheduled Employment'
— Meaning — Word does not mean "indus-
try" or "undertaking" or "establishment".

It would be defeating the objective of
the Act if a narrow interpretation to the
word "employment" is put so as to mean
industry, establishment or undertaking.
'Employment' according to the Cham-
bers's Dictionary means an act of employ-
ing, what engages or occupies, occupa-
tion. Thus a printing Section of a
Cigarettes Company which does the work
of printing cartoons and labels, is a Sched-
uled employment. AIR 1960 SC 56 &
AIR 1960 SC 1068 & AIR 1955 SC 25 &
AIR 1957 Bom 149, Dist. (Paras 10, 12)

(B) Minimum Wages Act (1948), S. 3
(1) (a) and (b) — Notification issued
under clause (b) purporting to review the
rates — No rates previously fixed in res-
pect of the employment — Although noti-
fication ought to be issued under Cl. (a),
it is only a technical error not defeating
its validity. AIR 1958 SC 232 & AIR 1964
SC 1329, Rel. on. (Para 13)

(C) Minimum Wages Act (1948), S. 2
(b) — 'Wages' — Term has a composite
meaning which will include all remun-
erations contemplated by the Act read
with R. 23 of Bihar Minimum Wages
Rules. AIR 1957 Mad 69, Rel. on.

(Para 17)

(D) Minimum Wages Act (1948), S. 12
(1) — Employer paying much higher total
rates of wages cannot come within the
mischief of Section 12.

From the scheme of the Act it is clear
to guarantee to scheduled employment a
minimum rate of wages. If the wages
paid by the employer are more than what
the employees would have got on the
basis of the minimum wages then no
relief can be given under the Act in spite
of Act providing for the regulation of
the hours of work, or rule 25 prescribing
wages for the over time work at double
the ordinary rate of wages. AIR 1965
Mys 317 & AIR 1963 Bom 54, Rel. on.

(Para 18)

(E) Minimum Wages Act (1948), S. 26
(2A) — 'Is of the opinion' — Process of
forming opinion is open to limited scru-
tiny of Court — Refusal to grant exemption
to printing section of a Cigarette manu-
facturing Company — Existence of a con-
ciliation agreement under which Company

was paying wages much higher than
prescribed minimum not taken into ac-
count — Refusal to grant exemption,
held, was illegal. AIR 1967 SC 295, Rel.
on. (Para 23)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 295 (V 54) =
(1966) Supp SCR 311, Barium
Chemicals Ltd. v. Company Law
Board 23
(1965) AIR 1965 Mys 317 (V 52) =
1965-2 Lab LJ 26, Municipal
Borough v. Gundawan 17
(1964) AIR 1964 SC 1329 (V 51) =
(1964) 6 SCR 857, Hukumchand
Mills Ltd. v. State of Madhya
Pradesh 13
(1963) AIR 1963 Bom 54 (V 50) =
(1962) 2 Lab LJ 655, Union of
India v. Rathi 17
(1963) 1963-1 Lab LJ 601 = 1963 (6)
Fac LR 68 (Cal.), Imperial Tobacco
Employees Association v. State of
West Bengal 19
(1960) AIR 1960 SC 56 (V 47) =
(1960) 1 SCR 703, Associated
Cement Companies Ltd. v. Their
Workmen 11
(1960) AIR 1960 SC 1068 (V 47) =
(1960) 2 Lab LJ 254, Madhya Pra-
desh Mineral Industry Association
v. Regional Labour Commr. 11
(1958) AIR 1958 SC 232 (V 45) = 1958
SCR 1052, P. Balakotaiah v. Union
of India 13
(1957) AIR 1957 Bom 149 (V 44) =
ILR (1958) Bom 438, Oudh Sugar
Mills Ltd. v. Regional Provident
Fund Commr. 11
(1957) AIR 1957 Mad 69 (V 44) =
(1956) 2 Lab LJ 490, Madras Port
Trust v. Claims Authority 17
(1956) AIR 1956 Bom 743 (V 43) =
1956-2 Lab LJ 319, Poona Mazdoor
Sabha v. Dhutia 21
(1955) AIR 1955 SC 25 (V 42) =
1955 SCR 735, Edward Mills Co.
Ltd. Beawar v. State of Ajmer 11

N. C. Chakravarty, Ranen Ray and L.
M. Sharma, for Petitioner; S. Ali Ahmad
and S. Sarwar Ali, for Opposite Party.

WASIUDDIN, J.: This is an application
under Articles 226 and 227 of the Con-
stitution for quashing the notification
'Annexure-E' of the petition and the deci-
sions and directions as contained in An-
nexures M, O/1, O/2, R, P, and T of the
petition, with regard to applicability of
the provisions of the Minimum Wages
Act to the Printing Section of the peti-
tioner and refusal of the Government to
grant the exemption to the petitioner
under the Act.

2. The petitioner is the Imperial To-
bacco Company of India Limited which
has a factory at Monghyr within the State

of Bihar. The Company has been carrying on the business of manufacturing and selling cigarettes and smoking tobacco throughout India and it has a Printing Unit section which is an integral part of and/or ancillary and/or, complementary to the said Cigarette Factory and its Printing Section is situated in the same premises and within the same compound. The Printing Section is exclusively operated to print materials (such as Cartoons, Labels, Tissue paper etc.) which are only used in relation to, or for packing of, cigarettes manufactured by the petitioner Company in the said Factory. It is also said that the petitioner does not carry on the business of running and operating a printing press in the said Printing Section and the Printing Section is not meant for, and, in fact, has nothing to do with outside printing nor with execution of any outside job/orders. The Cigarette Factory as well as the Printing Section are under the supervision and control of the same Branch Manager and thus the Printing Section has no independent existence, apart from the Cigarette Factory, and its functions and operations consist of process or branch of work of Cigarette Factory.

According to the petitioner the same Standing Orders which have been duly certified under the Industrial Employment (Standing Orders) Act, 1946 are applicable to all the workmen in the Cigarette Factory, including the Printing Section. It is also said on behalf of the petitioner that as a result of enlightened and progressive labour policy adopted and followed by the petitioner Company, the terms and conditions of employment of the said workmen have always been settled since 1953 by series of long Term Settlements arrived at under S. 12 (3), read with section-18 (3) of the Industrial Disputes Act, 1947, between the petitioner Company on the one hand and Tobacco Manufacturing Workers Union (Opposite party no. 5) on the other. There has always been and there is still one Union representing all the workmen employed in the various Sections or Departments of the Cigarettes Factory including its Printing Section and one statutory settlement negotiated and concluded from time to time with the Union, which governed and governs the terms and conditions of employment of the said workmen, the majority of whom are daily-rated are transferred from the Printing Section to any other Section or Department of the Cigarette Factory. There have always been and still are comprehensive, and common wage scales for respective skilled, semi-skilled and unskilled workmen employed in various Sections or Departments of the Cigarette Factory, including the Printing Section,

under the terms of the said statutory settlements.

The petitioner Company employs about 2180 workmen in the Cigarette Factory, including 352 workmen in its Printing Section of whom 246 are daily-rated workmen. On 23rd August, 1964 the Union (Opposite party No. 5) representing all the said workmen submitted to the petitioner Company a Charter of Demands, which inter alia, included a demand to the effect that "All employees be made eligible for Sunday leave with pay as is now enforced in "Minimum Wage Factories." The Union, however, abandoned and/or waived the said demand eventually at the time of conciliation and conclusion of the Settlement dated the 25th September, 1965. The disputes arising out of the said Charter of Demands were admitted into conciliation by the Commissioner of Labour and Conciliation Officer, Government of Bihar, and after a protracted tripartite negotiations were finally settled on 25th September 1965, by virtue of a Memorandum of Settlement concluded between the petitioner Company and the Union, in the course of conciliation proceedings under S. 12 (3), read with section 18 (3) of the Industrial Disputes Act 1947. The aforesaid Settlement is operative for a period of four years and is still in full force and effect and is binding on all the workmen in the Cigarette Factory, irrespective of the Section or Department they are working in.

The terms and conditions embodied in the Memorandum of the Settlement include comprehensive wage structure and schedule of dearness allowance, and further substantial monetary and other benefits to the said workmen which are equally applicable to the workmen in the Printing Section as the workmen in any other Section of Cigarette Factory. The Settlement was arrived at on the basis of give and take, the Union having abandoned and/or waived certain claims and demands including the demand in regard to "Sunday leave with pay" and the petitioner Company having conceded in their other claims and demands. The Settlement as such represents a "package deal" and the said workmen and/or the Union have no right to act or to make any demand, in contravention or violation thereof.

3. The Minimum Wages Act 1948 was enacted to provide "for fixation, by the Provincial (State) Governments, of minimum wages for employments covered by Schedule to "the said Act". The items in the schedule are those where sweated labour is more prevalent or where there is a big chance of exploitation of labour". The State Government by a Notification No. W3-1019/51-L-197 dated 12th Novem-

ber, 1951 in exercise of its powers conferred by Sec. 30 of the Minimum Wages Act framed rules under the Act and the relevant rule in this connection is Rule 23 which provides that unless otherwise provided by the State Government, no worker shall be required or allowed to work in a scheduled employment of the first day of the week for which he shall receive payment equal to his average daily wages during the preceding week. The petitioner's contention is that the Cigarette industry and/or undertaking is not a "scheduled employment" within the meaning of the said Act and as such the Cigarette Factory is not governed by the said Act and/or the said Rules. The opposite party as early as on 24th February 1950 by letter No. W. 301.L/1460 addressed to the Company (vide Annexure-C) had confirmed that the cigarette manufacturing would not be covered by the said Act. The opposite party No. 1 issued a Notification No. VI/W3-1042/59-L-9688 on 25th May, 1959 in exercise of its powers conferred by Section 27 of the Minimum Wages Act and directed by this notification that "Employment in Printing Presses" be added to Part I of the schedule appended to the said Act. A true copy of the said Notification is marked as Annexure-D. Opposite party No. 1 then issued a Notification No. VI/W3-105/601/4676 dated 24th May, 1960 in exercise of its powers conferred by Section 3(1)(b), read with Section 5 (2) of the said Act and by this it fixed the minimum rates of wages, specified in the Schedule thereunder, payable to different categories of employees in the Printing Presses. The notification is Annexure-E of the petition. It has been urged by the petitioner that this notification of 1960 was bad, illegal and debars the powers and jurisdiction of the opposite party No. 1 inasmuch as the said notification contravened Section 3(1) (a) of the said Act as it then stood. According to the Notification (Annexure-E) minimum wages have been prescribed for nineteen categories of daily-rated employees but the petitioner Company states that at all material times the petitioner Company did not and does not employ any daily-rated workmen in the Printing Section of the Cigarette Factory in the categories and/or with the designation mentioned in the schedule given in the Notification, save and except unskilled workmen (such as General Workers or Mazdoor), Litho Machinemen and Binders which are covered by Items 12, 17 and 19 of the aforesaid Notification. The petitioner Company has been paying and still pays under the Settlement of 1965 wages at scales which are considerably higher than the minimum rates fixed by the Notification of 1960. According to the charts which have been given in the petition the

minimum rate of wages prescribed for unskilled workmen (Darwan, Peon and Mazdoors) is Rs. 45 per month, but according to Settlement of 1965 the petitioner Company has been paying to them at the rate of Rs. 202.91 P. per month. Similarly although the minimum wages prescribed in respect of Litho Machine Men is Rs. 100 per month and for Binder Rs. 50 per month, but the petitioner Company has been paying to them at the rate of Rs. 262.31P. in each case respectively.

4. The petitioner, therefore, has been asserting firstly, that the notifications of 1959 and 1960 are not applicable to the Cigarette Factory and/or its Printing Section, and even assuming that the Printing Section of the Factory is a scheduled employment within the meaning of the said Act/Rules/Notification, the petitioner Company has been paying to the daily-rated unskilled workmen substantially higher contractual wages than the aggregate of the minimum wages fixed by the 1960 Notification and the remuneration for the weekly rest day provided by Rule 23 of the said Rules. The petitioner Company received from the Chief Inspector of Factories, Bihar (Opposite Party No. 2) a Circular No. 3M-52/61-5990 dated the 18th December, 1961 in which direction was given to the petitioner Company to give immediate effect to Rule 23 of the Bihar Minimum Wages Rules 1951 which required that every worker even a daily-rated worker should be paid wages for Sundays including holidays also. The said Circular also contained a threat that any violation of the said rule will be supposed to be a serious offence and will be strongly dealt with. The petitioner Company also received a letter No. 489 dated 19th April, 1962 from opposite party No. 4 the Inspector of Factories, Monghyr circle, Monghyr, in which it was stated that a worker even if he works for one day in a week he becomes entitled for a day off with pay.

The petitioner Company by its letter No. IM/IL.1/A.398 dated the 17th May, 1962 informed the opposite party No. 2 that there was some misunderstanding with regard to the applicability of the said Act, because it had already been clarified by opposite party No. 1 (State of Bihar) on the 24th February, 1950 that the Cigarette Factory was not covered by the said Act. The petitioner Company was informed by the Chief Inspector of Factory (opposite party No. 2) by his letter No. 3M/52/62-2828 dated 24-5-1962 that the said Circular dated the 18th December, 1961 had been sent to such factories also as do not come under the purview of the Minimum Wages Act, as in most of these factories, certain scheduled employments are in existence, like building operations

etc., to which the Minimum Wages Act applies. The opposite party further confirmed in this letter that the sending of the circular did not mean or imply that the provisions of Rule 23 of the Bihar Minimum Wages Rules are considered to be applicable to even such factories which are not included in the Schedule attached to the Minimum Wages Act. A copy of this letter is Annexure-1 to the petition. In spite of this confirmation the petitioner Company further received communication from opposite party No. 4 (Inspector of Factories, Monghyr) being letter No. 1380 dated the 31st March, 1963 in which it was stated that the Printing Section in the Cigarette Factory comes under schedule of the said Act and that the said Act and the Rules made thereunder should be implemented in the Printing Section. The petitioner Company was also threatened that on failure to comply, it will be prosecuted as it is a serious offence. The petitioner Company then wrote to the Secretary to Government of Bihar, Labour and Employment Department making submissions therein that the Printing Section of the Cigarette Factory was not a Printing Press, within the meaning of 1960 notification. It was also stated therein that in case the Govt. still considers the said Act is applicable to the Printing Section, the petitioner Company, as a matter of abundant caution, applied to be exempted from the provisions of the said Act under Section 26(2A) for the reasons given in the letter such as that the terms and conditions of employment of the workmen, had already a comprehensive wage structure and schedule of dearness allowance which were governed since 1953 by series of statutory settlements and that they in all categories enjoyed wages much in excess of the wages fixed by the 1960 Notification.

It was also contended therein that the Minimum Wages Legislation was intended for the protection of "Sweated labour" who are likely to be exploited, and that the Union operating in the Cigarette Factory was well organised and the very high rate of wages prevailing in the Cigarette Factory was due to the process of continuous collective bargaining for several years. The petitioner thereafter had been reiterating in the representations one after another the grounds for exemption but the Government has been sticking to the position that it was a Scheduled employment. The prayer for exemption was specifically refused when the petitioner received a letter No. VI/W3-1029/67-L and E-2568 dated the 27th April 1967 in which it was stated that since the General Secretary, Tobacco Manufacturing Workers' Union, Basdeopur, Monghyr had raised objection to the prayer for grant of ex-

emption to their Printing Factory at Monghyr from the operation of the provisions of the Minimum Wages Act, 1948, the State Government regretted that it was not possible for them to grant exemption prayed for by the Company. It may be stated that this letter did not contain the ground on which the objections were raised by the Union. A copy of this letter is annexure P to the petition. The petitioner Company went on making representations and there were tripartite discussions and meetings but without success and ultimately the prayer for exemption was finally rejected by letter (Annexure T).

5. The petitioner Company is therefore, under constant fear of illegal threat of prosecution from the opposite party and such illegal and wrongful threats still persist. The industrial relation and peace in the said Cigarette Factory are in serious jeopardy on account of this kind of illegal threat and if the prosecution is launched the petitioner Company will suffer irreparable loss and injury both monetarily and in its reputation. The industrial harmony in the Cigarette Factory (ensured by the said settlement) will be unsettled and disturbed beyond redemption and the petitioner Company apprehends that it may even have undesirable repercussions on the industrial peace now prevailing in the other Factories of the petitioner Company elsewhere in India. The petitioner Company has been employing more than 8,500 workmen throughout India.

6. In such circumstances, as stated above, the petitioner Company states and contends that the decisions and/or directions and/or Orders of the Opposite parties as contained in the Annexures-M O/1, O/2 and R hereto and/or Notifications (being Annexure-E) are patently illegal, manifestly erroneous, arbitrary and in excess of the powers and jurisdiction vested in the opposite parties and therefore, the prayer in this petition is for quashing of the direction and decisions as mentioned above.

7. Opposite party No. 1 is the State of Bihar, opposite party No. 2 is the Chief Inspector of Factories, opposite party No. 3 is the Deputy Chief Inspector of Factories and opposite party No. 4 is the Inspector of Factories, Monghyr. No counter-affidavit has been filed on behalf of the opposite party Nos. 1 to 4, but at the time of hearing of this petition Mr. Sarwar Ali appearing for the State supported the stand which the Government has taken.

8. Opposite party No. 5 as stated above, is Tobacco Manufacturing Workers Union and they have filed a counter-affidavit. It has been contended on their behalf that the Printing Factory owned by the petitioner Company was not an integral part

of the Cigarette Factory inasmuch as the press is located in a separate building having separate godown etc. and in day to day work also it has no concern with the Cigarette Factory. The Tobacco Factory and the Press are separately registered under the Factories Act and each of these two have been allotted separate registration numbers under the Act. It has also been stated that it was correct that the Press at present does not accept any work other than that of the Company but there is nothing in the Memorandum of Association which prohibits the press from accepting work from outsiders. It has also been stated that according to present Standing Order all the employees under the petitioner Company excepting those who come under Class B are availing Sundays as paid holidays and that Class B employees also are monthly paid like all others. As regards their demand for wages for Sunday it has been asserted that the Union never abandoned and/or waived the demand for Sunday being paid rest day for Class 'B'. All the employees of the press come within the categories mentioned in the schedule of the Notification of 1960 and the settlement nowhere mentions that the employees will not get the benefit of the Notification under the Minimum Wages Act. It has also been urged that the mere fact that the wages which are being given are higher than the wages prescribed in the Notification will not debar them from further benefits to which they may be entitled in law. It has been urged, therefore, that the impugned Notification, directions and decision were all duly passed by the competent authorities and valid in law and cannot be quashed.

9. The first point which has been urged on behalf of the petitioner is that it is not a scheduled employment within the meaning of the relevant provisions of the Minimum Wages Act which hereinafter will be called only as "the Act". The preamble of the Act clearly shows that this Act was passed for the fixation of minimum rates of wages in certain employments. The words employer and the employee have been also defined in the Act under Clauses (e) and (i) of Section 2 of the Act. These definitions also show that they refer only to such employees or employers who will be regarded as a scheduled employment under the Act. Section 2 (g) of the Act defines what a scheduled employment is and it lays down that the scheduled employment means an employment specified in the schedule, or any process or branch of work forming part of such employment. In this connection I may also refer to Section 27 of the Act which empowers the appropriate Government to add to Schedule by notification. The schedule

of the Act shows that the employments have been classified in two parts; Part I and Part II. Part II is in respect of employments in agriculture and we are not concerned with such employments in this present case. Part I consists of 12 items and item no. 3 is as follows:

"Employment in any tobacco (including Bidi making) manufacturing". It has been contended on behalf of the petitioner that the petitioner Company does not manufacture tobacco and manufacture of cigarettes will not come within the meaning of item no. 3 because it does not manufacture tobacco. In item no. 3 of the Schedule exception has been made in respect of Bidi making and if the legislatures so desired that cigarettes also should be included, there would have been no difficulty in mentioning cigarettes also. Now as far as the position of the petitioner Company in this respect is concerned there does not seem any dispute on this point that the Government as early as in the year 1950 had decided that the Act will not apply to the petitioner Company and I may refer here to Annexure C which is a copy of the letter from the Under Secretary to the Government addressed to the Labour Liaison Manager, Tobacco Manufacturers (India) Ltd., Monghyr, dated the 24th February, 1950 and in the concluding portion of this letter it is stated as follows:

"Government are advised that cigarette Manufacturing would not be covered by item 3 of Part I of the Schedule to the Minimum Wages Act, 1948".

It also appears from the submissions made as well as the contention in the petition of the Company that since then no direction or decision of the Government has been communicated showing that the Government considers the Tobacco Manufacturing Company as a Scheduled employment, but the dispute and controversy has been on the point whether the Printing Section of the petitioner Company is a scheduled employment or not. I have already referred above to the definition of scheduled employment as given in Section 2 (g). Section 27 lays down as follows:

"The appropriate Government, after giving by notification in the Official Gazette not less than three months' notice of its intention so to do, may, by like notification, add to either Part of the Schedule any employment in respect of which it is of opinion that minimum rates of wages should be fixed under this Act, and thereupon the Schedule shall in its application to the State be deemed to be amended accordingly".

This section, therefore, confers authority and power on the appropriate Government to add any employment to the Sche-

dule. The Government by notification dated the 25th May, 1959 (vide Annexure D) added four types of employment. It may be mentioned here that the Schedule of the Act contains twelve items under Part I and by addition of four items so far as the opposite party no. 1 (State of Bihar) is concerned there are now sixteen items of employment in the schedule. We are concerned here with item no. 13 which was added by this notification and it is "Employment in Printing Presses". It is the admitted case of the petitioner that it has a Printing Section in the Factory, but it has been contended that this printing Section has no independent existence of its own and it is an integral part of the Cigarette Manufacturing, and therefore, it cannot be regarded as a scheduled employment.

I may also in this connection refer to another notification issued by the Government dated the 24th May, 1960 by which minimum rates of wages were fixed in respect of different categories of employees in the Printing Presses added to the Schedule under the Act under section 27 of the Act. According to the petitioner this Printing Section is only for the purpose of printing cartoons etc. for the purpose of the sale of the cigarettes and as such it is only a Unit or a Section of the Factory and thus it is an integral part of the same. It has also been contended that this Printing Section is located in the same premises and the compound of the Factory. The Printing Press does not accept and it is not supposed to take outside work and the same terms and conditions of employment as prevailing in the Factory are also prevailing in the Printing Section. It has been urged on the other hand by the learned counsel appearing for the opposite party no. 5 that this Printing Section is a separate organization inasmuch as it is separately registered under the Factories Act having separate registration numbers and there is no bar under the Memorandum of Association in the Printing Section undertaking and inviting orders from outside for printing. After filing of the counter-affidavit by the opposite party no. 5, a reply to the affidavit was filed on behalf of the petitioner and from a perusal of the same it is clear that this is not disputed that the factory and the Printing Press are separately registered under the Factories Act, but it has been stated that this was for historical reason.

It is admitted that the ownership of the Printing Press was of another Company, the Printers India Ltd. and in 1954 there was a transfer of the ownership to the Cigarette Factory. It is true that the Cigarette Factory is now the owner of the Printing Press also but nevertheless there is no getting away from this posi-

tion that both are separately registered under the Factories Act. The nature of the work is also different and it appears to me that the work of printing which is being carried on cannot be said to be an ancillary process to the manufacture of cigarettes and at best it is only to facilitate the sale of cigarettes by the printing of the cartoons, labels and packages. This is also worthy of consideration that the word 'employment' has been used both in section 2 (g) and the schedule. The contention on behalf of the petitioner Company is that since the Cigarette Factory is not a scheduled employment so this Printing Section of this factory cannot be a scheduled employment. The definition as given in S. 2 (g) of Scheduled employment no doubt shows firstly that the employment should be mentioned in the schedule and then it further postulates that any process or branch of work forming part of such employment will also be a scheduled employment.

I think from this the converse cannot be true that if a certain employment is not a scheduled employment then all the other processes or branches of that employment will also not be a scheduled employment. I do not think that this could have been the intention of the legislature because the acceptance of such a meaning will defeat the very object of the Act and also the purpose of embodying section 27 which empowers the appropriate Government to include and add in the schedule. I may again refer here to the Notification dated the 25th May, 1959 in which item No. 16 is "Employment in brick laying" and this may be read along with viz. Annexure-I dated the 24th May, 1962 which shows that the Government made the position very clear that the copy of the Notification had been sent to such factories also which do not come within the purview of the Minimum Wages Act as in most of these factories, scheduled employments are in existence like building operations etc. to which the Minimum Wages Act applies. If a narrow interpretation be given as contended by the learned counsel appearing for the petitioner then it would mean that in factories which are not "scheduled employment" such classes of employment as are added under section 27 will be outside the purview of the Act.

10. The word 'employment' has not been defined in the Act, but according to the Chambers's Dictionary it means an act of employing, that engages or occupies, occupation. It was urged that the word 'employment' which has been used in the Act should mean industry or undertaking, but this contention also does not seem to be correct and it appears that the legislature has purposely used the

word 'employment' and has avoided the word 'industry', 'undertaking' or 'establishment'. The statements of objects and reasons as given at the time of passing of the Act are as follows:

"The justification for statutory fixation of minimum wages is obvious. Such provisions which exist in more advanced countries are even more necessary in India, where works' organisations are yet poorly developed and the workers' bargaining power is consequently poor. The Bill provides for fixation, by the Provincial Governments of minimum wages for employments covered by the schedule to the Bill. The items in the schedule are those where sweated labour is most prevalent or where there is a big chance of exploitation of labour. After a time, when some experience is gained, more categories of employments can be added and the Bill provides for additions to the schedule."

11. The aforesaid statements of objects and reasons also clearly show what the legislature intended and as stated above it would be defeating the very objective of the Act if such a narrow interpretation is put as contended by learned counsel appearing for the petitioner. The learned counsel appearing for the petitioner has relied on four decisions and one of these is in the case of the Associated Cement Companies Ltd. v. Their Workmen, AIR 1960 SC 56, in which tests have been laid down to find out what can be considered to be one establishment. But I think this decision will not apply to the facts of the present case because the factors which came up for consideration in that case were quite different and the question for consideration was with regard to meaning of the word 'establishment' as mentioned in the Industrial Disputes Act and Mines Act. But, here as pointed above, the word 'establishment' has nowhere been used in the Minimum Wages Act and the word which has been used is 'employment'. The legislature perhaps advisedly has not used the word 'establishment'.

The second decision on which reliance has been placed is in the case of Madhya Pradesh Mineral Industry Association v. Regional Labour Commr. (1960) 2 Lab. LJ 254 = (AIR 1960 SC 1068). This was no doubt a case under Minimum Wages Act but here also the facts are quite different. The short facts of that case are that the President of India under Article 258 of the Constitution had entrusted the Government of certain States including Government of Madhya Pradesh with their consent the functions of the Central Government under the Act in so far as such functions relate to the fixation of minimum rates of wages in respect of employees employed in stone-breaking or

in stone-crushing operations carried on in mines situated within their respective States. The Madhya Pradesh Government issued a notification purporting to act under Section 5 (2) of the Act. Item 8 of the Schedule of the Act is as follows:

"Employment in stone-breaking or stone-crushing". The question which arose for decision in that case was whether employment in stone-breaking or stone-crushing operations carried on in mines as specified in the ambit of notification, amounts to employment in stone-breaking or stone-crushing vide item no. 8 of the Schedule of the Act. It may be also mentioned here that the Company in that case was carrying on operations in manganese mines so in that context also the question arose for consideration as to what was the meaning of the word 'stone' as used in item 8, of the Schedule. It was held by the Supreme Court in that case that the scheduled employment as defined in Section 2 (g) of the Act covers the employment specified in the schedule or any process or branch of work forming part of such employment which would include all branches of work which may be incidental to the main scheduled employments and that the impugned notification in that case on the other hand, applied only to the stone-breaking or stone-crushing operations carried on in mines and did not cover other operations connected with the manganese-mining works which position is inconsistent with the scheme of the schedule.

Their Lordships in that case also referred to the meaning of the word 'employment' which means a kind of employment or state of being employed. It was held that item 8 of the Schedule was not intended to cover the breaking or the crushing of stones incidental to the manganese mining operations. Reliance has been placed on the use of the expression 'incidental' and it has been urged that just as in that case the work of the printing was incidental to the manufacture of cigarettes. But I think that this decision will not be helpful because as pointed above the work of printing cannot be said to be an operation incidental to the manufacture of cigarettes. It can best be said to be only a necessary aid in the process of putting the cigarettes on sale.

The learned counsel for the petitioner has relied on two other reported decisions; one was in the case of Edward Mills Co. Ltd. Beawar v. State of Ajmer, AIR 1955 SC 25 and the other in the case of Oudh Sugar Mills Ltd. v. Regional Provident Fund Commr. AIR 1957 Bom. 149. In the former case a question with regard to a notification under section 27 of the Minimum Wages Act was being considered and it was laid down that the legislature undoubtedly intended to apply

this Act not to all the industries but to those industries only where by reason of unorganised labour or want of proper arrangements for effective regulation of wages or for other causes the wages of labourers in a particular industry were very low. It is with an eye to these facts that the list of trades has been drawn up in the schedule attached to the Act but the list is not an exhaustive one and it is the policy of the legislature not to lay down at once and for all time, to which industries the Act should be applied. This decision lays down the general principle and the purpose of S. 27 but it is not on the point whether this Printing Section of the petitioner Company can or cannot be considered to be a scheduled employment.

The latter decision on which reliance has been placed, that is, one reported in AIR 1957 Bom. 149 it was not a case under the Minimum Wages Act but it was under the Employees' Provident Funds Act. The petitioner Company in that case was carrying on the business of vegetable oil and its by-products. The vegetable oil produced by the Company was tinned in the containers fabricated by the Company in the precincts of the oil factory. These tin containers were used only for the purpose of packing vegetable oil and not used for any other purpose. Mudholkar, J. in that case held that the aforesaid Act applies to a unit on the premises of which (i) a manufacturing process is carried on, (ii) in any industry engaged in the manufacture of any of the scheduled products, but this was with reference to the words 'manufacturing process' and 'industry' as contemplated by the Employees' Provident Funds Act. Tambe, J. dissented from this view and he was pleased to observe that it was not correct to say that where the principal object of an industry does not fall within the meaning of the first schedule of the Act, then even if certain scheduled articles for being used in that industry only are manufactured, the provisions of the Act are not attracted. In my opinion, as the considerations in that case were in respect of specific provisions in a completely different Act, so this decision is also distinguishable and will not apply to the facts of the present case.

12. On a consideration of all these facts, I am of the opinion that the Printing Section where printing work was being carried on for the reasons stated above can be regarded as scheduled employment as decided by the Government and communicated to the petitioner Company.

13. It has also been urged that the notification of the year 1960 (Annexure E) was in contravention of the provisions of the Minimum Wages Act. I may refer

here to the aforesaid notification which laid down that it was being issued in exercise of the powers conferred by Clause (b) of sub-section (1) of section 3 of the Minimum Wages Act. Clause (b) of section 3 (1) of the Minimum Wages Act refers to a case of review of the rates of minimum wages but in this case the minimum wages had not been previously fixed and were being fixed for the first time. So the fixation could have been under clause (a) and not under clause (b). This contention seems to be correct, but in my opinion there was just a technical or a clerical error and did not affect the jurisdiction. I may refer here two decisions of the Supreme Court in this connection; one of which is in the case of P. Balakotaiah v. Union of India, AIR 1958 SC 232 where it was held that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its powers under any other rule, and that the validity of an order should be judged on a consideration of its substance and not its form.

The other decision is in the case of Hukam Chand Mills Ltd. v. State of Madhya Pradesh, AIR 1964 SC 1329. It was a case with respect to the making of amendments in the Indore Industrial Tax Rules and it was held that the Government had the power to amend the rules under section 5 (1) read with section 5 (3), but in the notification instead of S. 5 it was mentioned under Rule 17 and in such circumstance it was held that it would not vitiate the amendment for the mere mistake in the opening part of the notification in reciting the wrong source of power does not affect the validity of the amendments made. In the present case also there was a mistake in the opening part of the notification but this will not in any way affect the validity of the notification of 1960 (Annexure E).

14. The second contention in this connection that has been raised in this case is that the notification of the year 1960 was invalid as it was after the expiry of the period as contemplated by Sec. 3 of the Act. The Minimum Wages Act was passed in the year 1948 and then there were some amendments in the Act in the years 1954, 1957 and 1961 respectively. The notification (Annexure-E) of 1960 was issued prior to 1961 so naturally it will be governed by the provisions of the Act as it then stood in 1960. Section 3 (1) as it then stood is as follows:

"Section 3 (1) — The appropriate Government shall, in the manner hereinafter provided—

(a) fix the minimum rates of wages payable to employees employed—

(i) in an employment specified in Part I of the Schedule at the commencement of this Act, before the 31st day of December, 1959;

(ii) in an employment specified in Part II of the Schedule at the commencement of this Act, before the 31st of December 1959;

Provided that the appropriate Government may, instead of fixing minimum rates of wages under this sub-clause for the whole State, fix such rates for a part of the State or for any specified class or classes of such employment in the whole State or part thereof and

(iii) in an employment added to Part I or Part II of the Schedule by notification under section 27, before the expiry of one year from the date of the notification;

(b) review at such intervals as it may think fit, such interval not exceeding five years, the minimum rates of wages so fixed and revise the minimum rates, if necessary."

It has been urged, therefore, that under section 3 (1) (a) the notification fixing the minimum wages should have been made before 31st December, 1959. as far as Part I of the schedule is concerned. Similarly in respect of Part II of the Schedule also but we are not here concerned with Part II as it is in respect of agricultural employment. The notification of 1960 (Annexure-E) as already pointed above was of 24th May, 1960 and so it has been urged that it was after the expiry of the date as laid down in section 3 (1) (a) of the Act. Section 3 (1) (a) (iii) as quoted above lays down that in an employment added to Part I or Part II of the Schedule by notification under section 27, the minimum rates of wages payable may be fixed by the appropriate Government before the expiry of one year from the date of notification. The additions to the schedule were made by the Government notification under section 27 by Annexure-D dated 25th of May, 1959. The notification (Annexure-E) was on 24th of May, 1960 and so it was before the expiry of one year from the date of the notification under section 27. The position of course would have been different if the rates of minimum wages had been fixed with regard to the Cigarette Factory itself because in that case then according to the section as it then stood it should have been before 31st of December, 1959. But this restriction of period for obvious reasons would not apply to a case where there are additions in the schedule under section 27 of the Act and in that case the fixation of minimum wages can be made within one year of such notification.

15. The notification (Annexure-E) of the year 1960 in my view for the reasons

stated above cannot be said to be invalid.

16. The notification (Annexure E) dated 24th May, 1960 fixed minimum rates of wages for nineteen categories of employees but admittedly we are concerned in this writ petition with only three categories of daily-rated employees and these are as described in items 12, 17 and 19 of the notification. It has been urged on behalf of the petitioner Company that these categories of workers were getting already much higher wages and it was more than 250 to 450 per cent than the minimum wages fixed by the notification in the year 1960.

It was also contended that even if remuneration for Sunday was allowed, the wages which are being paid would still be much higher than what the workers would be entitled under the notification. It was also contended that they have been getting such high rates by virtue of a settlement which was arrived at in a conciliation proceeding and which was binding on both parties. I will discuss the matter of settlement separately but I will be here discussing only as to how far this contention was correct that the workers were really getting much higher wages than what has been laid down in the notification of 1960 and further what would be the effect of this. It may be mentioned here that neither on behalf of the Government nor on behalf of the Union this position has been challenged or disputed that factually the workers as described in items 12, 17 and 19 of the notification are getting much higher wages. In the writ petition a comparative chart has also been given showing the wages which are being paid and the wages which are payable under the notification of 1960. I may give here below an extract of the comparative chart for the elucidation of the position.

(For Chart see page 202)

17. The aforesaid chart, therefore, clearly shows that under the settlement of 1965 the petitioner Company has been paying, which is not disputed, much higher wages than what the workers are entitled to under the notification of 1960. The opposite party has been contending that they are entitled to wages for Sundays also and the chart which I have given above (here given on next page) will show that even if the wages for Sunday are added to the wages laid down in the notification still the wages which are being actually paid are much higher. The learned counsel appearing for the opposite party has contended that this does not make any difference and the Company still is liable to pay for the Sundays also, I will now proceed to examine as to how far this contention is correct. I may again refer here to the preamble of the Act which lays down "whereas it is

Item of the notification of 1960.	Minimum rates of wages under the Minimum Wages Act of notification of 1960.	Wages actually being paid after settlement in the year 1965.	Remuneration payable for rest day (four Sundays).
1	2	3	4
Item-12 Unskilled Workmen (Darwan, Peon, Majdoor Helper).	Rs. 45 per month.	Rs. 202.91	6.92
Item-17 Litho Machine men.	Rs. 100 per month.	Rs. 262.31	15.36.
Item-19 Binder.	Rs. 50 per month.	Rs. 262.31	7.69.

expedient to provide for fixing minimum rates of wages in certain employments". The object of the Act is, therefore, to prescribe minimum rates of wages and I may again refer here to Sec. 12 of the Act which can be said to be the charging section under the Act. This section lays down as follows:

"12(1) Where in respect of any scheduled employment a notification under S. 5 is in force, the employer shall pay to every employee engaged in a scheduled employment under him wages at the rate not less than the minimum rate of wages fixed by such notification for that class of employees in that employment without any deductions except as may be authorised within such time and subject to such conditions as may be prescribed.

(2) Nothing contained in this section shall affect the provisions of the Payment of Wages Act, 1936."

The liability under the section is, therefore, to this extent that the employer should pay the minimum rates of wages fixed by the notification. Section 13(b) lays down that the appropriate Government may provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such days of rest; wages has been defined in Section 2(h) of the Act which is as follows:

"Wages' means all remunerations, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled be payable to a person employed in respect of his employment or of work done in such employment (and includes house rent allowance) but does not include—

(i) the value of—

(a) any house accommodation, supply of light, water, medical attendance, or

(b) any other amenity or any service excluded by general or special order of the appropriate Government;

(ii) any contribution paid by the employer to any Pension Fund or Provident Fund or under any scheme of social insurance;

(iii) any travelling allowance or the value of any travelling concession;

(iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(v) any gratuity payable on discharge."

This definition clearly shows that the word 'wages' as contemplated by the Act has a composite meaning which will include all remunerations as contemplated by this Act read with Rule 23 of the Bihar Minimum Wages Rules. Learned counsel for the petitioner has also relied on three decisions; one of these is of the Madras High Court and the other two of the Bombay High Court and Mysore High Court respectively. In the case of Madras Port Trust v. Claims Authority (1956) 2 Lab LJ 490 = (AIR 1957 Mad 69) it was held by the Madras High Court that basically what the employee is entitled to is wages and the scheme of the Minimum Wages Act is to provide for a minimum wage for each employee. It further also lays down that the Act provides for a payment of a minimum. So long as that minimum is paid, the contractual wage structure is left unaffected and the component parts of the wages could still be regulated by contract, between the employer and the employee, and that the definition of wages postulates a contractual basis express or implied. If the contractual rate of wages is higher, the statutory right and obligation do not come into play.

It was also held that the wages paid to the concerned workmen under various heads of monthly wages, dearness allowance, house rent allowance etc. exceeded the minimum rate of wages fixed under the Act, the employer could not be held guilty of contravening the notification, though the particular component of the wage structure, viz. dearness allowance, was at a rate lower than the one fixed under the Act.

A similar question came up for consideration in the case of Union of India v. Rathil, (1952) 2 Lab LJ 655 = (AIR 1963 Bom 54) in which it was laid down that the object of the said Act being to provide minimum wages to the employees according to the nature and the duration

of the work done by the employees, one has to find out what is the total liability imposed on the employer in order to achieve that object; as pointed out above, Section 12(1) is the only section which defines that liability of the employer as regards the payment of wages. Here in this case also it was held that it is clear that so long as the employer pays the total minimum wages as provided by the Act and the rules thereunder, the employer will not be liable to pay anything more merely because the Act provides for the regulation of the hours of work, and because Rule 25 prescribes wages for the over time work at double the ordinary rate of wages. In the third case of *Municipal Borough v. Gundawan*, 1965-2 Lab LJ 26 = (AIR 1965 Mys 317) Hegde, J. as he then was pleased to hold that from the scheme of the Act, it is clear, its object was to guarantee to those, who were working in scheduled employment, a minimum rate of wages and if the wages paid by the employer are more than what the employees would have got on the basis of the minimum wages then no relief can be given under the Act.

18. On a consideration of the facts and circumstances, it is clear that the petitioner Company has been actually paying much higher rates of wages to these workmen and in this view of the matter they cannot come within the mischief of Section 12 of the Act. Their liability was only to pay the minimum rates of wages and since they have been paying much more than in view of this section and the object of the Act, the petitioner company cannot be held guilty of infringement of any of the provisions of the Act. It is also obvious that it will be extremely unfavourable to the workers themselves if they seek their rights under the Minimum Wages Act and the employer also pays them only what they are liable to pay under the notification. The workers and the Union will not be satisfied and it will unnecessarily create complication and unpleasantness.

19. It has also been urged that the rates which are being paid are by virtue of a settlement in a conciliation proceeding which has got statutory force and binding against the parties and, therefore, a very anomalous situation has been created and the petitioner company is faced with a serious situation whether to abide and act in accordance with the terms of settlement arrived at in the year 1965 or to give effect to the notification of 1960 as directed by the authorities concerned. It may be mentioned here that this does not seem to be a disputed position that from as early as in the year 1953 the petitioner Company has been receiving charters of demand from the workers and from time to time they have been settling the de-

mands. This position was also not disputed that in the year 1964 the Union, i.e. opposite party No. 5 submitted a charter of demands and one of the demands was as follows:

"All employees be made eligible for Sunday leave with pay as is now enforced in 'Minimum Wage Factories.'"

After the presentation of charter of demands by the Union there was a conciliation proceeding before Shri F. Ahmad, I. A. S., Labour Commissioner and Conciliation Officer, Bihar. Annexure B is the memorandum of settlement and the opening paragraph runs as follows:

"Memorandum of Settlement in an Industrial Dispute between the Imperial Tobacco Company of India Limited, Monghyr, (herein called 'The Company') of the one part and Tobacco Manufacturing Workers Union, Monghyr, representing the workmen employed at the Company's Monghyr Printing Factory (hereinafter called 'The Union') of the other part at conciliation proceedings held under Section 12(3) of the Industrial Disputes Act 1947, on the 25th September, at Patna".

It has been contended by the learned counsel Mr. Ali Ahmad for the opposite party that there was no settlement with regard to the demand for wages for Sunday and that this demand was never abandoned or waived but it has been urged on the other hand on behalf of the petitioner company that this demand of the Union had either been waived or abandoned. Admittedly the memorandum of settlement does not make any settlement about this demand and so it has to be seen as to how far the contention of the petitioner Company is correct that this demand had either been given up or waived. Learned counsel appearing for the opposite party has relied on Item 23 of the memorandum of settlement with a view to show that the settlement was with regard to only those matters which are specifically mentioned therein. The relevant Item 23 runs as follows:

"The workmen (collectively or individually) shall not during the period of the operation of this settlement make any demand or resort to conciliation, adjudication, go-slow or strike in respect of 'merged wages', Dearness Allowance, 'Bonus' and any other aspect of remuneration or other matters covered by this Memorandum of Settlement".

It is true that there is no specific mention therein about Sunday wages but the last portion would clearly include that also which states "any other aspect of remuneration or other matters covered by this Memorandum of Settlement". I may also refer here to item No. 6 of the Memorandum of Settlement which runs as follows:

"All matters arising out of the Charter of Demands dated 23rd August, 1964, annexed as Annexure-III hereto are and shall be deemed to be covered and settled by this Memorandum of Settlement and the parties hereto agree, and confirm that no dispute, matter or demands of whatsoever nature are outstanding between them on the execution of this Memorandum of Settlement".

This clearly shows that all the demands which had been put forward, had been settled by the memorandum of settlement and that no dispute, matter or demands of whatsoever nature then remained outstanding between them on the date of execution of this document. The interpretation of a document has to be made on reading the entire document as a whole. A perusal of Item 23 of the memorandum of settlement along with Item 6 of the memorandum to my mind clearly shows that all the outstanding demands at that time had been settled. It would naturally mean that as far as the remuneration for Sunday or the rest day was concerned this had also been settled inasmuch as it had not been pressed or the workers were otherwise fully and thoroughly satisfied when they got such high rates of wages. This is apparent from the comparative chart which I have given in this judgment while dealing with the point whether such higher wages were actually being paid or not. In this connection, I may also refer to a decision of the Calcutta High Court in the case of Imperial Tobacco Employees Association v. State of West Bengal, reported in (1963) 1 Lab LJ 601 (Cal). In this case also the workmen through a trade union which was recognised by the employer presented a charter of demands which inter alia included the question of fixation of working hours. The parties entered into a settlement in the course of a conciliation proceeding and one of the terms of the settlement was that all the demands raised by the workmen and which formed the subject matter of the conciliation proceeding shall be deemed to have been covered by it, that there are no demands or dispute of whatsoever nature pending between the parties. It was held in that case that it may not be unreasonable to hold that under the settlement the workmen gave up all demands which were not specifically covered by the terms of the settlement. In other words the settlement was arrived at on the basis of give and take; the workmen gave up certain claims and demands, and the employer-company conceded to their other claims and demands.

20. Now turning again to the memorandum of settlement one of the important terms of settlement is embodied in Item 25 and the relevant portion is as follows:

".....it being agreed that under no circumstances shall this Memorandum of Settlement be so modified or substituted or terminated before 31st December, 1969." The position, therefore, was very clear that there was a settlement in which the Union, i.e., the opposite party was a party and this settlement is in force at present and will be expiring in December, 1969. The question arises as to what would be the legal consequences and effect of such a settlement. I may first of all refer here to Section 25 of the Minimum Wages Act which provides for the contingency of contracting out and this section runs as follows:

"Any contract or agreement, whether made before or after the commencement of this Act, whereby an employee either relinquishes or reduces his right to a minimum rate of wages or any privilege or concession accruing to him under this Act shall be null and void in so far as it purports to reduce the minimum rate of wages fixed under this Act."

It will be thus clear that a contract or agreement shall be null and void only to that extent that it purports to reduce the rate of wages fixed under the Act and so any contract or agreement which confers right to higher wages will not be hit by this section. As a matter of fact, such a contract or agreement should be rather very laudable and welcome under the Scheme of the Act.

21. The next question arises as to how far and against whom such settlement was binding and for this I may refer to the relevant provision under the Industrial Disputes Act. Section 12 deals with the duties of a Conciliation Officer and sub-section (3) lays down that "if a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings the Conciliation Officer shall send a report thereof to the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute". This is with regard to the duty of the Conciliation Officer and presumably the Conciliation Officer in this case must have forwarded his report as contemplated by sub-section (3) of Section 12. Section 19 of the Industrial Disputes Act deals with the period of operation of settlements and award and sub-section (2) lays down that "such settlement shall be binding for such period as is agreed upon by the parties", and in this case as pointed above the settlement is for a period up to 31st December, 1969. I may now refer here to a decision of the Bombay High Court in the case of Poona Mazdoor Sabha v. Dhutia, (1956) 2 Lab LJ 319 = (AIR 1956 Bom 743). Chagla, C. J. held in that case that when the legislature, provides for a particular

agreement being binding upon the parties to an industrial dispute, it clearly intends that there is industrial peace with regard to the subject matter of the agreement for the duration of that agreement and it is obvious that if there is to be an industrial peace for the period contemplated, then neither party to that settlement could be allowed to raise an industrial dispute with regard to that. It was thus clear that neither an industrial dispute could be raised with regard to matters covered by such settlement nor could matters covered by such settlement form the subject matter of conciliation proceedings under Section 12 of the Act.

22. Now as far as the question against whom such settlement would be binding, I may refer to Section 18 of the Industrial Disputes Act. Sub-section (3) of that section lays down that "where a settlement is arrived at in the course of conciliation proceeding then it shall be binding on all the parties to the industrial dispute." The Union (Opposite Party No. 5) was undoubtedly a party to the dispute and therefore, such a settlement would be binding against the Union and the petitioner Company. Learned counsel appearing for the opposite party has contended firstly that the provisions of the Industrial Disputes Act cannot be applied when dealing with a case under the Minimum Wages Act. But I think this contention does not seem to be correct because when considering matters relating to a conciliation proceeding and the settlement arrived at in such proceeding then naturally the relevant provisions in the Industrial Disputes Act have to be examined and particularly in light of the provisions of the Minimum Wages Act.

It was secondly contended by the learned counsel appearing for the opposite party that even if such a settlement would be binding against the opposite party under sub-section (3) of Section 18 of the Act, it cannot be binding against the Government which was not a party to the proceeding and, therefore, the Government cannot be stopped from taking action for prosecution of the petitioner company for the infringement of the provisions of the Minimum Wages Act. True, it is that the Government in the technical sense was not a party to the conciliation proceeding but nevertheless a responsible officer of the Government acted as a Conciliation Officer. The settlement was in the nature of a tripartite agreement and as pointed above the settlement must have been brought to the notice of the Government as early as in the year 1965. The Government in such circumstances cannot be allowed to take the plea of being ignorant of such a settlement. The Government cannot also be allowed to ignore such a solemn statutory settlement.

Now if it be held that the settlement is not binding against the parties or that the Government still can take action under the Minimum Wages Act in spite of the fact that after the settlement the petitioner Company has been paying such higher wages then it would mean that the petitioner Company is being placed in a very embarrassing and anomalous position. The petitioner is, therefore, faced with the situation whether to abide by the settlement or to abide by the notification of the year 1960. I think that the settlement was binding not only against the opposite party No. 5 but the settlement was such that it should have been duly taken notice of by the Government before issuing the directions in the impugned orders.

23. The petitioner had been filing several petitions putting forward therein various grounds for exemption but these were of no avail. The prayer for exemption was first of all refused by a letter dated 19th June, 1967, (Annexure P). In this letter the Government in the relevant portion stated as follows:

".....that since the General Secretary, Tobacco Manufacturing Workers' Union, Basdeopur, Monghyr has raised objections to the prayer of M/s. Imperial Tobacco Company of India Limited for grant of exemption to their Printing Factory at Monghyr from the operation of the provisions of the Minimum Wages Act, 1948, the State Government regret that it is not possible for them to grant the exemption prayed for by the Company".

The matter was again pressed by the Company and then the Government in its impugned letter (Annexure T) dated 27th February, 1968 informed the Company that the reasons put forward by the Management of the Company do not justify their prayer for grant of exemption of the Printing Factory of the Company under Section 26(2A) of the Minimum Wages Act 1948 and in the circumstances, the State Government regret that it is not possible for them to exempt the Printing Factory of the Company from the operation of the provisions of the said Act. It has been urged that the refusal was on extraneous grounds and as such there was an error of law apparent on the face of record. It has been urged on the other hand both by the learned counsel appearing for the State and the learned counsel appearing for the opposite party firstly, that there is no prescribed authority under the Act for granting exemption and the Government was also not bound to give reasons for refusal to grant exemption. It was also urged that the letter (Annexure T) shows that the Government had also considered the reasons which had been advanced by the Company praying for grant of exemption. I may now

first of all refer to the provisions of Section 26(2A) which is as follows:

"The appropriate Government may, if it is of opinion that, having regard to the terms and conditions of service applicable to any class of employees in a scheduled employment generally or in a scheduled employment in a local area (or to any establishment or a part of any establishment in a scheduled employment) it is not necessary to fix minimum wages in respect of such employees of that class (or in respect of employees in such establishment or such part of any establishment) as are in respect of wages exceeding such limit as may be prescribed in this behalf, direct, by a notification in the official Gazette and subject to such conditions, if any, as it may think fit to impose, that the provisions of this Act or any of them shall not apply in relation to such employees".

This section clearly provides and empowers an appropriate Government to grant exemption and it cannot be said that there is no prescribed authority or that the petitioner Company could not ask for exemption because the section is very clear on this point and I may also in this connection refer to the letter of the Inspector of Factories, Monghyr Circle dated 28th March, 1967 (Annexure M) which is also one of the impugned letters and in this letter also the officer informed the Company that the Factory is advised to pay all the daily-rated workers rest day wages in accordance with the provisions of Rule 23 of the Bihar Minimum Wages Rules, until the factory gets the exemption. This clearly shows that the officer was also conscious of the position that exemption is permissible. The exemption on the first occasion was refused by the Government obviously on a consideration of a matter and contemplated by the section because the only ground of refusal was that an objection had been raised by the Secretary of the Union.

The other letter no doubt while refusing the prayer for exemption (vide Annexure T) also stated that the Government was not satisfied with the reasons advanced by the Company. Section 26 (2A) as pointed above lays down as to what things are to be considered and these are that the Government should consider the terms and conditions of service applicable to any class of employees in a scheduled employment and to see if it is not necessary to fix any minimum wages in respect of such employees as are in receipt of wages exceeding such limit as may be prescribed. This clearly shows that the Government when forming its opinion has to take into consideration all the factors specially mentioned in the section and this in my opinion can be done either suo motu or on a petition being filed

by the person concerned. It appears that all these facts had not been considered and the letter also does not clearly show that all these had been considered.

I may in this connection also refer to a decision of the Supreme Court in the case of Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295. It was in respect of Section 237 of the Companies Act. The words occurring in that section are "If in the opinion of Central Government there are circumstances suggesting" and those circumstances are enumerated in the section. It was held in that case that the words "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is altogether a subjective process not lending itself even to a limited scrutiny by the Court that this was not formed on relevant facts or within the limits of the Statute. Here in this case the facts and circumstances which I have discussed would clearly show that undoubtedly there had been a settlement in a conciliation proceeding which by virtue of the agreement between the parties will be in force till 31st of December, 1969. Under the settlement as pointed above much higher wages were being paid to the workmen concerned and *prima facie* in the subjective process of formation of opinion these facts had not been taken into consideration. I think it is a fit case in which the Government should have granted the exemption under Section 26 (2A) of the Act and, therefore, the impugned letters of the Government (Annexures P and T) refusing to grant exemption and also the letter (Annexure R) holding out threat of prosecution only are hereby quashed and it is held that the petitioner is entitled to exemption. Government is thus directed to pass the necessary order to that effect. The prayer of course, for quashing the notification of 1960 and the decision of the Government that Printing Section of the Factory is a scheduled employment is rejected. In the circumstances of the case no order for costs is being passed.

24. MISRA, C. J.: I agree to the order proposed. I reserve my opinion, however, in regard to the application of the provisions of the Industrial Disputes Act as to conciliation proceedings to a matter under the Minimum Wages Act.

Order accordingly.

AIR 1970 PATNA 207 (V 57 C 32)

KANHAIYAJI, J.

Rukmini Raman Singh and another,
Petitioners v. Herdeo Mandal, Opposite
Party.

Criminal Revn. No. 1160 of 1968,
D/- 11-12-1968, from order of Ist Class
Magistrate, Sitamarhi, D/- 8-4-1968.

Criminal P. C. (1898), Ss. 139A, 133,
137 and 138 — Court's duty to conduct
preliminary enquiry in cases where the
respondent denies existence of public
right on reliable evidence.

Section 139A of Criminal P. C. requires
that when a person on whom conditional
notice under S. 133 has been served ap-
pears in response to that notice and
denies the existence of any public right
in a way, river, channel or place alleged
to have been obstructed, the Magistrate
shall enquire into the matter, and, if in
course of such enquiry, the Magistrate
finds that there is any reliable evidence
in support of the denial, he is bound to
stay the proceeding until the existence
of the right has been decided by a com-
petent civil Court. If, on the other hand,
he finds that there is no such reliable
evidence he is required to proceed in the
manner prescribed by Sec. 137 or Sec. 138
of the Code. (Para 1)

In a case where the person proceeded
against under S. 133 Criminal P. C. denied
the existence of any right in the
public to use the ridge in question, the
Magistrate himself proceeded to decide
the question of existence of the public
right considering the documentary and
oral evidence produced by the parties
without considering if the denial was
based on reliable evidence.

Held, that the action was opposed to
the procedure prescribed under S. 139A
and that he had improperly usurped the
functions of a Civil Court thus depriving
the party concerned of the right to have
the matter decided by that court at a
preliminary stage. The object of the pro-
vision was that where there was reliable
evidence in support of the denial of
the existence of the public right, the
Magistrate would have no jurisdiction to
pronounce on the cogency of that evi-
dence, but to refer the matter to the civil
court. AIR 1941 Pat 38 & AIR 1959 Pat
81 Foll. (Paras 3 & 4)

Cases Referred: Chronological Paras
(1959) AIR 1959 Pat 81 (V 46) =
1959 Cri LJ 230, Darsan Ram v.
State 4

(1941) AIR 1941 Pat 38 (V 28) =
42 Cri LJ 34, Muni Lal Agarwala
v. Public of Bhagalpur 4

Balbhadra Prasad Singh, Radha Raman
and Uma Shanker Prasad, for Petitioners;

Balbhadra Singh and Narayan Singh, for
Opposite Party.

ORDER: This case is typical of the
cases which generally come up to this
court under Chapter X of the Criminal
Procedure Code (hereinafter referred to
as the Code) owing to the neglect of the
Magistracy to observe the procedure
prescribed by Section 139A of the Code.
The section requires that when a person
on whom conditional notice under sec-
tion 133 of the Code has been served ap-
pears in response to that notice and
denies the existence of any public right
in a way, river, channel or place alleged
to have been obstructed, the Magistrate
shall enquire into the matter, and, if in
course of such enquiry, the Magistrate
finds that there is any reliable evidence
in support of the denial, he is bound to
stay the proceeding until the existence
of the right has been decided by a com-
petent civil court. If, on the other hand,
he finds that there is no such reliable evi-
dence he is required to proceed in the
manner prescribed by section 137 or sec-
tion 138 of the Code.

2. In the present case, the opposite
party filed an application before the
Subdivisional Magistrate, complaining
obstruction by cutting the Rashta appear-
ing between survey plots Nos. 5313 and
5321 in the north and 5312 and 5323 in
the south, at village Riga, police station
Sitamarhi, and amalgamating it into the
adjoining lands, which caused much in-
convenience to the people in general in
going to the main road of the village. The
application was filed by the learned
Magistrate for non-prosecution on the 9th
April, 1963. However, it was restored
and the petitioners appeared and com-
plained that the application filed by the
opposite party was vague and inaccurate
with respect to the plots alleged to have
been obstructed.

The Subdivisional Magistrate, by his
order dated the 14th August, 1963, direct-
ed the office to draw up a proceeding
under section 133 of the Code against
petitioner No. 1, and it was transferred
to the court of Shree V. N. Shukla for
favour of disposal. The petitioners filed
their show cause petition on the 10th
October, 1963. The learned Magistrate
perused the show cause petition filed by
the petitioners and held on the 13th
January, 1964, that the survey plot num-
ber was not fixed and hence the court
could not proceed. Consequently, the op-
posite party was given an opportunity to
furnish the correct plot number, failing
which it was ordered that the proceeding
would be dropped. The opposite party
supplied specification of the disputed
Rashta, on the basis of which the pro-
ceeding was amended and show cause
notice was ordered to be issued to the

petitioners. The petitioners filed show cause on the 10th July, 1964, denying the existence of any public right on the alleged ridge. The petitioners claimed that the public was not interested in the said ridge. The learned Magistrate heard the parties on the 3rd August 1964. Thereafter the opposite party filed a petition dated 17th August, 1964. The learned Magistrate also heard the lawyers for the parties on the petition filed by the first party. Ultimately on the 15th March, 1965, the learned Magistrate passed the following order:

"1st party files Hazari.

Perused the petitions filed by the O. Ps. on 14-5-64 and 10-7-64 to drop the proceedings for the grounds given in the petitions. Also perused the petition filed by the 1st party filed on 17-8-64. Heard the learned lawyers of both the parties. I do not find any force in the petitions filed by the O. Ps. The proceeding can be started as given in law either 'on receiving a police report or other informations' and hence it is a fit case which can proceed u/s 133 Cr. P. C. and hence I disagree with show cause petitions filed by the O. Ps.

Since the proceeding has already been amended and specification is given in the amended proceeding of the 'public Rasta', and the O. Ps. were directed to remove the said obstruction within 15 days from the service of the notice, but no compliance has been reported to the court and hence the case will proceed according to law. As the O. Ps. have challenged the public Rasta and so the 1st party has to prove if there is a public Rasta by adducing evidence. Put up on 12-4-65 for evidence."

The parties filed documents and examined witnesses in support of their respective cases before the Magistrate, who, ultimately, by his order dated the 8th April, 1968, held that the ridge (Rasta) was a public Rasta in a public place and ordered the petitioners to remove the obstruction and vacate the encroachment from plot number 13450.

3. It is apparent from the above that in the present case, the petitioners (second party) appeared to show cause against the conditional order, but the Magistrate made no enquiry from them as to whether they denied the existence of the public right or not, nor did the Magistrate make any enquiry as to whether there was any evidence in support of such denial. It is apparent, however, that the Magistrate has taken evidence with regard to the existence of the public right and that on consideration of that evidence, he has been able to decide that the right does exist. It is manifest that

the Magistrate did not direct his mind at all to ascertaining whether there is any evidence in support of the denial of the existence of the public right and took upon himself to decide the question whether a public right existed or not. In this way, he usurped the functions of a civil court and deprived the party concerned of the right to have the matter decided by that Court at a preliminary stage.

4. It is contended on behalf of the first party (Opposite party) that the order should not be set aside merely because the Magistrate did not comply with the provisions of Section 139A of the Code. That however, is to overlook the whole object of the provisions of that section. It has been held in *Munilal Agarwala v. Public of Bhagalpur*, AIR 1941 Pat 38, by *Agarwala J.* (as he then was) that those provisions are clearly designed to show that where there is a reliable evidence in support of the denial of the existence of the public right, the Magistrate shall have no jurisdiction to pronounce on the cogency of that evidence, but to refer the matter to the civil court. This view is also supported by a Bench decision of this court in the case of *Darsan Ram v. State*, AIR 1959 Pat 81. It has been held in that case that in a case falling under section 139A, it is imperative for the Magistrate, first, to hold an enquiry as laid down therein before he proceeds under section 137 or section 138 of the Code, as the case may be. The Magistrate gets jurisdiction to continue the proceeding after an enquiry held in accordance with section 139A. The enquiry envisaged in section 139A is in the nature of an ex parte summary enquiry and what the Magistrate is to see is whether there is a prima facie reliable evidence in support of the denial and not that the non-existence of the public right should be affirmatively proved.

5. For the reasons given above, the orders passed by the learned Magistrate after the 26th February, 1965, are set aside and he is directed to rehear the proceeding from the stage where the second party should have been asked under section 139A of the Code, whether he denied the existence of the public right. It is needless to say that in the rehearing of this case, the learned Magistrate should not overlook the actual terms of the conditional order issued under section 133 of the Code. The application is allowed.

Petition allowed.

Authority, Amritsar for a fresh assessment according to law".

6. Against this order, the respondent filed the writ petition in this Court which was accepted by the learned single Judge on January 9, 1964. While accepting the writ petition, the learned Single Judge relied on the judgment of their Lordships of the Supreme Court in *Ghanshyamdas v. Regional Asst. Commr. of Sales Tax, Nagpur*, (1963) 14 STC 976 = (AIR 1964 SC 766), and observed as under:—

"The fresh proceedings which the Assessing Authority started after the lapse of four years would necessarily be proceedings under Section 11-A and thus would be without jurisdiction as that they were initiated after the prescribed period for the purpose had elapsed."

7. The present appeal has been filed by the Assessing Authority, Amritsar, and the Assistant Additional Excise and Taxation Commissioner, Punjab, for setting aside the order of the learned Single Judge. In support of it, the learned Advocate General for the State of Punjab has contended that the fresh proceedings taken by the assessing authority in pursuance of the order of remand by the Assistant Additional Excise and Taxation Commissioner were not fresh proceedings but were continuation of the proceedings that had been taken earlier and in respect of which orders had been passed on February 16, 1960 and December 16, 1960. That contention has no force in view of the judgment of their Lordships of the Supreme Court in *Jaipuria Brothers Ltd.*, (1965) 16 STC 494 = (AIR 1965 SC 1213) (Supra). The assessing authority, after the order of remand, issued a fresh notice to the respondent for reassessment as a part of the turnover had escaped assessment because of the deductions that had been held by the revising authority to have been wrongly allowed. It was open to the Commissioner to redetermine the quantum of turnover liable to tax while exercising the revisional powers but once he decided to direct the assessing authority to make a reassessment in accordance with law, the proceedings for reassessment were fresh proceedings which were governed by the period of limitation prescribed in Section 11-A of the Act. The learned Advocate General has put forth an argument that since the original assessment order was passed on best judgment the nature of the proceedings after remand remained the same. Even if that be so, the same period of limitation is provided in sub-sections (4), (5) and (6) of S. 11 which govern the orders of assessment based on best judgment.

8. For the reasons given above there is no merit in this appeal which is dismissed with costs.

9. SHAMSHER BAHADUR, J.:— I agree.

10. R. S. NARULA, J.:— I also agree.

Appeal dismissed.

AIR 1970 PUNJAB & HARYANA 241
(V 57 C 34)

FULL BENCH

**P. C. PANDIT, GURDEV SINGH AND
H. R. SODHI, JJ.**

Sunder Lal and others, Petitioners v. The State of Punjab and others, Respondents.

Civil Writ No. 1164 of 1964, D/- 22-7-1969, decided by Full Bench on order of reference made by S. B. Capoor and Gurdev Singh, JJ., D/- 21-12-1966.

(A) Government of India Act (1935), S. 241 (1) (b) — Rules under — Punjab Government Service (War) Amendment Rules (1943), Rr. 3, 6, 4, 5, 7 and 8 — Interpretation — Rule 6 forms integral part of entire set of rules and cannot be singled out for taking benefit under — Appointment of persons rendering war service on temporary basis — Appointment cannot be regarded as one under R. 3 — Appointee cannot avail of benefit of R. 6 for fixation of his seniority.

Per majority (Gurdev Singh, J. Contra):
Rules 3, 4, 5, 6, 7 and 8 of Punjab War Service Rules had to be read as a whole and one of them, namely R. 6, could not be torn out of the context and be availed of. It formed an integral part of the entire set of rules and could not be singly taken out and made use of. Its benefit could not be claimed by a Government employee with war service to his credit, who had not been appointed against a vacancy reserved under R. 3. After the operation of R. 3 had been terminated on 1st January, 1946, no vacancy was to be reserved for the war service candidates and persons with war service had to compete with others for all the posts.

(Para 14)

After the termination of the operation of Rule 3, the other rules, in the very nature of things had to remain in force, because the vacancies that had been reserved under Rule 3 had to be filled and the appointees had to be assigned places in the cadre. Those rules merely contained the instructions, in the form of concessions in the matter of relaxation of age, educational qualifications and in fixing of seniority. They could not, by their own force, offer recruitment to vacancies occurring after 31st December, 1945. It was on 21st January, 1953, that all the rules were abrogated, because it was assumed that by that time all the reserved posts

had been filled up and the officials had been given their due places in the cadre.

(Paras 12, 13)

A bare reading of Rules 4 to 8 would show that they concerned appointment against permanent vacancies, because all the vacancies left unfilled or filled on a temporary basis under Rule 3 were to be thrown open after the war for recruitment from among persons with war service to their credit. No one appointed in a temporary capacity against a temporary post was covered by these rules. Under Rule 6, the candidates with war service to their credit, who were appointed to the Punjab Government Services, had to be assigned places in the cadres of such vacancies. Ordinarily only those candidates, who were appointed in a substantive capacity against permanent posts could be assigned places in the cadres and their places had to be fixed under this rule with due regard to their ages and the period allowed to be deducted under R. 5. Their places in the cadres had to correspond with these which they could have had, if the war had not intervened and they had qualified in the normal way.

(Para 17)

There was no necessity of specifically mentioning in the rules that the benefit of Rules 5 to 8 would be given only to the war reserved vacancies under Rule 3. Since, all the rules were an integrated whole and on reading them together there is no escape from the conclusion that the benefits or the concessions referred to in Rules 5 to 8 had to be given to the war services candidates who were going to be appointed against the vacancies reserved under Rule 3 only. Case law discussed.

(Para 19)

Hence persons with war service to their credit who had been appointed temporarily in temporary ex-cadre posts could not have the benefit of Rule 6 for the fixation of their seniority as against the persons, who were recruited earlier.

(Para 32)

(B) Constitution of India, Art. 311 — Confirmation of Government servant owing to wrong interpretation of Punjab Government Service (War) Amendment Rules (1913) — Government can revise its decision at subsequent stage when mistake comes to its notice— Consequent reduction of servant does not amount to reduction in rank.

The Government is well within its rights to withdraw the war service concessions erroneously given to its employees earlier by wrong interpretation of the Punjab Government Service (War) Amendment Rules and thus change the dates of their confirmation.

(Para 45)

If owing to some bona fide mistake, the Government has taken a decision regarding the confirmation of an officer, it can certainly revise its decision at a subsequent stage, when the mistake comes to

its notice. The mistake can be corrected and it cannot be said that it would be allowed to perpetuate even when the same is discovered. The consequent reduction of the officer could not amount to reduction in rank and would not attract the applicability of Art. 311 of the Constitution. Such a reduction is the necessary result of any routine administrative decision. It is only when an officer brings his case within the purview of Art. 311 of the Constitution that he can attack the legality of any order passed by the Government, which might adversely affect his career in Government service. Case law discussed.

(Para 36)

Cases Referred: Chronological Paras

- (1968) AIR 1968 All 276 (V 55) = 1968 Serv LR 830, K. B. Sharma v. Transport Commr. U. P. Lucknow 40
- (1968) AIR 1968 Punj 436 (V 55) = 1968 Serv LR 353, Ram Rattan Bakshi v. State of Punjab 27
- (1968) 1968 Serv LR 503 (Punj), Dilbagh Rai v. Punjab State 27
- (1967) AIR 1967 Delhi 67 (V 54), Labh Singh Waryam Singh v. Union of India 41
- (1964) AIR 1964 SC 521 (V 51) = (1964) 4 SCR 954, State of Punjab v. Jagdip Singh 34
- (1964) AIR 1964 Punj 249 (V 51) = 66 Pun LR 318 (FB), Deep Chand v. Addl. Director Consolidation of Holdings Punjab Jullundur 33, 44
- (1963) AIR 1963 Cal 563 (V 37), Benukar Mahata v. State of West Bengal 37
- (1963) Civil Writ No. 1399 of 1961, D/- 23-5-1963 (Punj), Honorary Captain E. S. Dass v. State of Punjab 30, 64
- (1962) Civil Writ No. 1478 of 1960, D/- 23-11-1962 (Punjab), Chandan Singh v. Punjab State 31, 67
- (1961) Civil Appeal No. 35 of 1958, D/- 2-2-1961 (SC) (Pak), Manzur Ahmad v. Province of West Pakistan 25, 68
- (1959) AIR 1959 Mad 1 (V 46) = ILR (1958) Mad 968 (FB), N. Devasahayam v. State of Madras 38
- (1959) Letters Patent Appeal No. 358 of 1959, D/- 23-10-1959 (Punj) Jagdip Singh v. State of Punjab 34
- (1955) AIR 1955 All 528 (V 42) = ILR (1956) 1 All 537, O. N. Chauhan v. Collector of Central Excise, Allahabad 39
- (1954) AIR 1954 Pepsu 129 (V 41) = ILR (1953) Patiala 639, Gursewak Singh Harnam Singh v. State 33, 43
- (1937) AIR 1937 PC 27 (V 24) = 64 Ind App 40, R. T. Rangachari v. Secy. of State 33, 42
- Abnasha Singh with R. N. Mittal, for Petitioners: M. S. Punnu, Advocate General with V. P. Sarda, D. N. Awasthy.

H. L. Sarin, (Senior), with A. L. Bahal, for Respondents.

P. C. PANDIT, J.:— This order will dispose of two connected writ petitions Nos. 1164 and 1481 of 1964. Counsel for the parties are agreed that the decision in the former petition will govern the other as well. I will, therefore, refer to the facts in Civil Writ 1164 of 1964.

2. Hardial Malik, Sunder Lal & Kahan Chand, all employees of Irrigation Branch in the Public Works Department, Punjab Government, filed a petition under Articles 226 and 227 of the Constitution against the State of Punjab and the Chief Engineer, Irrigation Branch (South) Punjab, Respondents Nos. 1 and 2. Subsequently, about 200 persons, whose seniority would be affected if the writ petition was allowed, were also impleaded as respondents. The petitioners were appointed as Assistant Clerks in the said department on 25th September, 1946, 17th February 1947 and 9th June, 1947, respectively. They had been working as civilian clerks in the Armed Forces during the Second World War and it was after their release from the Armed Forces that they joined the Irrigation Department as Assistant Clerks in a temporary capacity. Later, by an order dated 29th October, 1956, they were confirmed as Assistant Clerks with effect from 1st February, 1949. Subsequently, they were promoted as Sub-Divisional Clerks, then as Accounts Clerks and thereafter as Head Clerks. According to them, they were entitled to the benefit of the Punjab Government Services (War) Amendment Rules, 1943 (hereinafter called the Rules) which were promulgated by the Home Department of the Punjab Government by Notification No. 5011-G-43/59012 dated 18th September, 1943 and were published in the Punjab Government Gazette dated 24th September, 1943, at Lahore. In 1960, they received notices from Respondent No. 2, asking them to show cause why the war service benefits, which had been erroneously given to them, be not withdrawn and they be not de-confirmed.

In reply to the show cause notices, they submitted their representations, but the same were rejected on 29th February, 1964. They were informed that the benefit of war service, which was wrongly allowed to them, had been withdrawn forthwith as regards seniority. As a result, respondent No. 2 then passed orders changing the dates of confirmation of the petitioners as Assistant Clerks to their disadvantage and showing the respondents, other than respondents Nos. 1 and 2, as senior to them. The case of the petitioners was that this was against Rules and would adversely affect them so far as their confirmation, promotion, seniority and pension etc., were concerned.

That led to the filing of the present writ petition in June, 1964.

3. In the return filed by respondent No. 2, it was stated that in accordance with the provisions of the Rules and subsequent clarifications given by the Government from time to time, the concession of war service was available only to those candidates who were initially appointed against permanent posts in the cadre of the service. It was not admissible in the case of those officials, who were appointed on temporary basis against temporary posts. All the petitioners were initially appointed as temporary hands against temporary posts. The vacancies for war service candidates had already been filled in the Joint Punjab before partition and no such vacancy was passed on to the share of the East Punjab Government at the time of partition. It was admitted that the petitioners were confirmed as Assistant Clerks by the order dated 29th October 1956, but that was done erroneously by the Chief Engineer on account of the wrong interpretation of the Rules and the instructions of the Punjab Government in that behalf. The mistake was, subsequently, corrected by de-confirming the petitioners by the order passed by respondent No. 2 on 5th June, 1964.

4. The other respondents also took up the same position as respondent No. 2. In addition, they took certain preliminary objections to the maintainability of the writ petition, but only one of them was pressed before us namely, that the rules being violative of Articles 14 and 16 of the Constitution had become void and inoperative on the enforcement of the Constitution and thus could not be given effect to.

5. These writ petitions, in the first instance, came up for hearing before S. B. Capoor and Gurdev Singh, JJ. on 21st December, 1966. They however, referred them to a larger Bench, because, according to them, these petitions raised legal questions which were likely to affect a large number of Government servants. That is how the matter has been placed before us.

6. It is common ground that the respondents had been appointed earlier than the petitioners in the Irrigation Department and if benefit of Rule 6 of the Rules was not given to the latter, they would undoubtedly become junior to the former. The main question for determination in these petitions would be about the scope and interpretation of the Rules.

7. For the proper appreciation of the various contentions of the parties, it would be necessary to set out the Rules—

"No. 5011-G-43/59012— In exercise of the power conferred by Cl. (b) of sub-s. (1) and Cl. (b) of sub-section (2) of S. 241 of the Government of India Act, 1935, the

Governor of Punjab is pleased to make the following rules:—

1. (a) These rules may be cited as the Punjab Government Services (War) Amendment Rules, 1943.

(b) They shall apply to all services under the rule-making control of the Punjab Government and shall come into force at once.

2. For the purposes of these rules 'war service' should be interpreted as follows:

(a) service of any kind out of India with a mobilized unit or with such unit in India in an area declared by the Provincial Government to be an area in which active operations have occurred.

(b) service in India in a unit or formation (including service under military armaments or stores authorities) with a liability to serve overseas.

(c) a continuing liability for service overseas as a result of training with a military unit or formation.

(d) all other service involving subjection to naval, military or air force law.

(e) whole-time service in any civil defence organisation specified in this behalf by the Central or the Provincial Government, and

(f) such other service as may hereafter be declared a war service for the purpose of this definition.

Note.—In making selections for Government appointments after the war to posts reserved in any service or department for candidates with war service the order of preference will be as shown above. Only category (a) above will count as combatant service.

3. From the date of the publication of these rules and for such period, as may be prescribed, direct recruitment on a substantive basis shall not be made to any service of the Punjab Government except with the sanction of Government and for special reasons to be stated by the Administrative Department concerned. Recruitment to vacancies by promotion, confirmation of candidates accepted for permanent employment before the 1st of April, 1940, and actually taken into the service before the issue of these rules with a view to permanent employment in due course of transfer from another Government Department wherever such recruitment is authorised by the existing rules will continue as usual. Where in the interest of the Public Service, it is necessary to fill vacancies which under the existing rules are filled by direct recruitment, such vacancies in the absence of special Government sanction will be filled so long as these rules remain in force on a temporary basis. Each Head of Department will maintain a list of vacancies left unfilled or filled on a temporary basis, for recruitment from among persons with war service to their credit and submit to the Punjab Government and to the Public

Service Commission, not later than the 15th May, of each year, a statement giving details of such appointments. This statement shall include vacancies which have been left unfilled or filled on a temporary basis before these rules came into force.

4. Vacancies in all Punjab Government Services left unfilled or filled on a temporary basis under R. 3 will be thrown open after the war for recruitment from among persons with war service to their credit and in making such recruitment special importance will be attached to the order in which categories of war service are set forth in the definition in R. 2 preference being given to those in the higher categories.

5. In the case of a person who has rendered war service his period of war service shall be excluded in computing his age for appointment. Such person shall, if invalidated from war service, be entitled further to deduct from his age the period from the time when he was invalidated up to the date of his application for appointment or until the end of the war whichever is earlier.

6. Every candidate with war service who is appointed to a Punjab Government Service, shall be assigned a place in the cadre of such services, which shall be fixed with due regard to his age and the period allowed to be deducted under R. 5, and shall, as nearly as may be, correspond with the place which he would have had if the war had not intervened and he had qualified in the normal way. The seniority inter se of all candidates so appointed to a cadre shall be determined by their ages irrespective of the class of war service rendered by each of them.

7. A candidate who has rendered war service shall not be ineligible for selection to a service, class or category merely because he does not possess the educational or other qualifications prescribed in the special rules for such service, class or category provided that the appointing authority can certify, in the case of selection for technical services or posts that the candidate is in possession of technical qualifications equivalent to those prescribed in the said special rules and in the case of selection for non-technical services or posts that the candidate has acquired by experience or otherwise qualifications equivalent to those prescribed in the said special rules.

8. When selection for a service, class or category is made on the basis of a competitive examination comprising a written test or a written test and an oral test in the shape of interview conducted by the Punjab and North-West Frontier Province Joint Public Service Commission or by another authority, a candidate who has rendered war service shall not be required to appear for the written test, provided the Commission or the appointing

authority, as the case may be, is satisfied that the candidate has sufficient knowledge to carry on the duties of his office efficiently."

8. These Rules were framed on 18th September, 1943, and were published in the Punjab Government Gazette on 24th September, 1943. They were framed by the Governor of the Punjab in exercise of the powers conferred on him by Section 241 (1) (b) and (2) (b) of the Government of India Act, 1935 and had to apply to all the services under the rule-making control of the Punjab Government. They came into force at once.

9. For the purpose of the Rules, "war service" was defined in Rule 2. By virtue of Rule 3, no direct recruitment on a substantive basis could be made to any service of the Punjab Government except with the sanction of the Government and for special reasons to be stated by the Administrative Department concerned. This, however, was not to affect the recruitment to vacancies by promotion or confirmation of candidates accepted for permanent employment before 1st April, 1940, and actually taken into service before the issue of the Rules. If, however, it was necessary in the interest of public service to fill some vacancies, which under the existing rules had to be filled by direct recruitment, those, in the absence of special Government sanction, could be filled on a temporary basis. A direction was given to each Head of the Department to maintain a list of vacancies left unfilled or filled on a temporary basis and submit the same to the Punjab Government and to the Public Service Commission not later than 15th May each year. These vacancies were reserved for recruitment from among persons with war service to their credit. This statement had also to include vacancies which had been unfilled or filled on a temporary basis before these rules came into force.

The vacancies in all the Punjab Government services, which were left unfilled or filled on a temporary basis under R. 3, were to be thrown open after the war for recruitment from among persons with war service to their credit under Rule 4. Rule 5 provided for computing the age at the time of appointment of a person with war service. Then comes Rule 6, according to which every candidate with war service, who was appointed to a Punjab Government service, had to be assigned a place in the cadre of such service, and that had to be done with due regard to his age and the period allowed to be deducted under Rule 5. The place which was to be assigned in the cadre had, as nearly as might be, to correspond with the place which he would have had, if the war had not intervened and he had qualified in the ordinary way. According to Rule 7, a war service candidate was

made eligible for selection to a service even though he did not possess educational or other qualifications for the purpose, provided the appointing authority could certify, in the case of selection for technical service, that the said candidate did possess the technical qualifications which were equivalent to those prescribed for the purpose, and in the case of non-technical service, the candidate had acquired by experience the requisite qualifications. Under Rule 8, when selection for a service involved a competitive examination including a written test, the candidate with war service was not required to appear for that test, provided the appointing authority was satisfied that he had sufficient knowledge to carry on the duties of that office efficiently.

10. It is undisputed that the war started on 3rd September, 1939, and ended on 15th August, 1945, though officially on 1st April, 1946. The main purpose why these Rules were promulgated was not mentioned in the said Rules. It appears, however, that the Government wanted to induce young persons to join the war and in order to safeguard their interests the said Rules were framed. A direction was given that no vacancy was to be filled and if there was some great urgency in certain cases, those could be filled only on a temporary basis, except the ones which could be filled with the sanction of Government and for special reasons to be stated by the Administrative Department concerned. That meant that ordinarily no vacancies were to be filled. All these vacancies, whether unfilled or filled on a temporary basis, had to be thrown open only to persons with war service to their credit after the war was over. In order to fill up those vacancies, instructions were given in Rules 5, 7 and 8. These rules contained the concessions which were given to the war service candidates in the matter of relaxation of age and qualifications. When the recruitment to those vacancies had been made and the candidates had been appointed to those posts, they had to be fixed in the cadre of various services and assigned a place there. For that, it was mentioned in Rule 6 that the Government would give due regard to their ages and the period allowed to be deducted under Rule 5. The places that would be assigned to them in the cadre would, as nearly as might be, correspond with those which they would have had, if there was no war and they had qualified in the normal way.

It appears that the idea of Government was that during the continuance of the war persons, who had gone there, should not suffer in any way and no vacancies occurring in their absence during that period should be filled by persons other than those with war service to their credit, the reason being that persons who

had gone there could not obviously apply and compete with those who remained behind. They were thus working under a handicap which in a way had been removed. These concessions had to be given also to encourage young persons to join the war and ensure their prospects, so that they might not suffer by their absence as they were sacrificing their prospects of getting service on the civil side. Civil jobs were made unavailable, because recruitment to them had been stopped, except of course in exceptional cases. This was also done to give impetus to youngmen to join the war. The idea was to give concessions to war service candidates and during the period commencing from 24th September, 1943, and ending with 1st January, 1946, all the vacancies in the services of the Punjab Government be reserved for them and on the expiry of war those vacancies should be thrown open to persons with war service to their credit. Further, the concessions in regard to age and educational qualifications were given to them and their seniority in the cadre of the service was to be fixed at a place which they would have normally got, had the war not intervened. All the vacancies in the Punjab Government services, which were left unfilled or filled on a temporary basis under Rule 3, were then to be given to persons with war service.

11. It is common ground that the operation of Rule 3 was terminated with effect from 1st January, 1946, the war having ended on 15th August, 1945. The result was that thereafter no vacancy was to be left unfilled or filled on a temporary basis, of which persons with war service could take advantage. All such persons could henceforward apply and compete for getting those posts.

12. It was contended on behalf of the petitioners that if the benefit of Rules 5 to 8 could be taken only by the persons appointed to war reserved vacancies under Rule 3, it would seem to follow that as soon as those vacancies were filled, the entire set of rules had exhausted itself and ceased to be operative. But it would be seen that it was only Rule 3 which ceased to operate with effect from 1st January, 1946, and all the remaining rules remained in force till 21st of January, 1953, when they were abrogated. This showed that the intention of the rule-makers was to extend the concessions granted to candidates with war service to their credit not only in the matter of recruitment to war reserved posts under Rule 3, but also to other vacancies which occurred while the Rules remained in force, i.e., up to 21st of January, 1953, thus giving sufficient time to the war service candidates to obtain employment in civil posts under the Punjab Government.

13. There is no substance in this contention, because after the termination of the operation of Rule 3, the other rules, in the very nature of things, had to remain in force, because the vacancies that had been reserved under Rule 3 had to be filled and the appointees had to be assigned places in the cadre. Those rules merely contained the instructions, in the form of concessions in the matter of relaxation of age, educational qualifications and in fixing of seniority. They could not by their own force offer recruitment to vacancies occurring after 31st December, 1945. It was on 21st January, 1953, that all the Rules were abrogated, because it was assumed that by that time all the reserved posts had been filled up and the officials had been given their due places in the cadre.

14. All these Rules had to be read as a whole and one of them, namely Rule 6, could not be torn out of the context and be availed of by the petitioners. It formed an integral part of the entire set of Rules and could not be singly taken out and made use of. Its benefit could not be claimed by a Government employee with war service to his credit, who had not been appointed against a vacancy reserved under Rule 3. After the operation of Rule 3 had been terminated on 1st January, 1946, no vacancy was to be reserved for the war service candidates, and persons with war service had to compete with others for all the posts.

15. An argument was raised by the learned counsel for the petitioners that by adopting this interpretation of the Rules, there was likelihood that war service candidates, who were not released by the army soon after the termination of the war due to one reason or the other, might suffer for no fault of theirs, because by the time they came, the war reserved vacancies might have been filled by those who had been released earlier.

16. There is no merit in this contention, because all the persons who had joined the army had not been guaranteed posts on the civil side after they were released by the army. The posts on the civil side, in the very nature of things, were only limited and, consequently, a specified number of persons released from the army could be accommodated. Whatever criterion might have been adopted for filling up those numbered posts, it would have resulted in depriving at least some of the persons with war service to their credit of getting those posts, unless of course the number of reserved posts happened to be larger than the number of persons released by the army. But that, by any chance, could not be said to have caused any injustice to them. Moreover, there might be some war service candidates, who were released by the army after 21st January, 1953, when all

the rules were admittedly abrogated. Even if the interpretation of the rules, suggested by the learned counsel for the petitioners, was accepted, those persons were bound to suffer for no fault of theirs. Even this difficulty was tried to be solved by the Punjab Government by issuing executive instructions directing that certain percentage of vacancies occurring after 21st December, 1945, be reserved for war service candidates for some period thereafter. Further, there was an indication in Rule 5, that the date of the application for appointment or the end of the war, whichever was earlier, and not the date of release of the war service candidate by the army, was to be taken into consideration for computing the age for appointment to the service.

17. A bare reading of Rules 4 to 8 would show that they concerned appointment against permanent vacancies, because all the vacancies left unfilled or filled on a temporary basis under Rule 3 were to be thrown open after the war for recruitment from among persons with war service to their credit. No one appointed in a temporary capacity against a temporary post was covered by these rules. Under Rule 6, the candidates with war service to their credit, who were appointed to the Punjab Government services, had to be assigned places in the cadres of such vacancies. Ordinarily only those candidates, who were appointed in a substantive capacity against permanent posts could be assigned places in the cadres and their places had to be fixed under this rule with due regard to their ages and the period allowed to be deducted under Rule 5. Their places in the cadres had to correspond with these which they would have had, if the war had not intervened and they had qualified in the normal way.

18. It was also submitted by the learned counsel for the petitioners that if the intention was to confine the applicability of the Rules only to the vacancies reserved under Rule 3, it would have been clearly so stated in Rule 6. In the absence of any such limitation, there was no justification for confining the benefit of Rules 5 to 8 only to the candidates appointed against permanent vacancies reserved under Rule 3.

19. There is no point in this argument as well. There was no necessity of specifically mentioning in the rules that the benefit of Rules 5 to 8 would be given only to the war reserved vacancies under Rule 3. As I have already mentioned above, all the rules were an integrated whole and on reading them together there is no escape from the conclusion that the benefits or the concessions referred to in Rules 5 to 8 had to be given to the war service candidates who were going to be appointed against the vacancies reserved

under Rule 3 only. Under Rule 3, a direction was given to the various Heads of Departments not to fill any vacancies, and if some of them had to be filled in the interest of public service, that could be done on a temporary basis. Under Rule 4, all such vacancies, which were unfilled or filled in a temporary capacity, had to be thrown open after the war for recruitment from amongst persons with war service to their credit. In Rules 5, 7 and 8, directions had been given as to how that recruitment was to take place. Under Rule 6, after the candidates had been recruited and appointed to the Punjab Government services, they were to be assigned places in the cadres.

20. It was also argued on behalf of the petitioners that the provisions of Rules 5 to 8, regarding the relaxation of age, educational qualifications etc., were wide enough to cover the candidates with war service, even though they might not have been appointed in vacancies reserved under Rule 3.

21. This contention again is without any merit. As I have already said, this set of rules had to be read together and one or more rules could not be taken out of their context and availed of by persons with war service to their credit. They had to be read along with the rules that preceded them and it was only then that one could find out what their real meaning was and to whom they applied. The well-recognised canon of construction of any statute or statutory rules was that they had to be read as a whole and not out of their proper context. Divorced from their context, they were likely to be misinterpreted and misconstrued.

22. During the course of arguments, another contention was raised by the petitioners that if these Rules were only intended for war reserved vacancies under Rule 3, as contended by the respondents, then this would very adversely affect the persons who were invalidated during the progress of the war and were released on that account. After their release, they would not be able to get civil employment till Rule 4 came into operation and all the vacancies in the Punjab Government services left unfilled or filled on a temporary basis under R. 3 would be thrown open after the war for recruitment from among persons with service to their credit. The invalidated war service candidates would have to wait for getting an employment till the war was over. Even if it could be said that under the latter part of Rule 3, he could have been given a job on a temporary basis in the interest of the public service, which itself was doubtful, that would not have benefited him very much, because after the war was over, that vacancy, which had been filled on a temporary basis, would have been thrown

open under Rule 4 to all the persons with service to their credit and he would have had to stand in a queue along with others for getting that post.

23. This contention ignores the provisions of Rule 3, where under the earlier part of the rule, power had been given to the Government to give sanction for special reasons to be stated by the Administrative Department concerned to recruit a person directly on a substantive basis to any service of the Punjab Government. A special case could have been made by the Government for accommodating such a person.

24. I would like to make it clear that while determining the scope and the interpretation of the Rules, I have not thought it proper to refer to the various instructions given by the Punjab Government from time to time regarding these Rules and also to the different interpretations placed on these Rules by their Officers, which had been appended as annexures to the writ petitions and the returns filed by the respondents, for the simple reason that those interpretations and instructions were neither helpful or relevant nor binding on us. The Rules had to be interpreted by us unaffected by the different interpretations given by the various officers in that behalf. The intention of the rule-makers had also to be gathered from the Rules themselves uninfluenced by the executive instructions issued by the Government in that regard. I have, however, not refrained from noticing the judicial interpretations of these Rules, e.g., by the Pakistan Supreme Court.

25. In support of their contention that Rule 6 was not confined only to war reserved vacancies under Rule 3, but was general in nature and available for all persons, having war service to their credit, applying for any posts falling vacant even after 31st of December, 1945, great reliance was placed on the judgment of the Supreme Court of Pakistan in Civil Appeal No. 35 of 1958, *Manzur Ahmad v. Province of West Pakistan*, D/-2-2-1961, wherein it was observed—

"It is important to note that the rule (Rule 6) is not confined in its application to persons who had been appointed to war reserved vacancies, i.e., vacancies which appear upon the list maintained in accordance with Rule 3. The words are altogether general, viz., 'Every candidate x x x who is appointed to a Punjab Government service.' Rules 7 and 8 are similarly worded generally, so that their application is not restricted in terms to persons appointed in war reserved vacancies."

26. In the abovementioned judgment, the question involved was one of senior-

ity to be determined between Manzur Ahmad appellant, who had war service to his credit, on the one hand, and Messrs. Mohammad Ihsan-ur-Rehman Khan and Muhammad Rafi the contesting respondents, on the other. There a clear finding was given that Manzur Ahmad was recruited against a de facto war service vacancy. He was, consequently, given the benefit of the Rules and made senior to the two contesting respondents. Under these circumstances, the precise question as to whether the Rules had to be read as a whole and Rule 6 could not be divorced from the context did not arise for decision in that judgment, with the result that the observations relied upon by the petitioners were merely obiter dicta. Besides, I say so with respect, there was no discussion regarding the point as to why Rule 6 was not confined in its application only to persons who had been appointed to war reserved vacancies. No reasons had been given for coming to that conclusion except this that the words in Rule 6 were general, because it had been mentioned therein—

"Every candidate who is appointed to a Punjab Government service x x x"

In my opinion, there was no other alternative but to use the expression 'appointed to a Punjab Government service'. Under Rule 3, direct recruitment on a substantive basis to all the services in the Punjab Government had been stopped. Undoubtedly, there were a number of Departments in the Punjab Government, where, by virtue of Rule 3, the posts remained unfilled. After the war, all these vacancies in the various departments were thrown open to persons with war service to their credit. Candidates were then recruited to the different services. Rule 6 dealt with fixation of seniority of the appointees in the cadres of various services. This rule, therefore, said that when a person was appointed to a Punjab Government service, i.e., any Punjab Government service, then his seniority would be fixed in the way mentioned in that rule. In the very nature of things 'Punjab Government service' had to be preceded by the word 'a' and not 'the', because these Rules were not dealing with one particular service only, but with the various services under the Punjab Government. A candidate could have been appointed to any one of those services and, therefore, it was stated in Rule 6 that when a candidate with war service was appointed to a Punjab Government service, i.e., any Punjab Government service, his seniority would be fixed in the manner mentioned in that rule. Likewise, Rules 7 and 8 had also to be similarly worded. This apart, all the contentions that are being raised in this Court regarding the interpretation and the scope of the Rules were not agi-

tated before the Supreme Court of Pakistan and, therefore, that Court had no occasion to deal with them.

27. Learned counsel for the petitioners then referred to two decisions of this Court by Tek Chand J. in *Dilbagh Rai v. Punjab State*, 1968 Serv LR 503 (Punj) and *Ram Rattan Bakshi v. State of Punjab*, 1968 Serv LR 353 = (AIR 1968 Punj 436), in which a reference had been made to these war service Rules.

28. I have gone through these authorities and I am of the opinion that they do not help us in any way in interpreting the Rules. In the former case, *Dilbagh Rai*, petitioner, had joined as a Clerk in the Transport Department in December, 1946, after rendering war service. He was given the benefit of war service towards seniority and promotion by the Government in October, 1966, after he had made several representations in that behalf. The order of the Government, however, was only partially implemented by the officials concerned. The petitioner filed a writ of Mandamus in this Court and Tek Chand J. issued the said writ to the Government to enforce and implement its decision taken in October, 1966.

29. In the latter decision, *Ram Rattan Bakshi* petitioner volunteered his services in the Second World War and served in the I.A.V.S. from April, 1942 to December, 1948. He was given seniority in 1947 in accordance with war service Rules, but no decision about the fixation of his pay was communicated to him. Another colleague of his, however, who was placed in identical circumstances, was given war service benefit including those of pay. It was held by Tek Chand J. that the petitioner was entitled to the benefit of the war service under the war service Rules and could not be discriminated. It was held in that ruling that the concessions given under the war service Rules could not be withdrawn by the Government by issuing executive instructions, because no circular letter could abridge the rights conferred by the statutory rules.

30. There are two other Bench decisions of this Court in which also a reference was made to these war service Rules. The first was Civil Writ No. 1399 of 1961 (Punj) *Honorary Captain E. S. Dass v. State of Punjab*, decided by S. B. Kapoor, J. and myself on 23-5-1963. This authority was relied on by the counsel for the respondents in support of the proposition that Rule 6 and other concessions set out in the war service Rules were available only to such candidates with war service, who were appointed against substantive vacancies reserved upto 31st of December, 1945, under Rule 3. In this case, I had written the judgment and

Capoor, J. had agreed with me. There, I had observed—

"Learned counsel for the petitioner then submitted that assuming for the sake of argument, that no posts had been reserved for war service candidates under Rule 6 of the War Service Rules, the petitioner should have been assigned a place in the cadre after giving him the benefit of the war service rendered by him.

There is no merit in this contention, because, firstly, this point was not taken by him in the writ petition and his case throughout had been that he had been selected against one of the vacancies in the cadre of the Punjab Forest Service Class I reserved for war service candidates. Secondly, Rule 6 applies to those posts, which had been reserved for war service candidates under Rule 3 of the War Service Rules. If in a case, the provisions of Rule 3 are not attracted, then no benefit can be derived from Rule 6 alone. Rule 6 forms an integral part of the entire set of War Service Rules and cannot be singly taken out and made use of by the petitioner."

31. The second decision was of *Mehar Singh and Grover JJ. in Civil Writ No. 1478 of 1960 (Punj)*, *Chandan Singh v. Punjab State*, decided on 23-11-1962. There, Grover J. who wrote the judgment and with whom *Mehar Singh J.* concurred, after referring to the scope of the war service Rules observed—

"It must consequently be held that there was no breach of the rules when *Ved Parkash* respondent was given seniority over the petitioner by virtue of his appointment against a permanent post with effect from 15th January, 1943 (assumed date) in view of the period of his war service and the petitioner's appointment with effect from 12th April, 1943."

At another place, while discussing Rule 6, as to whether it was mandatory or directory in nature, it was held—

"There is another insuperable difficulty in the way of any relief being granted to the petitioner. Once Rule 6 of the War Service Rules is held to be applicable in the matter of fixing seniority, it will not be open to this Court to issue any writ in the nature of mandamus or any other appropriate order or direction for treating the impugned orders as ineffective for the simple reason that the aforesaid rule is more of a directory nature than mandatory. The language employed leaves room for exercise of discretion by the Government and in such circumstances it is well settled that the extraordinary powers under Article 226 can neither be invoked nor exercised."

32. Let us now examine the case of the petitioners in the light of the scope and the interpretation of the Rules made

above. All the petitioners were initially appointed as Assistant Clerks in the Irrigation Branch of the Public Works Department in 1946 and 1947 in a temporary capacity. According to the return of the respondents, they were not appointed in the vacancies, which were reserved for war service candidates under Rule 3. As a matter of fact, they had been appointed temporarily in temporary ex-cadre posts. There is nothing on the record to counteract this assertion of the respondents. It has, therefore, to be assumed that what the Government had stated was correct. That being so, according to the interpretation that I have placed on the Rules, they cannot have the benefit of Rule 6 for the fixation of their seniority as against the respondents, who were recruited earlier than the petitioners. As I have already said above, it was conceded by the counsel for the petitioners that if benefit for Rule 6 was not given to the petitioners, they would certainly become junior to the respondents.

33. After having dealt with the scope and interpretation of War Service Rules, I will now deal with the other contention raised by the learned counsel for the petitioners to the effect that the Government, after having once granted benefits under the Rules by confirming the petitioners with effect from 1st February, 1949, as Assistant Clerks by its order dated 29th October, 1956, could not review its decision and de-confirm the petitioners. Reliance for this submission was mainly placed on three decisions—

1. R. T. Rangachari v. Secy. of State, AIR 1937 PC 27.

2. Gursewak Singh Harnam Singh v. State, AIR 1954 Pepsu 129.

3. Deep Chand v. Additional Director, Consolidation of Holdings, Punjab, Jullundur, (1964) 66 Pun LR 318—(AIR 1964 Punj 249 FB).

34. The factual position regarding this point is that on 29th of October, 1956, the petitioners were confirmed as Assistant Clerks with effect from 1st February, 1949. In 1960, show cause notices were issued to them informing them that the benefit of war service under Rule 6 was available only to those war service candidates who got permanent appointments and since the petitioners had been initially appointed on temporary posts and they continued to remain temporary up to the repeal of the Rules, the benefit of war service was, therefore, wrongly allowed to them. It had now been decided to withdraw the war service benefit wrongly allowed in their cases and to de-confirm them, because their confirmation in 1956 had been incorrectly done in consequence of the war service benefit having been wrongly given to them. They were, therefore, asked to show cause within 15 days of the receipt of the notices as to why the

action contemplated should not be taken to restore them to their original positions of seniority. The petitioners gave their replies to the show cause notices. Amongst other things, it was stated therein that it had been authoritatively decided by a Division Bench of the Punjab High Court in Jagdip Singh v. State of Punjab, Letters Patent Appeal No. 358 of 1959, D/-23-10-1959 (Punj), that a person, who was once confirmed, could not be de-confirmed. It appears that this matter remained pending for quite some time and in February, 1964, a letter was issued by the Punjab Government to all the Superintending Engineers of the Irrigation Branch of the Public Works Department saying that the judgment of the Supreme Court in the case of Jagdip Singh, AIR 1964 SC 521, had been received, by which the judgment of this Court was reversed. Accordingly, the war service benefit, if granted in contravention of the rules, could be withdrawn even now and the seniority could be refixed.

In view of the judgment of the Supreme Court, it was established that the benefit of war service had been erroneously allowed by them to the Clerks, who were initially appointed on temporary posts and continued to remain temporary up to 1956, in contravention of Rule 6. The said benefit might, therefore, be withdrawn forthwith. Consequently, in June 1964, the war service benefit given to the petitioners was withdrawn and their dates of confirmations were accordingly changed, with the result that the respondents were shown senior to them. Now the question is whether the Government could do so by reviewing its earlier decision.

35. It is undisputed that previously when the petitioners were confirmed with effect from 1st of February, 1949, the Government had interpreted the Rules in favour of the petitioners, who were given the benefit of war service, although they had been appointed temporarily on ex-cadre temporary posts which had not been reserved for war service candidates under Rule 3. Subsequently, the Government realised that it had misinterpreted the Rules and erroneously given the benefit of war service to the petitioners and, consequently, they withdrew that benefit from the petitioners and revised their seniority. Could this be done under the law?

36. In my view, if owing to some bona fide mistake, the Government has taken a decision regarding the confirmation of an officer, it can certainly revise its decision at a subsequent stage, when the mistake comes to its notice. The mistake can be corrected and it cannot be said that it should be allowed to perpetuate even when the same is discovered. The consequent reduction of the officer

could not amount to reduction in rank and attract the applicability of Article 311 of the Constitution. Such a reduction is the necessary result of any routine administrative decision. It is only when an officer brings his case within the purview of Article 311 of the Constitution that he can attack the legality of any order passed by the Government, which might adversely affect his career in Government service. Such a case does not come within the four corners of Art. 311 of the Constitution. In the instant case, the Government, after having misinterpreted the Rules, had given war service concessions to the petitioners. Subsequently, they realised their mistake and withdrew those benefits, with the result that the seniority of the petitioners was affected. The Government, in my opinion, could correct the error and such a decision would not come within the ambit of Article 311 of the Constitution. But it is noteworthy that in the present case, the petitioners had been given even the show cause notices and their representations had been considered by the Government before it took the impugned decision.

37. The view that I have taken is amply supported by authority. It was held by a Bench of the Calcutta High Court in Benukur Mahata v. State of West Bengal, AIR 1963 Cal 563, that in order that the provisions of Article 311 of the Constitution might be attracted, the reduction in rank had to be by way of imposition of penalty. Where such reduction resulted from a normal step taken in the course of office administration to rectify an error or a mistake and there was no penalty involved in the readjustment, there was no reduction in rank within the meaning of Article 311 of the Constitution and the procedure prescribed in clause (2) of Article 311 need not be followed.

38. Similarly, a Division Bench of the Madras High Court, consisting of P. V. Rajamannar, C. J., and Ramachandra Iyer J. in *N. Devasahayam v. State of Madras*, AIR 1959 Mad 1 (FB), held—

“Once a civil servant is unable to invoke the provisions of Art. 311 (1) or (2) of the Constitution in his aid, there is no other provision under which he can challenge the validity of the order of the Government which might adversely affect his official career. It is unnecessary to deal with a hypothetical case in which an officer without any ostensible reason and with no rule to support the action is reduced in rank or with a case in which mala fides on the part of the Government is alleged and proved.

This is a simple case in which the appellant who had obtained benefit in the way of seniority by the relaxation of rules has been deprived of that benefit by a subsequent cancellation of such relaxation.

The appellant cannot claim as of right any particular rank in his substantive cadre. Least of all can he seek to enforce such a right.”

39. Raghubar Dayal J. in *O. N. Chauhan v. Collector of Central Excise, Allahabad*, AIR 1955 All 528, observed—

“The expression ‘reduction in rank’ in Art. 311 (2), implies the posting of a public servant to a post of a lower rank by way of punishing him for some misbehaviour. There appears to be nothing wrong in a public servant, who is selected for a selection post not on account of his being the senior-most person entitled to that post but on account of some senior of his being considered unfit for that post, reverting to his original post in case it is found by an authority superior to the selecting authority that the supersession of the senior was unjustified and that the selection post should go to the senior.”

40. In another decision of the Lucknow Bench of the Allahabad High Court in *K. B. Sharma v. Transport Commr., U. P.* Lucknow, 1968 Serv LR 830 = (AIR 1968 All 276), it was remarked that an order of confirmation, if passed under some mistake could certainly be revised with a view to correct the mistake. Such a revision, even if it might affect the person confirmed earlier, could by no means attract Art. 311 of the Constitution.

41. *I. D. Dua, C. J.* of the Delhi High Court in *Labh Singh Waryam Singh v. Union of India*, AIR 1967 Delhi 67, was of the view that the reduction, resulting from a normal administrative decision to correct the mistake, did not involve any penalty and, consequently, Art. 311 (2) of the Constitution was not attracted in such a case.

42. The decisions, relied on by the learned counsel for the petitioners, are of no assistance to his clients. *R. T. Rangachari's case*, AIR 1937 PC 27 is clearly distinguishable on facts. There, a Sub-Inspector of Police was granted an invalid pension by a competent authority and he thus duly ceased to be in service. The officer succeeding the authority, which had granted the pension, reconsidered the matter and ordered his removal from the service. In those circumstances, it was held by the Privy Council that in a case in which after Government officials, duly competent and duly authorised in that behalf, had arrived at one decision, their successors in office, after the decision had been acted upon and was in effective operation, could not purport to enter upon a reconsideration of the matter and arrive at another and possibly different decision.

43. Similarly, *Gurusewak Singh Harnam Singh's case*, AIR 1954 Pepsu 129 has no application to the facts of the present case. There, disciplinary pro-

ceedings had been taken against the petitioner and they had ended in his favour. Subsequently, another officer again started disciplinary proceedings on the same charges, and in those circumstances, it was held that when a matter had been finally disposed by a competent authority, it could not be reopened by his successor except under the express provisions of law.

44. In Deep Chand's case, (1968) 66 Pun LR 318 = (AIR 1964 Punj 249 (FB)) it was held that an Additional Director of Consolidation was not empowered under Section 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, to review his order on the merits of the case. He could not, therefore, recall his earlier erroneous and unjust order, whenever it was discovered that the error was due to his own mistaken view of the merits of the controversy. This case has nothing to do with the point in issue in the present case, where the Government was not acting under any statute. As I have already said, certain concessions had been erroneously given to the petitioners by the Government and the same were later on withdrawn by it. Moreover, any officer who was adversely affected by the seniority list prepared by the Government, could make a representation and if there was merit in that, the said list could be altered. It could not be said that the seniority list prepared by the Government could under no circumstances be changed.

45. I would, therefore, hold that there is no merit in this contention of the petitioners and the Government was well within its rights to withdraw the war service concessions erroneously given to the petitioners earlier by wrong interpretation of the Rules and thus change the dates of their confirmation.

46. It might be mentioned that the learned counsel for the respondents submitted that Rule 6, on the basis of which the petitioners were claiming seniority, was merely directory and not mandatory in nature. It gave discretion to the authorities in the matter of fixation of seniority and that being so, the extraordinary powers under Art. 226 of the Constitution could neither be invoked by the petitioners nor exercised by this Court. It was also contended by the learned counsel for the respondents, other than respondents Nos. 1 and 2, that the war service Rules were ultra vires Arts. 14 and 16 of the Constitution. It might also be stated that the alternative argument raised by the learned counsel for respondents Nos. 1 and 2 was that, even if it be assumed, that the benefit of Rule 6 could be taken by persons appointed to all the vacancies and not necessarily to war service reserved vacancies under Rule 3, as contended by the learned counsel for the petitioners,

the petitioners in the instant case could not claim that benefit on the date when they were confirmed, viz., 28th of October, 1956, because on that day, Rule 6 stood abrogated, since the operation of all the Rules was terminated with effect from 21st of January, 1953.

47. But in the view that I have taken of the points raised by the petitioners, it is needless to discuss the contentions urged by the respondents.

48. In the result, these writ petitions fail and are dismissed. There will, however, be no order as to costs.

49. GURDEV SINGH J.:—The main question requiring the consideration of this Full Bench in these two writ petitions (Nos. 1164 and 1481 of 1964) pertains to the interpretation of the Punjab Government Services (War) Amendment Rules, 1943 (hereinafter called the Rules). The petitioners claim benefit of Rule 6 of these Rules which, though originally granted to them, was later withdrawn by the State Government in fixing their seniority. My learned brother Pandit, J. has expressed the opinion that the benefit of this R. 6 cannot be claimed by the petitioners and both the petitions must, accordingly, be dismissed. I have had the advantage of going through the opinion recorded by Pandit, J., but notwithstanding the respect that I have for my learned brother, I regret I do not find it possible to subscribe to the view taken by him regarding the interpretation of the relevant rule.

50. The material facts in both the petitions are identical, and in the course of arguments reference has been made only to the facts in Civil Writ 1164 of 1964 as counsel for the parties were agreed that once the relevant rules are interpreted in the light of the facts of one case, the other case would be easily disposed of.

51. The relevant facts are set out in the referring order and the judgment that my learned brother Pandit, J. has recorded, and it will suffice to briefly recapitulate the salient facts.

52. The petitioners in both the petitions, as also the respondents (other than respondents 1 and 2), are the employees of the Irrigation Branch of the Public Works Department, Punjab, having originally joined as Assistant Clerks in that department. The dates of their appointments are shown in annexure 2 of Civil Writ 1164 of 1964, according to which Narinder Singh, son of Kala Singh, was the first among the petitioners to be appointed as Assistant Clerk, his date of appointment being 29th July, 1946. The other petitioners were appointed subsequently on various dates in the years 1946, 1947 and 1948. The petitioners in Civil Writ 1164 of 1964 were confirmed as

Assistant Clerks with effect from 1st February, 1949. In the second writ petition, 13 petitioners were confirmed as Assistant Clerks on the same date and the rest on various dates in the years 1951, 1952 and 1953. From time to time they were promoted to the higher grade.

53. Prior to their appointment as Assistant Clerks in the Irrigation Department, all the petitioners were working as Civilian Clerks in the Armed Forces during the Second World War, and it was after demobilisation that they joined the Irrigation Department in temporary capacity, though in due course they were confirmed in the posts of Assistant Clerks. At the time the petitioners joined the Irrigation Department, the respondents other than respondents 1 and 2 in both the petitions were already serving in that department as Assistant Clerks. Giving the petitioners benefit of their war service, the State Government fixed their pay and seniority as permanent Assistant Clerks from various dates indicated in the notification of the P. W. D. Irrigation Branch, dated 29th October, 1956, copy of which is marked Annexure R. IX in Civil Writ No. 1164 of 1964. Later on, however, notices were issued to the petitioners in the year 1960 calling upon them to show cause why the war service benefit that had been given to them, earlier in the matter of seniority be not withdrawn and the petitioners de-confirmed. The petitioners' representations against the proposed action were, however, turned down by the State Government vide its letter, dated 29 February, 1964, which forms annexure M to the petition. By this letter, the petitioners were informed that the benefit of war service given to them as regards seniority would be withdrawn forthwith. Accordingly, the Chief Engineer passed orders altering the dates of confirmation of the petitioners as Assistant Clerks to their detriment and showing the respondents other than respondents 1 and 2 senior to them. The action of the Government in putting back their confirmation and depriving them of the benefit which they had already obtained naturally adversely affected the petitioners so far as their confirmation, promotion, seniority, pension etc., were concerned. Accordingly, they have approached this Court under Articles 226 and 227 of the Constitution for setting aside the order of the State Government revising their seniority.

54. Though in the return filed by the respondents it was urged by way of preliminary objection that a joint petition under Articles 226 and 227 of the Constitution was not competent and the dispute relating to seniority of the members of the service was not justiciable in a Court of law, these objections have not been pressed before this Bench and do not re-

quire a decision at our hands. The only question that has been debated before us relates to the interpretation of the Rules and their applicability to the petitioners.

55. In defending the impugned order by which the petitioners' seniority has been revised and their dates of confirmation as Assistant Clerks put back, it has been urged by the respondents:—

(1) that the benefit of the war service rendered by the petitioners cannot be afforded to them in fixing their seniority;

(2) that as on the day the petitioners joined the Irrigation Department, all the vacancies reserved for war service candidates had been filled up, and they were appointed temporarily against temporary posts, they could not claim seniority over the Assistant Clerks who had been recruited earlier to the Irrigation Department;

(3) that the War having come to an end before the petitioners joined the Irrigation Department, they were not entitled to claim benefit of the War Service Rules; and

(4) that the War Service Rules, of which the petitioners claim benefit being violative of Arts. 14 and 16 had become void and inoperative on the enforcement of the Constitution and thus cannot be enforced.

56. For proper interpretation of these rules and to ascertain their exact import, it is necessary to keep in view the circumstances in which these rules were promulgated. The Second World War broke out on 3rd September, 1939, and though the hostilities ceased on 15th August, 1945, officially the war ended on 1st April, 1946. Throughout the war, India was a part of the British Empire and the pick of its youngmen was drafted for service in the army to fight on behalf of the Allies. It is an historical fact that in the first couple of years of the War the Allies met with staggering reverses and persistent efforts were made and several measures initiated by them in India and other parts of the British Empire to step up war effort and to induce youngmen to come forward in increasing numbers to join the armed forces. Even persons who were already serving in various departments of the civil administration in India were encouraged to join the army and man the posts for which they were found qualified to serve. To achieve that purpose, it was necessary that interests of all volunteering for military service be safeguarded and some inducement offered to them. This was all the more necessary in the case of persons already serving in various civil departments of the Government as in absence of any measure for compulsory military service such youngmen would not be attracted to join the army. In the year 1943, when the War Service Rules, with which we are dealing in this case, were promulgated,

the Allies were in a bad way. It was with this end in view that the War Service Rules were promulgated. With this historical background, we may now turn to the contents of those Rules.

57. For appreciation of the various contentions raised by the parties, it is necessary to set out the Rules, especially in view of the contention put forward by the respondents, which has been accepted by my learned brother Pandit J. that the various rules formed an integral whole and must be read together for their proper interpretation. These Rules were promulgated on 18th September, 1943 by the Punjab Government (as it was before the Partition of the country) in exercise of its powers conferred by clause (b) of sub-section (1) and clause (b) of sub-section (2) of Section 241 of the Government of India Act, 1935, though they actually came into force on 24th September 1943 when they were published in the Punjab Gazette of 18th September, 1943. Reproduced in extenso they read as under:—

"1 (a) These rules may be cited as Punjab Government Services (War) Amendment Rules, 1943.

(b) They shall apply to all services under the rule-making control of the Punjab Government and shall come into force at once.

2. For the purposes of these rules 'war service' should be interpreted as follows:—

(a) Service of any kind out of India with a mobilised unit or with such unit in India in an area in which active operations have occurred,

(b) Service in India in a unit or formation (including service under military armaments or stores authorities) with a liability to serve overseas,

(c) a continuing liability for service overseas as a result of training with a military unit or formation,

(d) all other service involving subjection to naval, military or air force law,

(e) whole-time service in any civil defence organisation specified in this behalf by the Central or the Provincial Government, and

(f) such other service as may hereafter be declared a war service for the purpose of this definition.

NOTE— In making selections for Government appointments after the war to posts reserved in any service or department for candidates with war service the order of preference will be as shown above. Only category (a) above will count as combatant service.

3. From the date of the publication of these rules and for such period as may be prescribed direct recruitment on a substantive basis shall not be made to any service of the Punjab Government except with the sanction of Government and for

special reasons to be stated by the Administrative Department concerned. Recruitment to vacancies by promotion, confirmation of candidates accepted for permanent employment before the 1st of April 1940, and actually taken into the service before the issue of these rules with a view to permanent employment in due course or transfer from another Government Department wherever such recruitment is authorised by the existing rules will continue as usual. Where in the interest of the Public Service it is necessary to fill vacancies which under the existing rules are filled by direct recruitment, such vacancies in the absence of special Government sanction will be filled so long as these rules remain in force on a temporary basis. Each Head of Department will maintain a list of vacancies left unfilled or filled on temporary basis, for recruitment from among persons with war service to their credit and submit to the Punjab Government and to the Public Service Commission, not later than the 15th May, of each year, a statement giving details of such appointments. This statement shall include vacancies which have been left unfilled or filled on a temporary basis before these rules came into force.

4. Vacancies in all Punjab Government Services left unfilled, or filled on a temporary basis under Rule 3 will be thrown open after the war for recruitment from among persons with war service to their credit and in making such recruitment special importance will be attached to the order in which categories of war service are set forth in the definition in Rule 2, preference being given to those in the higher categories.

5. In the case of a person who has rendered war service his period of war service shall be excluded in computing his age for appointment. Such person shall, if invalidated from war service, be entitled further to deduct from his age the period from the time when he was invalidated up to the date of his application for appointment or until the end of the war whichever is earlier.

6. Every candidate with war service who is appointed to a Punjab Government Service, shall be assigned a place in the cadre of such services, which shall be fixed with due regard to his age and the period allowed to be deducted under Rule 5, and shall, as nearly as may be, correspond with the place which he would have had if the war had not intervened and he had qualified in the normal way. The seniority inter se of all candidates so appointed to a cadre shall be determined by their ages irrespective of the class of war service rendered by each of them.

7. A candidate who has rendered war service shall not be ineligible for selection to a service, class or category merely be-

cause he does not possess the educational or other qualification prescribed in the special rules for such service, class or category provided that the appointing authority can certify, in the case of selection for technical services or posts, that the candidate is in possession of technical qualifications equivalent to those prescribed in the said special rules and in the case of selection for non-technical services or posts that the candidate has acquired by experience or otherwise qualifications equivalent to those prescribed in the said special rules.

8. When selection for a service, class or category is made on the basis of a competitive examination comprising a written test or a written test and an oral test in the shape of interview conducted by the Punjab and North-West Frontier Province Joint Public Service Commission or by another authority, a candidate who has rendered war service shall not be required to appear for the written test, provided the Commission or the appointing authority, as the case may be, is satisfied that the candidate has sufficient knowledge to carry on the duties of his office efficiently."

58. Indisputably, these Rules grant concessions to persons having war service to their credit. As stated in Rule 1, they applied to all services under the rule-making control of the Punjab Government. Rule 2 defines "war service" of which the benefit can be claimed by a war service candidate. By Rule 3, direct recruitment on substantive basis to any service of the Punjab Government, except with the sanction of Government and for special reasons, was stopped and a direction was issued to fill up such permanent posts in absence of special Government sanction, only on temporary basis. Under this rule, each Head of Department was required to maintain a list of vacancies left unfilled or filled on temporary basis in accordance with the rules, and these vacancies were expressly reserved for recruitment from among persons with war service to their credit.

59. Under Rule 4, all the vacancies in the Punjab Government left unfilled or filled on temporary basis under Rule 3 were required to be thrown open after the war for recruitment among persons with war service only. Since according to the rules regulating appointment to various services some of the candidates serving in the war were likely to become ineligible for permanent appointment having crossed the maximum prescribed age limit or for failure to obtain the requisite educational qualifications, it was thought necessary to safeguard the interests of such candidates so that their chances of securing Government employment after discharge from the armed

forces are not prejudiced. Thus, to further safeguard the interests of such candidates provision was made in Rr. 5 and 7 to relax the age limit and educational qualifications. Particular care was taken to see that the persons who had joined the armed forces do not suffer on entering civil service under the Punjab Government by providing in Rule 6 that such a candidate shall be assigned a place in the cadre which shall be fixed with due regard to his age and the period allowed to be deducted under Rule 5, and it shall, as nearly as may be, correspond with the place which he would have had if the war had not intervened and he had qualified in the normal way. Rule 8 gave further concession to war candidates by providing that where selection for a service is made on the basis of a competitive examination, a candidate who has rendered war service shall not be required to appear for the written test provided that the Commission for the appointment or the appointing authority, as the case may be, is satisfied that the candidate has sufficient knowledge to carry on the duties of his office efficiently.

60. Thus, we find that by these Rules the Punjab Government not only reserved permanent vacancies in all departments of the Government that were required to be filled by direct recruitment, and occurring during the period for which Rule 3 was to remain in force, for persons with war service, but it also granted such persons concession in the matter of age and educational qualifications especially. In view of the concession relating to age and grant of benefit of the war service some provision had to be made in the rules for fixation of the seniority of such war candidates vis-a-vis those already serving in the department, appointed by promotion or otherwise recruited. It was for that purpose that Rule 6 was incorporated in the rules, providing:—

"Every candidate with war service who is appointed to a Punjab Government Service, shall be assigned a place in the cadre of such services, which shall be fixed with due regard to his age and the period allowed to be deducted under Rule 5, and shall, as nearly as may be, correspond with the place which he would have had if the war had not intervened and he had qualified in the normal way."

61. On a plain reading of this rule, it is abundantly clear that grant of a particular concession under a specific rule is not dependent upon the applicability of any other rule but only on the length of the war service rendered by a candidate, for example, a war service candidate seeking employment in a civil department under the Punjab Government may possess the necessary educational and technical qualifications prescribed for a job

but on the date of application he may be faced with the fact that during the period that he had served in the army he had crossed the maximum age prescribed for recruitment to that post and was thus ineligible. In such a case he can certainly avail of the concession granted to a war candidate under Rule 5 in computing his age. Similarly the age of a war service candidate on the date of the application for appointment to a civil post may be within the prescribed limit, but having interrupted his studies by joining the army, he may be faced with the fact that he does not fulfil the requisite educational or technical qualifications and was thus not eligible for appointment. In such a situation, he can claim benefit of Rule 7 or 8, as the case may be. In fact, it is not seriously disputed on behalf of the respondents that the benefits of Rules 5 to 8 providing for relaxation of age and educational qualifications could be claimed and granted to candidates with war service not only in respect of the posts reserved under Rule 3 but also for recruitment to other posts.

There is nothing in Rule 6 (which relates to fixation of seniority and with which we are concerned in this case) or in Rules 5, 7 and 8 to limit their operation to the war reserved posts, namely, to permanent posts reserved for appointment from among the candidates with war service at the conclusion of the war, and I see no reason why in absence of any compelling circumstance or indication to the contrary in the Rules themselves, full effect be not given to the language of these Rules 5, 6, 7 and 8. When the language is quite clear and unambiguous, it has to be given effect to. Since these Rules grant concession to a category of candidates for Government service and were intended to safeguard their interests and to give them preference over those who did not volunteer for war service, there is no justification for limiting their scope so as to confine their applicability only to such posts as were reserved under Rule 3.

62. In support of the respondents' contention that the provision with regard to fixation of seniority contained in Rule 6 would apply only to the posts reserved under Rule 3, it is contended that the Rules must be read as a whole and the Rules 5 to 8, which relate to relaxation of age and educational qualifications are merely intended to protect the interests of the war candidates in appointments to the posts reserved under Rule 3 and cannot be extended so as to cover appointments made after reservation in favour of war candidates had stopped. I do not find it possible to accept this contention. While interpreting a particular set of rules, all the rules have no doubt to be read as a whole to ascertain their true

import, purpose and effect, but this does not mean that in absence of anything in the particular rule itself or indication in the context in which it occurs, one rule has to be read as subservient to the other, and despite its wide language and admitted applicability to cases other than those contemplated in the rule, it has to be applied to a limited extent. The contention that Rules 5 to 7 were merely "hand-maids", as the respondents' counsel Mr. D. N. Avasthy called them, to Rule 3, ignores not only the clear and unambiguous and wide language of those rules but also proceeds on the assumption that in promulgating these rules the Punjab Government merely intended to reserve certain vacancies for a part of the war duration exclusively for candidates who were serving in the war, and did not intend to grant them any other concession. I regret I find no warrants for such an assumption, but on the contrary as I have indicated earlier, I am of the opinion that while framing these Rules the Punjab Government was actuated by a desire not only to reserve posts for the war service candidates but also give them preference in the matter of appointments to various posts in the civil administration of the Punjab Province by providing for relaxation of the age and educational qualifications. In this view of the matter, it would follow that even in the matter of recruitments to posts other than those reserved under Rule 3, a candidate with war service to his credit could avail of relaxation of age and educational qualifications in accordance with the provisions contained in Rules 5 to 8.

63. If this is the position with regard to the applicability of Rules 5 to 8, it cannot be different in applying Rule 6 which relate to fixation of seniority. The language of that rule is wide, and there is nothing in it to limit its operation to persons recruited to war reserved posts. This rule opens with the words "every candidate with war service who is appointed to a Punjab Government Service shall be assigned a place in the cadre of such service.....". The plain meaning of this expression is that the provision with regard to the fixation of seniority made in this rule can be availed of by every candidate with war service who is appointed to any service under the Punjab Government, and this would clearly include even those appointments that had not been made against posts reserved for war service candidates under Rule 3. Had it been intended that this provision with regard to the fixation of seniority contained in Rule 6 should apply only to the war service posts reserved under Rule 3, Rule 6 would have been differently worded, and it would have read something like this:—

"Every candidate with war service, who is appointed to a post reserved under

Rule 3' to a Punjab Government Service shall be assigned.....".

64. The words underlined (here in ' ') above do not occur in R. 6. For accepting the contention raised on behalf of the respondents that this Rule 6 applies only to posts reserved under Rule 3, we will have to introduce these words in that rule, but this obviously is not permissible. The language of this rule is clear and unambiguous, and its effect and general applicability cannot be whittled down solely on the assumption which, in my opinion, is unwarranted that the object of promulgation of these War Service Rules was merely to reserve certain posts for war service candidates and not to grant them any other concession in the matter of recruitment to various posts in the civil administration of the Punjab Government. The Court is not at liberty to add to the language of a statute especially when it is clear and unambiguous, and the provision with the interpretation of which it is concerned can be given effect to as it stands and without adding any word to it. It is also a well-established rule of interpretation that the words of a statute when clear and unambiguous have to be given full effect to irrespective of its effect or hardship on others. In fact, I am of the opinion that if the interpretation canvassed on behalf of the petitioner is adopted and it is held that Rule 6 is not confined to the war reserved posts but applies to all cases relating to the fixation of seniority of persons who had rendered war service vis-a-vis others, it does not lead to any undue hardship. On the contrary, the refusal to give benefit of these rules in the matter of fixation of seniority to persons with war service to their credit would inflict hardship on such ex-service personnel and not only defeat the purpose of the rules but also amount to breach of faith and assurances held out in these rules to the candidates who joined the army. In Civil Writ 1399 of 1961, D/- 23-5-1963 (Punj) on which reliance has been placed on behalf of the respondents, my learned brother Pandit J. with whom S. B. Kapoor J. concurred, after examining the scope of the War Service Rules, in dealing with a similar contention observed:—

"Learned counsel for the petitioner then submitted that assuming for the sake of argument that no posts had been reserved for war service candidates under Rule 6 of the War Service Rules, the petitioner should have been assigned a place in the cadre after giving him the benefit of the war service rendered by him.

There is no merit in this contention, because, firstly, this point was not taken by him in the writ petition and his case

throughout had been that he had been selected against one of the vacancies in the cadre of the Punjab Forest Service Class I reserved for war service candidates. Secondly, Rule 6 applied to those posts which had been reserved for war service candidates under Rule 3 of the War Service Rules. If in a case the provisions of Rule 3 are not attracted, then no benefit can be derived from Rule 6 alone. Rule 6 forms an integral part of the entire set of War Service Rules and cannot be singly taken out and made use of by the petitioner."

65. The latter observations with regard to the interpretation of Rule 6 are in the nature of obiter dictum as in the case with which the Division Bench was dealing the petitioner's claim was that he had been appointed against a war reserved post and was thus entitled to the benefit of Rule 6. Apart from this, as I have observed earlier, it is true that R. 6 forms an integral part of the entire set of War Service Rules, but speaking with respect, I find it difficult to subscribe to the proposition that its benefit cannot be claimed by a Government employee with war service to his credit who had not been appointed against a vacancy reserved under Rule 3. If we accept the argument that the benefit of Rules 5 to 8 could be claimed only by persons appointed in the vacancies reserved under Rule 3, it would seem to follow that as soon as those vacancies were filled up the entire set of rules had exhausted itself and ceased to be operative. We, however, find that except for Rule 3 which was deleted with effect from 1st January, 1946, all other rules continued in force till 1953 when they were expressly repealed. This appears to indicate that the intention was to extend the concession granted to the candidates with war service to their credit not only in the matter of recruitment to the posts reserved under Rule 3 but also to other vacancies occurring during the period for which the rules remained in force, thus giving sufficient time to the ex-service candidates to obtain employment in other departments under the Punjab Government. The Rule 8 also seems to support this impression. In view of what has been said above I am of the opinion that the seniority of the petitioners as originally fixed was in accordance with Rule 6 and the Government was not justified in re-fixing their seniority on the assumption that Rule 6 applied only to posts reserved under Rule 3.

66. This brings me to the consideration of the other contentions raised on behalf of the respondents in opposing the grant of writ and quashing the order re-fixing the petitioners' seniority. These contentions are:—

(1) That no relief can be granted to the petitioners under Article 226 of the Con-

stitution as Rule 6 on the basis of which the petitioners claim seniority is merely directory and not mandatory, vesting discretion in the authorities concerned;

(2) that the Rule 6 is violative of Article 14 of the Constitution and thus cannot be enforced by any relief granted on its basis; and

(3) that the entire set of rules having been abrogated in 1953, no relief can be obtained on their basis nor any direction issued to enforce them.

67. So far as the first contention is concerned, reliance has been placed upon the Division Bench decision of this Court in Civil Writ No. 1478 of 1960, D/- 23-11-1962 (Punji), wherein Grover J. (as he then was) observed as under:—

"There is another insuperable difficulty in the way of any relief being granted to the petitioner. Once Rule 6 of the War Service Rules is held to be applicable in the matter of fixing seniority, it will not be open to this Court to issue any writ in the nature of mandamus or any other appropriate order or direction for treating the impugned orders as ineffective for the simple reason that the aforesaid rule is more of a directory nature than mandatory. The language employed leaves room for exercise of discretion by the Government and in such circumstances it is well settled that the extraordinary powers under Article 226 can neither be invoked or exercised."

68. Reference is also made to the unreported decision of the Supreme Court of Pakistan in Manzur Ahmad v. Province of West Pakistan, decided on 2-2-1961, wherein Cornelius C. J., while dealing with the interpretation of these very rules observed:—

"It remains to consider what place belongs to Manzur Ahmad in the cadre of the Punjab Forest Service Class I, within the contemplation of the Rules. As has been seen, Rule 6 gives a wide discretion to the appointing authority in regard to the fixation of the seniority, and if the facts showed that the place given to him has been fixed with due consideration to the various factors enumerated in R. 6, we imagine that the scope for interference by a Court would have been reduced to nothing. But that is clearly not the case. What actually happened was this. Some three years after the issue of the last instructions of 1946, on the 16th February, 1949, the Punjab Government issued a fresh instruction to the Departments which purported to clarify 'some confusion in the matter of concession admissible to ex-service men on their appointment to civil posts'...... In the High Court, the learned Judges thought that by this 'clarification' a mistake had been corrected which they found to lie in the instructions of the 11th December,

1946, viz., that the Government had lost sight of two facts— (1) that Rule 6 was no longer of statutory force and (2) that the application of Rule 6 injured the rights of those non-war service officers who had been recruited after that date. With respect to the views of the learned Judges, we cannot see that any such mistakes appear from the printed papers." In that case, their Lordships interpreted Rule 6 in the manner in which I have done, and despite the observation that Rule 6 was somewhat discretionary, they granted writ of mandamus directing the Government of West Pakistan to give due seniority to the petitioner Manzur Ahmad in the cadre of the Provincial Forest Service Class I taking into account the war service rendered by him.

69. It is true that where an order is made by an authority in exercise of the discretionary powers, this Court will not interfere with the discretion exercised by the authority concerned nor can a writ lie to compel an authority to exercise its discretion in a particular way, but the Court is certainly competent to go into the question to ascertain whether the discretion has been exercised by competent authority and within the ambit of such powers conferred on it. Where it is found that the order is made in excess of the discretion vesting in the authority, or by ignoring the principles on which the authority is required to exercise such discretion, or in violation of the limitations imposed upon it, the Court will not hesitate to interfere with such an order even though it purports to have been made in exercise of discretionary powers. In this view of the matter, the extent of the discretion vesting in that authority in fixing seniority of War Service candidates under Rule 6 of the War Service Rules may now be examined. This rule reads thus:—

"Every candidate with war service who is appointed to a Punjab Government Service, shall be assigned a place in the cadre of such services, which shall be fixed with due regard to his age and the period allowed to be deducted under R. 5, and shall, as nearly as may be, correspond with the place which he would have had if the war had not intervened and he had qualified in the normal way. The seniority inter se of all candidates so appointed to a cadre shall be determined by their ages irrespective of the class of war service rendered by each of them."

70. The argument that in fixing seniority under this rule the authority concerned has a certain discretion in the matter is based on the words "shall, as nearly as may be, correspond with the place which he would have had if the war had not intervened and he had qualified in the normal way." Before these words, however, basis is laid down for fixing seniority and the factors which have to

be taken into consideration in fixing seniority are age and the period which is allowed to be deducted under the previous Rule 5. This Rule 5 provides that in the case of a candidate who has rendered war service, the period for which he has served in the war shall be excluded in computing his age, and if he was invalidated from war service, he shall further be entitled to deduct from his age the period from the time when he was invalidated upto the date of his application for appointment or until the end of the war whichever is earlier. In other words, in fixing seniority of officers in a particular cadre, under this rule, those who have war service to their credit are to be given benefit as to age and the period spent by them in war service.

The object of allowing this benefit of war service to the war service candidates as stated in this rule is to ensure that a person who volunteered for service during the war should not suffer or be at a disadvantage and he should at least get a place in the service which he would have occupied if he had not joined the army but had entered the particular civil service on the date he joined the army. There may be cases in which even after allowing this benefit of age and war service a war service candidate may not get the place which he would have occupied if he had not joined the army and served in the war. It is to remedy such a situation that the words "as nearly as may be, correspond with the place which he would have had if the war had not intervened and he had qualified in the normal way," were incorporated in this Rule 6. It is only for the purpose of giving a place in the civil service to a war service candidate, which would correspond to the place that he would have occupied if the war had not intervened, that some discretion had been given to the authority. Except for this discretion for the limited purpose of ensuring that a war service candidate gets the place which he would have occupied if the war had not intervened, there is no discretion vesting in the authority in the matter of fixation of seniority of a war service candidate under Rule 6 as would be apparent from the use of the word "shall" at various places in the rule.

71. It thus follows that if in fixing the seniority of a war service candidate his age and the period allowed to be deducted under Rule 5 are not taken into account and he is not given benefit of the same, the fixation of seniority will not be in accordance with such rule, and it cannot be defended on the plea that in fixing seniority ignoring these factors the authority had exercised the discretion vesting in it. Similarly, if seniority is fixed on wrong interpretation of Rule 6, there can

be no room for argument that since the authority had discretion in the matter, there should be no interference with the order fixing seniority. In the case with which we are dealing, it has never been pleaded on behalf of the respondents that in fixing the seniority of the petitioners vis-a-vis the other persons in the same cadre, the authorities had exercised the discretion vesting in them under Rule 6, nor has it been even asserted that this discretion had been exercised so as to ensure that a war service candidate gets the place as nearly as may be corresponding to that which he would have got if the war had not intervened and he had qualified in the normal way. Accordingly, I find that this Court is not debarred from going into the validity of the order fixing the petitioner's seniority and affording him the necessary relief once it is found that the benefit of war service had been wrongly denied to him in fixing seniority under Rule 6.

72. This brings me to the consideration of the plea raised on behalf of some of the respondents that the Rule is violative of Article 14 of the Constitution and thus cannot be enforced as it leads to discrimination. These rules were framed in 1943 long before the Independence of the country. It is true that if these rules are inconsistent with any provision of the Constitution, they cannot be enforced. The Constitution was promulgated in 1951 and it was before that that all the three petitioners were appointed after having served in the Second World War. It is not disputed that on their entering the service under the State they were entitled to the benefit of War Service Rules and their seniority had to be fixed in accordance with Rule 6. Thus, the benefit of war service had accrued to them before the promulgation of the Constitution, and in fact the same was granted to them in fixing their seniority. The petitioners enjoyed that benefit till the year 1964 when their seniority was refixed to their disadvantage by the impugned order. It is thus evident that before us the petitioners' grievance in short is that the benefits of War Service Rules to which they were admittedly entitled on the day they joined the cadre, and that was before the promulgation of the Constitution, could not be taken away from them nearly 13 years after the promulgation of the Constitution.

By these writ petitions, the petitioners do not want conferment of any benefit under the War Service Rules but merely relief against deprivation of the benefits which they were already enjoying. Reliance on the War Service Rules has been placed by the petitioners to show that their seniority was rightly fixed in the first instance and they could not be deprived of the same by a subsequent order

of the Government. It is thus not a case for the grant of any benefit to the petitioners under the War Service Rules but of protecting the petitioners against the deprivation of the benefits that they were enjoying and to which they were entitled before the Constitution came into force. It is true that Article 16 of the Constitution invalidates all laws and rules and regulations which were in force at the time the Constitution was promulgated to the extent that they were inconsistent with the provisions of the Constitution, yet there is nothing in the Constitution itself which empowers the authorities to take away the benefits that had already accrued and had been enjoyed under the then existing rules. As has been observed earlier, in the case before us the grievance of the petitioners is that the benefit which they were enjoying under the War Service Rules and that had accrued to them before the Constitution came into force had been taken away by the authorities on a wrong interpretation of the rules and that too long after those rules had been abrogated in the year 1953. It thus cannot be said that what the petitioners want is the grant of any benefit under the War Service Rules. On the other hand, they merely want to retain the benefits that had already accrued to them before the Constitution came into force.

73. Apart from this, I do not find it possible to agree with the contention that the War Service Rules are hit by Article 14 or are inconsistent with any provision of the Constitution. The rule was not intended to discriminate one employee in a service against another but to make reservation and confer certain advantages on a particular group in a service. The group to which certain benefits have been granted is specified and is confined to persons who had served in the Armed Forces during the last war. This classification is based on reasonable criteria and the rules thus cannot be struck down as discriminatory.

74. The last objection raised on behalf of the respondents is that the entire set of the War Service Rules having been abrogated as far back as the year 1953, no relief can be obtained on their basis nor any direction issued to enforce them. As has been observed earlier, the petitioners' grievance before us is that the benefit that had been validly granted to them under the War Service Rules, which were admittedly in force when they joined the service and which governed them, had been withdrawn in the year 1964 illegally and on a wrong interpretation of Rule 6 of the War Service Rules. The petitioners do not want the enforcement of those rules. On the contrary, the respondents have sought to justify their

conduct in revising the seniority of the petitioners to their detriment on a new interpretation of R. 6 contending that the original interpretation on the basis of which the petitioners were granted seniority was wrong. It is thus obvious that it is the respondents who wish to deprive the petitioners of the benefit that they were enjoying and the respondent-authorities have purported to act on the rules that had already been abrogated. I thus find that there is no impediment in the way of the petitioners being granted relief under Article 226 of the Constitution once it is found that their seniority as originally fixed under the War Service Rules was correct and the authorities had no power to revise that order on a wrong interpretation of the relevant rules, and that too after the rules had been abrogated.

75. In view of the interpretation that I have placed on Rule 6 and my opinion that its benefit is not confined to persons who have been appointed against war reserved posts but can be claimed by all entrants to Government service who have rendered war service irrespective of the fact whether they hold a post which was reserved for war service candidates under Rule 3 or some other post, both these petitions have to be allowed. I, accordingly, accept them and award the petitioners a writ of mandamus directing the State Government of Punjab to restore the petitioners to the same position in the cadre which they were holding before the impugned order was passed and give them the benefit of their war service referred to in Rule 6. In view of the fact that it is the wrong order of the Government that has compelled the petitioners to approach this Court, I would further direct that the petitioners shall have their costs to these petitions from the State of Punjab.

H. R. SODHI, J.:— I have had the privilege of going through the judgments of my brethren P. C. Pandit and Gurdev Singh, JJ. I am in agreement with the reasoning and conclusions of my brother Pandit J.

ORDER OF THE FULL BENCH.

P. C. PANDIT, GURDEV SINGH AND H. R. SODHI, JJ.:— In view of the majority decision, these writ petitions are dismissed, but with no order as to costs.

Petitions dismissed.

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(V 57 C 35)

(FULL BENCH)

MEHAR SINGH, C. J., HARBANS
SINGH, D. K. MAHAJAN, GURDEV,
SINGH AND BALRAJ TULI, JJ.

Hardial Singh and others, Petitioners
v. Director of Consolidation of Holdings,
Punjab, Jullundur and others, Respon-
dents.

Civil Writ Nos. 1594 of 1966 and 378
of 1969, D/- 1-12-1969, decided by Full
Bench on Orders of Ref. made by Prem-
chand Jain, J., D/- 7-10-1969.

Tenancy Laws — East Punjab Holdings
(Consolidation and Prevention of Frag-
mentation) Act (50 of 1948), S. 42 — Addi-
tional Director can amend and vary
scheme in case of single right-holder —
Procedure to be followed indicated. Civil
Writ No. 1928 of 1963, D/- 11-3-1964
(Punj), Civil Writ No. 1728 of 1963,
D/- 7-1-1965 (Punj), 1965 Cur LJ 807
(FB) (Punj); Civil Writ No. 1057 of 1963,
D/- 12-11-1965 (Punj); Civil Writ No.
1551 of 1964, D/- 12-5-1966 (Punj); Civil
Writ No. 659 of 1965, D/- 25-5-1966 (Punj)
and Obiter in AIR 1968 Punj 10 (FB),
Overruled.

A scheme of consolidation can be
amended under Section 42 of the Act in
an individual case and the amendment
need not necessarily be actual re-writing
of a particular provision of the scheme.

It is proper and adequate compliance
with the proviso to Section 42 of the Act
if a change or amendment or variation in
a scheme of consolidation is made after
the authority making the same has before
its mind the particular provision of the
scheme to be thus affected and the argu-
ments of the parties in respect to the
effect of the change. Once the matter is
present to the mind of the authority exer-
cising power under Section 42 of the Act,
and after considering the relevant provi-
sion of the scheme it gives a decision or
makes an order, that is sufficient compli-
ance with the proviso to Section 42 of the
Act and no more is required. AIR 1961
Punj 208 (FB), AIR 1967 SC 1568,
Foll.; Civil Writ No. 1928 of 1963, D/- 11-
3-1964 (Punj) & Civil Writ No.
1728 of 1963, D/- 7-1-1965 (Punj)
& 1965 Cur L J 807 (Punj) & Civil Writ
No. 1057 of 1963, D/- 12-11-1965 (Punj)
& ILR (1967) 1 Punj 555 & Civil Writ
No. 659 of 1965, D/- 25-5-1966 (Punj) and
Obiter in AIR 1968 Punj 10 (FB), Over-
ruled. (Para 12)

Cases Referred: Chronological Paras

(1968) AIR 1968 Punj 10 (V 55)=
69 Pun LR 835 (FB), Mange v.
Addl. Director Consolidation of
Holdings 4, 10

(1968) 70 Pun LR 249, Bachint Singh
v. Addl. Director, Consolidation of
Holdings, Punjab II
(1967) AIR 1967 SC 1568 (V 54)=
69 Pun LR 824, Johrimal v. Direc-
tor of Consolidation of Holdings,
Punjab 4, 5, 7,
8, 9, 10

(1966) Civil Writ No. 1551 of 1964,
D/- 12-5-1966=ILR (1967) 1 Punj
555, Ratti Ram v. State of Punjab 4

(1966) Civil Writ No. 659 of 1965,
D/- 25-5-1966 (Punj), Ram Singh
v. Punjab Govt. 4

(1965) 1965 Cur LJ 807=68 Pun LR
124 (FB), Hans Raj v. Shri Jaspal
Singh 4

(1965) Civil Writ No. 1728 of 1963,
D/- 7-1-1965 (Punj), Karnail Singh
v. Addl. Director of Consolidation
of Holdings, Patiala 4

(1965) Civil Writ No. 1057 of 1963,
D/- 12-11-1965 (Punj), Jai Kishan
Singh v. State of Punjab 4

(1964) Civil Writ No. 1928 of 1963,
D/- 11-3-1964 (Punj), Rursingh
v. Director of Consolidation of
Holdings, Punjab 4

(1961) AIR 1961 Punj 208 (V 48)=
63 Pun LR 93 (FB), Director, Con-
solidation of Holdings, Jullundur
v. Johrimal 6

(1958) AIR 1958 Punj 305 (V 45)=
Civil Writ No. 51 of 1957, D/- 6-
12-1957, Fauja Singh Ram Singh
v. Director of Consolidation of
Holdings, Jullundur 5

B. S. Chawla, for Petitioners; Mela
Ram Sharma, Deputy Advocate General
(Pb.) with Rattan Singh, H. S. Toor, for
Respondent No. 4.

MEHAR SINGH, C. J.:— The facts of
these two references, one in Civil Writ
No. 1594 of 1966, Hardial Singh, Gurdial
Singh, Gurcharan Singh and Harcharan
Singh, petitioners v. The Director of Con-
solidation of Holdings, Additional Direc-
tor of Consolidation of Holdings, Settle-
ment Officer, and Nanak Singh, respon-
dents 1 to 4, and the other in Civil Writ
No. 378 of 1969, Mohinder Singh and Gur-
dial Singh, petitioners v. State of Hary-
ana, the Assistant Consolidation Officer,
Sadhu Singh and Gurcharan Singh, res-
pondents 1 to 4, are as below.

2. In the first case consolidation of
holdings began in village Khandoor in the
year 1964. In the scheme of consolida-
tion a path was provided from village
Khandoor to the land of Santa Singh,
father of the petitioners, in the area of
the adjoining village Chokhar along the
land allotted in repartition to respondent
4. In an application under Section 42
of the East Punjab Holdings (Consolida-
tion and Prevention of Fragmentation)
Act, 1948 (East Punjab Act 50 of 1948),
respondent 4 sought relief that the path

provided to the land of Santa Singh be deleted because another path is available from village Khandoor to village Chokhar. Respondent 2, Additional Director of Consolidation of Holdings, accepting the application of respondent 4, set aside the order of respondent 3. Settlement Officer, of November 18, 1964, whereby the path in question had been provided in the scheme, and made consequential changes by his order, copy annexure 'C' to the petition, of February 10, 1966.

In their petition the sons of Santa Singh have prayed that that order of respondent 2 be quashed. In paragraphs 9 and 10 of the petition the petitioners have taken the position that respondent 2 disallowed the path in spite of it having been provided in the scheme, and that he had no power to vary such a provision of the scheme for the sake of one right-holder (respondent 4). There are of course other grounds of attack so far as the order of respondent 2 is concerned, but those are not material for the present purpose.

In the second case in the draft scheme of consolidation of holdings in village Patli Khurampur Majri a part of survey No. 623, under garden, was reserved in the scheme for the petitioners as garden area. On an application by the petitioners the Settlement Officer on July 2, 1966, cancelled that reservation from the scheme because the petitioners requested for that, giving up his claim for the fruit trees. While making that order the Settlement Officer reduced the valuation of survey No. 623 from sixteen annas to fourteen annas. In repartition, this survey No. 623 came to the lot of one Inder Ram, on whose objections under S. 21(2) of the Act the Consolidation Officer changed his lot with respondents 3 and 4, who then filed an appeal against that order under Section 21(3) of the Act before the Settlement Officer. In which appeal, among others, the petitioners were made respondents. The copy of the order of the Settlement Officer is annexure 'A' to this petition, and therein one of the objections of respondents 3 and 4 was that contrary to the provisions in the scheme for making adjustments according to a right-holder's major portion, they had been given as overflow the inferior quality land of the petitioners, obviously referring to the land of survey No. 623. The Settlement Officer says in his order that he found that this land of the petitioners was of inferior quality and in spite of that it was valued at fourteen annas and that respondents 3 and 4, to whom it came to be allotted, had been hard-hit. He, therefore, gave back the area of this survey number to the petitioners.

On a second appeal by the petitioners from the appellate order of the Settlement Officer, the Assistant Director of Consolidation of Holdings on February 21, 1968, set aside that order. Against the order of the Assistant Director of Consolidation of Holdings, respondents 3 and 4 made an application under Section 42 of the Act, which was disposed of by respondent 1 on November 28, 1968. It appears from the order of respondent 1, copy annexure 'C', that in another case the matter had also been referred to him by the Assistant Director of Consolidation of Holdings under Section 42 of the Act. Respondent 1 accepted an argument on the side of respondents 3 and 4 that inferior quality land of the petitioners of survey No. 623 had been given to those respondents. He, therefore, allowed the application and made changes giving back the inferior quality land of survey No. 623 to the petitioners. In paragraph 10(vii) of their petition the petitioners have stated that they were given their major portion according to the scheme and that major portion could not include survey No. 623. So the order of respondent 1 giving back to them their survey No. 623 is against the scheme as thereby the land allotted to them has come in two blocks and they have been fitted at a place where according to the scheme they could not be fitted. There are again in this petition also other grounds of attack against the order of respondent 1, but those are not material here.

3. On the facts as given above in these two petitions, among other questions, two questions as given below came for consideration before P. C. Jain, J., and the learned Judge has by his orders of reference made on October 7, 1969, referred the same to a larger Bench—

(1) Can a scheme be amended in an individual case by the Additional Director, Consolidation of Holdings, under Section 42 of the Act?

(2) If answer to the first question is in the affirmative, what is the nature and extent of opportunity of hearing that must be given to a party affected by such an order in view of the proviso to Section 42 of the Act?

These are the two questions that are for consideration of this Bench.

4. The answers to the two questions are in substance available from the decision of their Lordships of the Supreme Court in *Johri Mal v. The Director of Consolidation of Holdings*, Punjab, 69 Pun LR 824=(AIR 1967 SC 1568), but, as in *Rur Singh v. The Director of Consolidation of Holdings*, Punjab, Civil Writ No. 1928 of 1963, D/- 11-3-1964 (Punj), S. B. Kapoor J., *Karnail Singh v. Addl. Director of Consolidation of Holdings*,

Patiala, Civil Writ No. 1728 of 1963, D/- 7-1-1965 (Punj), Grover J., Hans Raj v. Shri Jaspal Singh, 1965 Cur L J 807 (FB) (Punj), decided on September 7, 1965, Pandit J., Jai Kishan Singh v. The State of Punjab, Civil Writ No. 1057 of 1963, D/- 12-11-1965 (Punj), Grover J., Ratti Ram v. State of Punjab, Civil Writ No. 1551 of 1964, D/- 12-5-1966 (reported in ILR (1967) 1 Punj 555), Shamsher Bahadur J., and Ram Singh v. Punjab Government, Civil Writ No. 659 of 1965, D/- 25-5-1966 (Punj), J. N. Kaushal J., indicated tendency towards opinion which does not appear to be quite in accord with the decision in Johri Mal's case, 69 Pun L R 824=(AIR 1967 SC 1568) on the first question, and in Mange v. Additional Director, Consolidation of Holdings, 69 Pun LR 835=(AIR 1968 Punj 10) (FB), decided on August 8, 1967, of the learned Judges constituting the Full Bench, Grover and Narula JJ., have made observations, though obiter, not quite in accord with what appears apparent from the facts and circumstances of Johri Mal's case, 69 Pun LR 824=(AIR 1967 SC 1568) on the second question, so it has become necessary to go in quite a detail of the facts and circumstances of Johri Mal's case, 69 Pun LR 824=(AIR 1967 SC 1568) and the decision rendered therein.

5. The scheme of consolidation of holdings in Johri Mal's case, 69 Pun LR 824=(AIR 1967 SC 1568) in clause (vii) provided—

"The existing houses and permanent enclosures shall be kept in the ownership and possession of those proprietors who were owners in possession prior to the consolidation and in addition if these persons so desire, they shall be entitled to be given additional area up to one Bigha of extension of the Abadi. In the case of such persons or right-holders who have constructed houses or enclosures etc., within the Shamilat area they would keep them in their possession but adjustment would be made out of their Khewat land"

Johri Mal had his enclosure in Survey No. 3942. When the matter was brought up before the Director of Consolidation of Holdings, he made this order with regard to Johri Mal's enclosure in Survey No. 3942—

"So far as Khasra No. 3942 is concerned I quite agree with the Settlement Officer that there is no reason why it should have remained reserved for Shri Johri specially. It is ordered under Section 42 of the Act that Khasra No. 3942 shall not remain reserved for Shri Johri but shall be reserved for area for extension of Abadi for non-proprietors. Johri's claim for any area within the Phirni shall be considered independently. The con-

solidation records be changed to that extent."

The order of the Director of Consolidation of Holdings, a copy of which was annexure 'A' to Johri Mal's Civil Writ No. 728 of 1957, referred to the reservation made in the scheme, without, however, making any reference to clause (vii) of it. The arguments were heard by the Director with regard to the change of such reservation and he made the order with regard to Johri Mal's enclosure exactly as reproduced above and no more. The Director (a) did not inform the parties, including Johri Mal, that he proposed to amend the scheme, and (b) that he proposed to amend the scheme to the extent of taking away Johri Mal's enclosure alone from the scope of clause (vii) of the scheme. It is, however, quite and clearly apparent from the order of the Director in that case that the matter whether Johri Mal should be permitted to retain the enclosure in the terms of the scheme or not was considered by him and parties were heard with regard to the same, without his saying that he was going to so amend the scheme as to deprive Johri Mal of his enclosure. It was Johri Mal who came to this Court from the Director's order, under Articles 226 and 227 of the Constitution, and his petition was disposed of by Grover J. on May 21, 1958, when the learned Judge proceeded to quash the order of the Director observing—

"This petition must be allowed on the ground that the Director had no authority to make an order which is contrary to the scheme without amending the scheme. The scheme could have been ordered to be amended under Section 36 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948. No such order was ever made. As stated before, no objections were ever filed or have been shown to have been filed to the scheme as confirmed, and the order of the Director was passed on the report of the Settlement Officer made at the instance of Molar. It has already been observed by me in Civil Writ No. 51 of 1957, D/- 6-12-1957, Fauja Singh Ram Singh v. Director of Consolidation of Holdings, Jullundur, AIR 1958 Punj 305, that it is not open to the Director under Section 42 of the Act to make such orders which are contrary to the scheme as confirmed unless the scheme is first ordered to be amended in accordance with the procedure laid down in the Act. I consider, therefore, that the Director has exceeded his powers which he has under the statute, and his order must be quashed."

6. There was an appeal under clause 10 of the Letters Patent from the judgment and order of Grover J., by the Director of Consolidation of Holdings,

Jullundur, which came to be heard by a Full Bench consisting of Dulat, Tek Chand and Pandit J.J. The judgment of the Full Bench is reported as *The Director, Consolidation of Holdings, Jullundur v. Johri Mal*, 63 Pun LR 93 = (AIR 1961 Punj 208 FB). The counsel for Johri Mal urged two arguments (a) that the scheme of consolidation could not be varied, altered or revoked under Section 42 but that could only be done under Section 36 of the Act, which did not happen, and (b) that the scheme of consolidation was not in fact varied, as the scheme itself, particularly clause (vii), remained intact but the order was made prejudicial to the interests of Johri Mal contrary to the scheme and it could not be said that the Director had the jurisdiction to make variation of the scheme in the case of an individual.

Tek Chand J. accepted the arguments, and after reproducing the operative part of the Director's order with regard to the enclosure of Johri Mal, the learned Judge proceeded to observe—

"He (Director) is certainly not expressly referring to the scheme. If it was his intention to vary the scheme, he should have at least indicated in what manner the scheme was to be varied. A scheme as confirmed is a formal and a written document containing all the major details of consolidation. Whenever a scheme is varied in a particular manner, the specific amendments to it have to be incorporated in it. This scheme may be likened to an Act of the Legislature or to the statutory rules which are published It is couched in precise language and after due confirmation it is adopted as such. The language of the scheme, so long as it stands in its existing form, cannot be paraphrased, explained or otherwise altered, while still retaining its identity intact. The scheme in this case, as in all such cases, is a written document. So long as the scheme is left unaltered and untouched by the respondent (Director), such order, as he has passed in this case in respect of the petitioner (Johri Mal) re. Khasra No. 3942, cannot be treated as a variation of the 'scheme prepared or confirmed' It will lead to inescapable confusion, if a scheme is deemed to have been notionally or inferentially varied, without bringing about a corresponding variation in the language, to indicate such an intention. The word 'scheme' is not merely an idea, a proposal, or an intention unclothed in words. A statutory scheme must wear the garb of language. A scheme which is in the mind, not committed to the paper, is non-existent The word 'scheme' whenever used in the Consolidation Act and particularly in

Section 42, is a technical term which has a definite meaning assigned to it by the legislative draftsmen. The expression 'scheme of consolidation' must perforce be read in the sense of a written and published document which has been duly confirmed by the Settlement Commissioner (Consolidation) To my mind Section 42, as amended, contemplates variation of the actual scheme as published and confirmed. If the Director of Holdings passes an order purporting to interfere with the rights of an individual, which is in contravention of the scheme, but leaves the scheme intact, that order cannot be supported under Section 42 as amended. So long as he does not order variation in the scheme itself, no order affecting an individual, can be deemed to be tantamount to variation of the scheme Section 42 of the Act does not empower the Director to interfere with the rights of an individual without varying the scheme. But what he has done in this case is that he has left the scheme unimpaired though he had the power to alter it; and on the other hand he has interfered with the rights of an individual which section 42 does not permit him to touch."

The learned Judge, therefore, was of the opinion (i) that without varying the scheme itself expressly, the Director could not make an order having the effect of varying it in the case of an individual, (ii) that thus the Director had not in fact varied the scheme in that case, and (iii) that if it was the intention of the Director to vary the scheme, he should have at least indicated in what manner the scheme was to be varied, which was not done.

Dulat J., on the contrary, rejected the arguments on the side of Johri Mal and observed, after reproducing Section 36 of the Act, that—

"It is apparent that this section authorises the authority confirming a scheme to alter or revoke it, and, in that case, of course, the new scheme has to be published and confirmed once again in accordance with the ordinary procedure. This provision, however, does not touch the power of the State Government conferred on it by Section 42 of the Act, for it is only when the authority confirming a scheme decides to vary or revoke it that recourse has to be had to Section 36, while the power of the State Government under Section 42 is wholly independent of the power of the authority confirming the scheme, and the only limitation prescribed in Section 42, as contained in the proviso, is that before the State Government makes any order the parties interested in the matter are given notice to appear and opportunity to be heard. There is, therefore, no force in the con-

tention that a scheme of consolidation cannot be varied even by the State Government except in accordance with Section 36 of the Act, and the recent amendment of Section 42 leaves no room for doubt about that matter. I am, in the circumstances, unable to accept Mr. Sachar's main argument that, if the scheme of consolidation was to be disturbed even by the State Government, it was necessary to proceed under Section 36 of the Act. The reason for these two different provisions in Sections 36 and 42 of the Act is also clear, for if a scheme is varied or revoked by the authority confirming it, then the new scheme has to be published so that interested parties may object and their objection decided by competent authorities set up under the Act, those decisions being finally appealable to the State Government, but, when a scheme is to be varied by the State Government itself, there is not much point in publishing the varied scheme, for the State Government is required to hear the interested parties before the variation is made. Mr. Sachar's next contention is that in the present case the scheme of consolidation has not in fact been varied, for the scheme in general stands intact, and the Director of Consolidation or the State Government has merely made an order touching a particular individual in respect of a particular piece of land, and this cannot be called an order varying the scheme. I am unable to see much point in this contention. There is no doubt that a scheme of consolidation was prepared and confirmed, and equally no doubt that the Director of Consolidation considered that scheme and concerning a part of that scheme he made an order, and that order is that in spite of the scheme the particular gher in Khasra No. 3942 will not be retained by Johri Mal, but will be reserved for the extension of the Abadi. It is, to my mind, impossible to accept the suggestion that the scheme of consolidation has not been varied although, of course, the variation only is in respect of a small part of the scheme. Nor can it be seriously urged that the order of the Director is not in reference to the scheme of consolidation, and Section 42 of the Act clearly empowers the State Government to make any order in reference to a confirmed scheme."

Pandit J. agreed with Dulat J. So by a majority the learned Judges held (a) that under Section 42 of the Act a scheme of consolidation can be varied in the case of a particular individual, (b) that such a variation need not necessarily be an express variation of the scheme itself so long as the substance of the order amounts to variation of the scheme even though of a small part of it, (c) that a scheme can be varied under Section 42 without

having recourse to Section 36 of the Act, and (d) that in that particular case—Johri Mal's case—the Director of Consolidation of Holdings considered the scheme and concerning a part of it made the order adversely affecting Johri Mal, and that the order of the Director of Consolidation of Holdings had reference to the scheme of consolidation in that case.

Tek Chand J., on the contrary, held (i) that a scheme of consolidation could not be varied by an order favouring a particular individual unless that was expressly so done in the scheme itself, (ii) that in that case the order of the Director of Consolidation of Holdings could not be taken to be variation of the scheme in any sense, (iii) that the scheme could not be varied under Section 42 and that it can only be varied, altered or amended in the terms of Section 36 of the Act, and (iv) that the Director of Consolidation of Holdings not having expressly referred to the scheme in his impugned order, had not indicated the manner in which he was intending to vary the scheme. So the judgment and order of Grover J. was reversed and the petition of Johri Mal was dismissed. The majority of the learned Judges in the Full Bench thus upheld (a) the variation of the scheme of consolidation by the order of the Director without his actually interfering with the text of the scheme, without his saying in so many words that he was going to amend the scheme and without his saying the extent to which he intended to amend the scheme, and (b) that the variation could be made by an order under Section 42 of the Act in an individual case.

7. There was an appeal from the judgment and order of the Full Bench to the Supreme Court and the case is 69 Pun LR 824=(AIR 1967 SC 1568). Their Lordships reproduced clause (vii) of the scheme and the substance of the order of the Director of Consolidation of Holdings under Section 42 of the Act in regard to Johri Mal's Survey No. 3942, and then rejected the argument urged on the side of Johri Mal that the scheme of consolidation could not be varied by the State Government under Section 42 except in accordance with Section 36 of the Act. Their Lordships observed—

"What the amending Act (The East Punjab Holdings (Consolidation and Prevention of Fragmentation) (Second Amendment and Validation) Act, 1960 (Punjab Act 27 of 1960) Section 42) has done is to substitute for the words 'any order passed by any officer under this Act', the words 'any order passed, scheme prepared or confirmed or repartition made by any officer under this Act'. Section 36 of the Act, on the other hand, authorises the authority confirming a scheme to

alter or revoke it and in that case the new scheme must be published, objections heard and decided and the scheme has to be confirmed once again in accordance with the procedure under Sections 19 and 20 of the Act. In our opinion, the power conferred on the State Government under Section 42 is a separate power independent of Section 36 of the Act which deals with the power of the authority confirming the scheme. There is hence no force in the contention that the scheme of consolidation cannot be varied by the State Government under Section 42 of the Act except in accordance with Section 36 of the Act. The reason for the two different provisions in Sections 36 and 42 of the Act is also clear for if a scheme is varied or revoked by the authority confirming it, then the new scheme has to be published so that interested parties may object and their objection decided by competent authorities set up under the Act, those decisions being finally appealable to the State Government. But when a scheme is to be varied by the State Government itself under Section 42 of the Act, there is no requirement of the statute that the varied scheme should be published, for the State Government is required to give notice and to give an opportunity to the interested parties to be heard before the variation is made."

So there was only one argument before their Lordships having regard to the provisions of Sections 36 and 42 of the Act, which argument did not prevail, and so far as this matter was concerned, the judgment of the majority in the Full Bench was endorsed by the decision in the Supreme Court.

The other arguments before the Full Bench, (a) that the scheme had in fact not been varied by the Director of Consolidation of Holdings, (b) that it could not be varied in regard to an individual, and (c) that the Director has not indicated to the parties in what manner and to what extent he was going to interfere with and vary the scheme, were not urged before their Lordships in the Supreme Court. Those arguments were before the learned Judges in the Full Bench and have been dealt with both by Dulat J. and Tek Chand J. It cannot, therefore, be that the learned counsel who argued Johri Mal's case before their Lordships were not aware of those arguments and that they had not read the judgments delivered by the learned Judges in the Full Bench. Equally, it cannot be accepted that the judgments of the learned Judges of the Full Bench were not before their Lordships and thus all the points and arguments dealt with in those judgments were not present to the mind of the learned Judges. The other arguments apparently were not urged for absence of substance, and it cannot be expected that

their Lordships in their judgment would express themselves on the obvious and the matter not considered worthwhile on the side of the parties as one to be made the subject of an argument in the Supreme Court.

8. In Johri Mal's case 69 Pun LR 824 = (AIR 1967 SC 1568) the Director of Consolidation of Holdings was, while not interfering at all with clause (vii) of the scheme, making an exception against Johri Mal and taking out his enclosure from the scope of that clause in the scheme. He was thus varying the scheme qua one individual only. This the majority of the learned Judges in the Full Bench maintained as having been done correctly and within jurisdiction by the Director and their opinion has been upheld by their Lordships of the Supreme Court. So, in the wake of the decision of their Lordships in Johri Mal's case, it is no longer a matter of argument that under Section 42 of the Act a scheme can be varied or interfered with in or in relation to a particular individual as affecting his rights alone. In his opinion Tek Chand J., definitely said that the Director could not do so in the case of a particular individual. The Director had actually done so in that case. His order in this respect was maintained by their Lordships in the Supreme Court. It is, therefore, patent that Johri Mal's case is an authority that a scheme of consolidation can be varied and interfered with under Section 42 of the Act in a particular case in regard to a particular individual. Any opinion expressed in the cases already referred to above with a tendency to a different approach cannot, therefore, be supported and must be taken to have been overruled by the decision in Johri Mal's case in this respect.

9. In his Civil Writ No. 728 of 1957 Johri Mal never made a ground of attack against the order of the Director of Consolidation of Holdings that he had not had an opportunity of hearing in the terms of the proviso to Section 42 of the Act before the Director made the order adverse to him varying the scheme. This was not a matter which was referred to by Grover J. in his order. In the Full Bench, however, the matter apparently seems to have been made the subject of argument because Tek Chand J., observed clearly that if it was the intention of the Director to vary the scheme, he should have at least indicated in what manner the scheme was to be varied. Dulat J. observed equally clearly that the Director considered the scheme and then made the order adverse to Johri Mal. Pandit J., agreed with Dulat J. What then was the manner of consideration of the scheme by the Director when making the order adverse to Johri Mal? All that happened was that the provision of the

scheme was present to the mind of the Director that the land under the enclosures was reserved for the owners in possession of the enclosures and with that before him he said that Johri Mal's gher shall no longer remain reserved for him, but shall be available for extension of the habitation of non-proprietors. The Director did not say in so many words that he was going to vary or amend the scheme and in what manner and to what extent he was going to do so. He did not tell the parties any such thing. In spite of this, in the circumstances of the case, the majority of the learned Judges in the Full Bench were of the opinion—

"Equally no doubt that the Director of Consolidation considered that scheme and concerning a part of that scheme he made an order", and it was that order which was upheld by the majority of the learned Judges in the Full Bench and that decision has been sustained by their Lordships in the Supreme Court. If there was any possible substance in an approach that Johri Mal had not had a proper and an adequate hearing as envisaged by the proviso to Section 42 of the Act in that the Director of Consolidation of Holdings, (a) had not held himself back for a while and said to the parties that he was about to amend the scheme of consolidation, and (b) had not indicated the manner in which and the extent to which he intended to interfere with the scheme, that would be the obvious and the simplest ground on the basis of which the order of the Director could have been quashed as having been made in defiance of the proviso to Section 42 of the Act, and no other argument need have been attended to either before the Full Bench or in the Supreme Court. So that the facts and circumstances of Johri Mal's case and the nature of hearing given to him by the Director under the proviso to Section 42 of the Act when making an order adverse to him and contrary to the scheme of consolidation, which order has been held to have been the variation of that scheme, provided the exact and the precise manner in which in such cases the proviso to Section 42 of the Act is to be applied for the matter of giving a notice and a hearing to the party that might be adversely affected by an order made under that provision. So the Director of Consolidation of Holdings or any other officer exercising powers under Section 42 of the Act complies with the proviso to that section when the provisions of a scheme are in his mind, having been brought before him either because of the matter having been considered with regard to the same in the orders of the authorities below or for the first time raised before him seeking relief either within the scheme or outside the scheme, and are thus under

his consideration, in view of which he makes his order which has the effect of varying or modifying the scheme in an individual case. If he does that, that is ample compliance with the proviso to Section 42 of the Act and he need not say to the parties (a) that he intends to amend the scheme, and (b) that he intends to amend the scheme in a particular manner and to a particular extent.

The reason for this is quite simple, because once the provisions of the scheme are present to his mind and claims and counter-claims are made before him by the parties contrary to the scheme or in regard to the provisions of the scheme, it becomes immediately apparent to every body connected with the case at the stage of arguments that an argument accepted by the Director, in the circumstances, may affect the provisions of the scheme, and when it actually does, there is sufficient compliance with the proviso to Section 42 of the Act. To lay down more than this and a rigid formula in this respect would be to re-write the language of the proviso to Section 42 of the Act, which obviously is not permissible. So the answer to the second question is also available in the decision of their Lordships in Johri Mal's case, 69 Pun LR 824 = (AIR 1967 SC 1568) in that the manner of hearing given by the Director to Johri Mal remained unquestioned even up to the Supreme Court.

10. The decision in Johri Mal's case, 69 Pun LR 824 = (AIR 1967 SC 1568) was rendered by their Lordships in the Supreme Court on March 28, 1967. On August 8, 1967, came for hearing before a Full Bench consisting of Grover, Pandit and Narula, JJ., the case of 69 Pun LR 835 = (AIR 1968 Pun 10 (FB)). The learned Judges concurred in the conclusion that no miscarriage of justice had resulted in that case and so Mange was not entitled to any relief in his petition under Arts. 226 and 227 of the Constitution. So the learned Judges, concurred, on this ground, in dismissing his petition. It is obvious that that being the approach of the three learned Judges, no other question then could possibly arise in that case for decision. In spite of this, with regard to the scope and ambit of the proviso to Section 42 of the Act, Grover, J. observed—

"With the utmost deference to the views expressed in the majority judgment of the Full Bench (Johri Mal's case reported as 1963 PLR 93), I find it difficult to accept that whenever the State Government or the Director or Additional Director who exercises its powers, orders readjustments or changes in repartition between various individual right-holders in petitions under Section 42 of the Act without either giving any notice in writing or even oral at the time of hearing to

the parties that it is intended or proposed to amend the scheme qua an individual rightholder, the Courts are bound and indeed should imply a variation or amendment of the scheme. Indisputably the provisions of the Act provide first for the framing of a scheme leading to its confirmation under Section 20. Then the stage of repartition commences. The schemes of consolidation and repartition are two entirely distinct matters. When a rightholder approaches the State Government under Sec. 42 with regard to the lands allotted to him, and while giving him relief the authority concerned allots to him or changes allotment of others in a manner contrary to the scheme, its order would be open to challenge on the ground that repartition has not been made in accordance with the scheme. If, however, the authority is convinced that without amending the scheme proper relief cannot be given to the petitioner or to any other aggrieved person, I venture to think that the proper course to follow under the proviso to Section 42 would be to inform the parties concerned that the scheme is proposed to be amended to the extent it is necessary to give the required relief. The parties would then have notice as to what is proposed to be done and make their submissions supporting or opposing the amendment. Only then, if an amendment is ordered, can it be said that it has been made after giving the parties interested a proper hearing and opportunity to explain their case and in such a situation no express order may be necessary that the scheme is being amended. This does not mean that any specified or set procedure is required for amendment of the scheme under Section 42 but there must be something to indicate firstly that the authority concerned applied its mind to the question of amendment and secondly, that it followed a procedure which conformed to the requirements of the proviso to Section 42. To my mind, the parties interested will have no notice in the matter of amendment if all that they have been informed is that relief is being sought on the merits in regard to repartition. In order to sustain an order which contains no mention of amendment of the scheme as such, the least that should be shown is that the mind of the authority concerned was brought to bear on the question of amendment of the scheme. It may be mentioned that this point was neither canvassed nor decided in the judgment of the Supreme Court in *Johri Mal's case*."

It has already been pointed out above that these observations were not necessary for the decision in *Mange's case*, 69 Pun LR 835 = (AIR 1968 Punj 10 (FB)) and hence are obiter. It has also been pointed out above that *Tek Chand J.*, had in *Johri Mal's case*, 69 Pun LR 824 =

(AIR 1967 SC 1568) when before the Full Bench, said quite as much, but the majority of the Judges took a different view and supported the order of the Director of Consolidation of Holdings made against *Johri Mal*, which order was then sustained by their Lordships in the Supreme Court. No doubt this part was not an argument before their Lordships, but an obvious thing which was before the Full Bench, which was considered by the learned Judges of the Full Bench, and which was a subject-matter of divergence of opinion between them, was a thing that was directly and pointedly present before their Lordships in the Supreme Court, unless something quite unacceptable is suggested that the judgments of the learned Judges in the Full Bench were never read by the learned counsel in *Johri Mal's case*, 69 Pun LR 824 = (AIR 1967 SC 1568) before the Supreme Court, nor even by their Lordships. Anything so obvious and not needing any argument whatsoever, could not possibly be expected to be dealt with and discussed by their Lordships in their judgment when the parties themselves saw no substance in an argument in that respect. So that the reason that this matter was not canvassed before their Lordships in *Johri Mal's case*, 69 Pun LR 824 = (AIR 1967 SC 1568) does not justify the inference that the minority opinion of *Tek Chand J.*, has been accepted as the correct opinion, particularly when the decision of the Director in *Johri Mal's case*, 69 Pun LR 824 = (AIR 1967 SC 1568) in this respect, was accepted to have been correctly made and nobody complained that it suffered from the defect or the irregularity of defiance of the provisions of the proviso to S. 42 of the Act.

In that case *Pandit, J.*, did not subscribe to these observations. However, *Narula, J.*, after referring to the decision of their Lordships in *Johri Mal's case*, observed—

"The question, however, still remains as to what should broadly be the contents of a notice required to be served on interested parties in a case in which variation of a confirmed scheme is either specifically prayed for or otherwise intended to be effected; and also about the nature of opportunity required to be afforded to the interested parties in a case of that kind. I do not think that it would ever be argued on behalf of the State that it can vary a scheme under Section 42 (except in cases where the scheme is vitiated by unlawful considerations) at any time and to any extent in an arbitrary and unguided manner at the time of writing the orders even though the interested parties had no notice of the particular variation proposed. To allow such a course to be adopted would, in my opinion, relegate the statutory safeguard contained in the proviso to Section 42 to a mere illusion. I

am in full agreement with the opinion expressed by my learned brother Grover, J. in the penultimate paragraph of his judgment. Adopting any other view may make it impossible to distinguish by looking at an order passed under Section 42 of the Act as to whether the Director unwillingly and possibly oblivious of the relevant provision in the scheme passed an order in contravention thereof, or where the officer really intended to vary the scheme in the given case. I am also substantially inclined to agree with the view taken by various Single Benches of this Court (noticed by my Lord Grover, J.), while applying and interpreting the dictum of the Full Bench judgment of this Court in Johri Mal's case, 69 Pun LR 824 = (AIR 1967 SC 1568) to individual cases which came up for hearing after the pronouncement of the Full Bench."

It needs no reiteration that the learned Judge was concurring in obiter observations of Grover, J. If those observations are to be adopted as the nature of opportunity envisaged under the proviso to Section 42 of the Act, it would mean, at the least, that the Director must first tell the parties that he intends to amend the scheme and then must proceed to tell them the manner in which and the extent to which he intends to do so, and then only will there be a proper compliance with the proviso to Section 42 of the Act. The opinion of the majority of the learned Judges in Johri Mal's case, 69 Pun LR 824 = (AIR 1967 SC 1568) before the Full Bench has been endorsed by their Lordships in the Supreme Court, and Grover and Narula, JJ., took note of the decision of their Lordships in that case, but in spite of that they thought it necessary to make these obiter observations unnecessary in Mange's case, 69 Pun LR 835 = (AIR 1968 Punj 10 (FB)). This has led to quite a considerable deal of confusion in the handling and decision of similar cases not only in this Court but also with the authorities under the provisions of the Act.

It has been pointed out that in this respect the definite opinion of Tek Chand, J., which exactly conformed to the opinions of Grover and Narula, JJ., was not accepted by the majority of the Full Bench in Johri Mal's case, 69 Pun LR 824 = (AIR 1967 SC 1568) and nobody had the courage to urge an argument against that before the Supreme Court and it was a matter so obvious that if there was substance in it, their Lordships would obviously have struck down the order of the Director in Johri Mal's case, 69 Pun LR 824 = (AIR 1967 SC 1568) on this very simple consideration alone, particularly as the requirement of the proviso is emphasised by their Lordships as that was one of the reasons for repelling the argument with

regard to Section 36 of the Act. In the wake of the decision in Johri Mal's case, 69 Pun LR 824 = (AIR 1967 SC 1568) by the Supreme Court on the nature of the order made by the Director in that case, the opportunity of hearing that is to be given in accordance with the proviso to Section 42 of the Act is adequate and proper if in the case of variation or amendment of a scheme, the provisions of the scheme are present to the mind of the authority attending to the case under Section 42 of the Act and the argument before such an authority leads to a claim or opposition in regard to a certain relief to be granted so far as the scheme is concerned. The matter may come before such an authority as directly raised by the parties before it as it happened in Johri Mal's case, 69 Pun LR 824 = (AIR 1967 SC 1568). It may arise where it has been a matter of consideration and discussion, in the orders of the authorities below. It will obviously arise if one party is seeking relief contrary to the provisions in the scheme, or if one party complains against an order having been made against its interests contrary to the provisions of the scheme. Once the particular provision of the scheme varied or modified is present to the mind of such an authority and in relation to it an order is made which is contrary to it, then that has to be taken as modification or variation of the scheme even though in an individual case as happened in Johri Mal's case, 69 Pun LR 824 = (AIR 1967 SC 1568). This would be a sufficient compliance with the proviso to Section 42 of the Act. No more is to be done by such an authority and no ritualistic formula is to be followed by it in this respect. It is the substance of the matter that has to be seen. The Director has not definitely to use the language that he was going to amend the scheme and that he was going to amend the same in a particular manner so long as the provisions of the scheme in regard to which there is an argument by the parties before him is present to his mind and the parties have urged their cases for and against such argument. There may be any number of cases in which a scheme of consolidation operates so harshly as between individual cases that its rigor may have to be relaxed in the interests of justice, but such modification of the scheme only affects individual parties and so when relief is granted under Section 42 of the Act in this respect, that is sufficient compliance with the proviso, for the particular relevant provision in the scheme is present to the mind of every body and the parties have an opportunity to put forward their case before the authority concerned with regard to the same. Consequently no manner of hearing as given in the observations of Grover and Narula, JJ., in Mange's

case, 69 Pun LR 835 = (AIR 1968 Punj 10 (FB)) is envisaged by the proviso to Section 42 of the Act.

11. The learned counsel in Civil Writ No. 1594 of 1966 has in this respect referred to the judgment of Narula, J., in *Bachint Singh v. Additional Director, Consolidation of Holdings, Punjab*, (1968) 70 Pun LR 249. The record of the petition under Arts. 226 and 227 of the Constitution in that case has been seen. The impugned order of the Additional Director of Consolidation of Holdings was annexure 'A' to that petition. There is nothing in that order which showed that any change contrary to the scheme so as to increase the number of the lots of Bachint Singh was present to the mind of the Additional Director. No such thing appears from his order and no such thing appears from any order of the authorities below. In paragraph 8 of his order he deals with Bachint Singh's case before him and nothing of the sort appears in it. What happened was that while at the end of his order he was giving a statement of the adjustments of areas to various parties, he came to make adjustments with regard to Bachint Singh which increased the lots of Bachint Singh of 'A' grade from two blocks to three blocks, which was contrary to the provisions of the scheme of consolidation. Nothing in the order of the Additional Director indicated that when he was at the end of his order giving details of the changes made with regard to the parties affected by the order and adjusting the land to be given to Bachint Singh, he knew that what he was doing had the effect of increasing the lots of Bachint Singh from two to three, contrary to the scheme of consolidation, which provided that there shall be no more than two lots to a rightholder.

So that this was a case in which, on facts, it was patent that the Additional Director while giving his decision under Section 42 of the Act had not present to his mind the particular provision of the scheme relating to the number of lots that could be allotted to a rightholder in repartition, and nothing indicated in his order that there was ever an argument before him whether Bachint Singh's lots should or should not be increased from two to three. If there had been an argument before him in this respect and then he had increased Bachint Singh's lots from two to three, the case would have been exactly parallel to *Johri Mal's* case, but this did not happen. It is on this ground that Narula, J. was justified in quashing the order of the Additional Director of Consolidation of Holdings in Bachint Singh's case, (1968) 70 Pun LR 249. No doubt the learned Judge reproduces obiter observations of himself and those of Grover, J. in *Mange's* case, 69 Pun

LR 835 = (AIR 1968 Punj 10 (FB)) as supporting his decision in *Bachint Singh's* case, (1968) 70 Pun LR 249 but, on facts, it is obvious that, those observations aside, the order against Bachint Singh could not be sustained because the provisions of the scheme were never present to the mind of the Additional Director in that case when he made that order. An appeal under Cl. 10 of the Letters Patent in Bachint Singh case, (1968) 70 Pun LR 249 was dismissed in limine in view of these circumstances on August 14, 1968. This case, therefore, does not advance the argument on the side of the petitioners.

12. Consequently, the answer to the first question is that a scheme of consolidation can be amended under Section 42 of the Act in an individual case and the amendment need not necessarily be actual re-writing of a particular provision of the scheme, and the answer to the second question is that it is proper and adequate compliance with the proviso to Sec. 42 of the Act if a change or amendment or variation in a scheme of consolidation is made after the authority making the same has before its mind the particular provision of the scheme to be thus affected and the arguments of the parties in respect to the effect of the change. Once the matter is present to the mind of the authority exercising power under Section 42 of the Act, and after considering the relevant provision of the scheme it gives a decision or makes an order, that is sufficient compliance with the proviso to Section 42 of the Act and no more is required.

13. HARBANS SINGH J.:— I agree.

14. D. K. MAHAJAN J.:— I agree.

15. GURDEV SINGH J.:— I agree.

16. BAL RAJ TULI J.:— I also agree.

Answer accordingly.

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(V 57 C 36)

BAL RAJ TULI J.

Mst. Kapur Kaur, Plaintiff Appellant v.
Kishan Singh and others, Defendants Respondents.

Second Appeal No. 896 of 1962. D/-
2-12-1969, from decree of Addl. Dist. J.,
Faridkot, D/- 4-1-1962.

(A) Hindu Adoptions and Maintenance
Act (1956), S. 19 (2) — "Coparcenary property" — Meaning of.

The term "coparcenary property" occurring in Sec. 19 (2) of the Act means the property which consists of ancestral property, or of joint acquisitions or of property thrown into the common stock, and accretions to such property. AIR 1965 Punj 238 (FB), Foll. (Para 7)

CN/CN/B47/70/YRB/B

(B) Hindu Adoptions and Maintenance Act (1956), S. 28 — Suit by widowed daughter-in-law for maintenance — Father-in-law gifting his entire land to his daughter after filing of suit — Gift gratuitous — Daughter is liable to pay maintenance. (Para 9)

Cases Referred: Chronological Paras
(1965) AIR 1965 Punj 238 (V 52) =
ILR (1965) 1 Punj 271 (FB),
Gurdip Kaur v. Ghamand Singh 7

K. C. Puri, for Appellant.

JUDGMENT:— The appellant, Shrimati Kapur Kaur, is the widow of Hakam Singh, who predeceased his father Kishan Singh. Hakam Singh died in April, 1957, as a result of a truck accident. His father, Kishan Singh, owned agricultural land, which was ancestral. Shrimati Kapur Kaur filed a suit against her father-in-law, Kishan Singh, on July 23, 1958, claiming maintenance at the rate of Rs. 40 per mensem. Having got the scent of the suit, Kishan Singh made a gift of his entire land measuring 82 Kanals, 8 Marlas in favour of his daughter, Gurnam Kaur, on July 31, 1958. She stated in the plaint that she had no source of income. She further mentioned in the plaint that the parties were governed by Customary Law in the matter of maintenance and her father-in-law was liable to pay maintenance allowance to her.

2. The suit was dismissed by Shri Mohindra Singh, Sub-Judge 1st Class, Faridkot, on October 29, 1959, but, on appeal, the learned District Judge, Bhatinda, ordered re-trial by his judgment dated July 28, 1960, after framing the following issues:—

- (1) Whether the plaintiff is entitled to claim maintenance against the defendant according to custom applicable to the parties and what that custom is?
- (2) If issue No. 1 is not proved in the affirmative, is the plaintiff still entitled to claim maintenance otherwise according to law?
- (3) Is the property against which charge is claimed ancestral of the deceased Hakam Singh and the defendant as alleged in para 9 of the plaint and what is its effect?
- (4) To what amount of maintenance, if any, is the plaintiff entitled?
- (5) Whether Kapur Kaur is living in adultery with Jagrup Singh and, if so, what is its effect?

3. On issues Nos. (1) and (2) the learned trial Court held that there was no such property out of which maintenance allowance could be granted to the plaintiff in view of the provisions contained in Section 19 of the Hindu Adoptions and Maintenance Act (No. 78 of 1956) (hereinafter called the Act), but on issue No. (3) the finding was that 82 Kanals and 8 Marlas

of land had been proved to be ancestral qua the plaintiff's husband. On issue No. (4) the learned trial Court held that the plaintiff was entitled to a maintenance allowance of Rs. 20 per month, if she succeeded on other issues, Issue No. (5) was decided against the defendant.

4. As a result of his findings on various issues, the suit of the plaintiff was dismissed on December 9, 1960.

5. Feeling aggrieved, the plaintiff went up in appeal which was dismissed by the Additional District Judge, Faridkot, on January 4, 1962. The learned lower appellate Court held that the ancestral land measuring 82 Kanals and 8 Marlas in the hands of the defendant was not coparcenary property within the meaning of the word as used in Section 19 of the Act and, therefore, the defendant was not liable to maintain the plaintiff.

6. No other issue was argued before the learned lower appellate Court. The appellant has filed the present appeal against the decree of the learned lower appellate Court.

7. The first point argued by the learned counsel for the appellant is that a Full Bench of this Court by majority has held in Gurdip Kaur v. Ghamand Singh, ILR (1965) 1 Punj 271 = (AIR 1965 Punj 238) (FB), that the term "coparcenary property" occurring in Section 19 (2) of the Act means the property which consists of ancestral property, or of joint acquisitions or of property thrown into the common stock, and accretions to such property. That case also related to Jats and the point of law arose in similar circumstances. Gurdip Kaur had filed a suit against her father-in-law, Ghamand Singh, for maintenance at the rate of Rs. 100 per mensem, she being the widow of a predeceased son.

8. Respectfully following that decision, I hold that the appellant was entitled to a maintenance allowance from her father-in-law after the death of her husband. The amount of maintenance allowance was fixed as Rs. 20 per mensem by the learned trial Court and that finding was not agitated before the learned lower appellate Court. It is, therefore, held that she is entitled to a maintenance allowance of Rs. 20 per mensem from the date of her suit.

9. The learned counsel for the appellant has submitted that Kishan Singh, defendant, made a gift of his entire land, which was ancestral, measuring 82 Kanals and 8 Marlas, in favour of his daughter, Gurnam Kaur, on July 31, 1958, that is, after the filing of the suit by the plaintiff-appellant, and as such the right to receive maintenance can be enforced against Shrimati Gurnam Kaur under Section 28 of the Act, since Kishan Singh, respondent, died on November 17, 1964. In his place, his two sons and the daughter,

Gurnam Kaur, have been brought on record as his legal representatives. The gift of the land in favour of Gurnam Kaur, being gratuitous and during the pendency of the suit by the plaintiff, Shrimati Gurnam Kaur is liable to pay the maintenance allowance of Rs. 20 per mensem to the appellant under Section 28 of the Act, as the learned trial Court found that the land gifted to her by Kishan Singh was capable of affording that amount of maintenance to the appellant. This disposes of C. M. No. 137-C of 1966 filed by the respondents.

10. The learned counsel for the appellant has submitted that the maintenance allowance determined by the learned trial Court is too paltry a sum and it should be enhanced to Rs. 40 per mensem as claimed by her in the suit. I regret my inability to accede to this submission because the quantum of maintenance allowance fixed by the learned trial Court was not agitated before the learned lower appellate Court. The appellant may file another suit or take such other proceedings as may be open to her under the law for getting the maintenance allowance enhanced.

11. The appellant filed the suit and appeal in forma pauperis. The court-fee payable in respect of the suit and the appeal will be a first charge on the amount of maintenance that the appellant may recover from Shrimati Gurnam Kaur. A copy of this judgment may be sent to the Collector, Bhatinda, for realising the amount of court-fee.

12. For the reasons given above, this appeal is accepted and a decree for the recovery of maintenance allowance at the rate of Rs. 20 per mensem from the date of her suit is passed in favour of the plaintiff-appellant against Shrimati Gurnam Kaur, the transferee of the land from Kishan Singh, defendant, with costs throughout.

Appeal allowed.

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(V 57 C 37)

MAN MOHAN SINGH GUJRAL, J.

Ganesh Dass Maha Singh, Petitioner v. Kishan Chand and others, Respondents.

Criminal Revn. No. 812 of 1968, D/- 6-1-1970 from order of Addl. S. J., Gurdaspur, D/- 7-6-1968.

Criminal P. C. (1898), S. 209 — No reasonable possibility of conviction — Discharge of accused.

Where the enquiring Magistrate comes to the conclusion that there was no reasonable possibility of conviction he can discharge the accused and for this limited purpose he can weigh the evidence. How-

ever, where there is possibility that different Courts may take different views of the evidence, the enquiring Court should leave it to the Sessions Court to decide as to which view to take. AIR 1967 SC 740, Explained. (Para 3)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 740 (V 54) =

1967 Cri LJ 653, K. P. Raghavan
v. M. H. Abbas 3

D. S. Chahi, for Petitioner; M. R. Mahajan, for Respondents.

ORDER:— This is a revision petition against the order of the Additional Sessions Judge, Gurdaspur, dated 7th June, 1968, whereby the revision petition of the petitioner against the order of the Judicial Magistrate First Class, Batala, dated 27th February, 1967, discharging the respondents under Section 209 of the Criminal Procedure Code, was dismissed.

2. The facts giving rise to this revision petition are that there was some dispute between Ganesh Dass, the petitioner, and the respondent Kishan Chand regarding the opening of a window in the intervening wall. Kishan Chand, not caring for the views of his neighbour Ganesh Dass petitioner, opened a window in the wall and, in turn, Ganesh Dass, with a view to obstruct this window, constructed a wall in front of that window. This happened some time in October, 1964. On the night between 6th and 7th October, 1964, Amir Devi deceased who was the wife of Ganesh Dass went to sleep near the newly constructed wall in her courtyard and some animals were also tethered near her. In the middle of the night the newly constructed wall fell on Amir Devi with the result that she received some injuries which led to her death the same night at about 4.30 a. m. Ganesh Dass then lodged a report against Kishan Chand, his brother Ram Saran and his two sons Vijay Kumar and Tarsem Kumar alleging that they had demolished the wall with the help of bamboos and had thereby caused the death of Amir Devi.

Originally, a case under Section 325 of the Indian Penal Code was registered but later on the offence was changed to Section 304 of the Indian Penal Code. After investigation the police, finding that no case had been made out against the accused, made a report to the Magistrate for the cancellation of the case, on the basis of which the case was cancelled. Not satisfied with this, Ganesh Dass filed a complaint against Kishan Chand and his two sons which was enquired into by the Judicial Magistrate First Class, Batala. After recording the evidence led by the complainant the learned Magistrate found that no prima facie case had been made out against the respondents and discharged them under Section 209 of the Criminal Procedure Code. The revision petition

filed by Ganesh Dass in the Court of Session also failed and being dissatisfied he has come up to this Court in revision.

3. On behalf of the petitioner the only argument raised is that it was not open to the Magistrate under Section 209 of the Criminal Procedure Code to assess the evidence of the witnesses and as there was evidence in support of the prosecution case, the Judicial Magistrate should have committed the accused to stand their trial. In support of this argument reliance is placed on *K. P. Raghavan v. M. H. Abbas*, AIR 1967 SC 740, wherein Bhargava, J., delivering judgment on behalf of the Court, observed that no doubt a Magistrate enquiring into a case under Section 209 of the Criminal Procedure Code is not to act as a mere post office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session, but in arriving at that conclusion it is not the function of the enquiring Magistrate to weigh the pros and cons of the prosecution and defence evidence and to discharge the accused merely because in his view the defence version is better than the prosecution evidence.

These observations, however, do not imply that even if the prosecution case was found by the enquiring Magistrate to be inherently improbable or where the evidence led was such that no Court could reasonably come to the conclusion on the material produced that the prosecution case had been established, it was not open to the enquiring Magistrate to discharge the accused under Section 209 of the Criminal Procedure Code. The ratio of the decision in *Raghavan's case*, AIR 1967 SC 740 is that where the witnesses who give the evidence are such that there was no reasonable possibility of their being believed by any Court it was open to the enquiring Magistrate to discharge the accused. It is, however, not the function of the enquiring Court to appropriate to itself the function of judging whether the prosecution evidence was to be believed in preference to the defence evidence. Where the evidence was of a doubtful nature the Magistrate should leave it to the Court of Session to come to a conclusion whether to accept it or not; but, where, on the other hand, the enquiring Magistrate comes to the conclusion that there was no reasonable possibility of conviction of the accused, it is open to the enquiring Magistrate to discharge the accused and for this limited purpose he could weigh the evidence. On the other hand, where there was possibility that different Courts might take different views of the evidence the enquiring Court should leave it to the Sessions Court to decide as to which view to take. In *Raghavan's case*, AIR 1967 SC 740 (Supra) it was observed as follows:—

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"It cannot be said that the Magistrate has no discretion to weigh the evidence at all. He must clearly do so to some extent in order to decide whether a prima facie case has been made out and whether a conviction is possible. But these are the limits of his discretion and it is not his duty nor is it necessary for this purpose for him to examine the prosecution evidence with meticulous care, balance the evidence of one witness against the evidence of another, consider the probabilities of a conviction, or come to a conclusion on doubtful points."

Viewing the order of the learned Magistrate in the light of the above observations I find that the order was perfectly justified. In the first information report lodged by Ganesh Dass there was no mention of the fact that anybody had been seen pushing the wall with the help of bamboo. The Sub-Divisional Officer, P. W. D., who had been examined, had also stated that the wall had fallen as a result of structural defects and not by the use of force. Moreover, in the first information report it was mentioned that the witnesses had only heard the noise of the falling of the wall. It is not disputed that the wall had fallen in the middle of the night and normally there was no likelihood of anybody having seen the wall falling. Keeping these circumstances in view, the learned enquiring Magistrate was right in coming to the conclusion that there was no reasonable possibility of the evidence being accepted even though at the enquiry two daughters of Ganesh Dass had appeared to state that one of them had peeped through the jharna and had seen the accused pushing the wall with bamboos and had told about it to the other sister. The learned Magistrate had himself visited the spot and had seen that it was not possible to see the wall from the jharna from where one of the daughters of Ganesh Dass was alleged to have seen the accused with bamboo in his hand. It was, therefore, open to the Magistrate to find that no prima facie case for committing the accused for trial had been made out. Taking this view, I find no merit in this revision petition and dismiss the same.

Revision dismissed.

AIR 1970 PUNJAB & HARYANA 273
(V 57 C 38)

H. R. SODHI, J.

Tipper Chand Dhanpat, Appellant v. Matu Ram and others, Respondents.

Second Appeal No. 541 of 1959, D/- 10-9-1969, from decree of Sub. J., Karnal, D/- 5-12-1958.

(A) Civil P. C. (1908), Ss. 107, 149, O. 7, R. 11 — Appeal — Time for payment of deficit court-fee — Order 7, Rule 11 does

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not apply to appeals — Power to extend time available under S. 149 but not by virtue of S. 107.

Provisions of Order 7, Rule 11 are not applicable to appeals and it is a matter of discretion with the Court under Sec. 149 of the Code whether the time for payment should be extended or not. It may be that by virtue of Section 107, an appellate Court has the same power as an original Court in respect of plaintiffs but that does not imply that Order 7, Rule 11 becomes applicable in terms to appeals. The only provision of law under which an appellate Court can extend time is Section 149 of the Code, which vests a discretion in the Court in this regard but the discretion has to be judicial and not arbitrary. The mistake in not paying proper court-fee must be bona fide. AIR 1947 Lah 210, Foll.; AIR 1951 All 64 (FB), Rel. on; AIR 1957 Pat 111, Not foll.

(Para 6)

(B) Civil P. C. (1908), O. 22, R. 4 read with R. 11 — Appeal — Abatement of — Death of one of respondents — Application to bring legal representative on record made after 90 days — Delay not satisfactorily explained — Appeal abates.

(Para 7)

Cases Referred: Chronological Paras

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| (1957) AIR 1957 Pat 111 (V 44) = | |
| 1958 BLJR 302, Mahabir Ram v. | |
| Kapildeo Pathak | 5 |
| (1951) AIR 1951 All 64 (V 38) = | |
| ILR (1952) 1 All 461 (FB), S. | |
| Wajid Ali v. Mt. Isar Bano | 6 |
| (1947) AIR 1947 Lah 210 (V 34) = | |
| 48 Pun LR 393, Balwant Singh v. | |
| Jagjit Singh | 6 |

A. L. Bahri, for Appellant; Parkash Chand for Legal Representatives of Matu Ram deceased, for Respondents.

JUDGMENT:— This is a regular second appeal by Tipper Chand defendant against the judgment and decree of the Senior Subordinate Judge, with enhanced appellate powers, Karnal, who dismissed his appeal on 5th December, 1958, on the ground that it was insufficiently stamped and that the mistake on the part of the appellant was not bona fide. The facts as are necessary for the proper disposal of the point of law can be stated in a narrow compass.

2. Matu Ram plaintiff respondent filed a suit against the appellant and his brother Ayudhiya Parshad respondent praying for permanent injunction restraining the appellant from interfering with his ownership and possession of the southern one-half portion of the roof of the inner Dahliz as shown in the plan filed with the plaint, also from using that portion of the roof as passage, and further restraining him from opening any door in the same. The trial Court decreed the suit and granted a permanent injunction

restraining the defendant appellant from in any way interfering with the ownership and possession of the plaintiff in regard to the southern one-half portion of the roof of the inner Dahliz by constructing any door or an opening towards it or by passing over it. It was also directed that the defendant appellant and the plaintiff respondent shall construct a partition wall in the midst of the property in dispute from east to west, 4½ inches wide and 10 feet high before 1st December, 1957, bearing the expenses equally. It may be mentioned that the defendant appellant took an objection before the trial Court that requisite court-fee in the case had not been paid by the plaintiff. Defendant No. 2 did not, however, contest the suit and admitted the facts as stated by the plaintiff in his plaint.

3. An appeal was taken to the Senior Subordinate Judge, with enhanced appellate powers, Karnal, who was of the opinion that necessary issues arising from the pleadings of the parties had not been struck and that the plaint was also not sufficiently stamped. He held that the plaintiff had asked for two distinct and separate reliefs by way of injunction, restraining the defendant No. 1 from opening the door and also from using a part of the roof, shown red in the plan, as passage. The alternative relief prayed for was for possession of one-half share of the roof of the inner Dahliz by partition. The Senior Subordinate Judge hearing the appeal relied upon the rules framed under Section 9 of the Suits Valuation Act in holding that the value for the purposes of court-fee and jurisdiction in respect of the two reliefs was Rs. 140/-, and the aggregate amount of court-fee payable for these two reliefs came to Rs. 21/-. The case was consequently remanded and the plaintiff was permitted to make good the deficiency in court-fee. The trial Court gave findings on the issues as recast which are not necessary to be reproduced here, but it may be stated that the suit was decreed again. A permanent injunction was granted to the plaintiff restraining defendant No. 1 in the terms already referred to above.

4. An appeal was again preferred by the defendant but he valued the relief at Rs. 130/- and paid the court-fee of Rs. 13/- only. In other words, the appellant paid the court-fee for one of the reliefs and that too was deficient by Re. 1/- though he had himself raised an objection that earlier in the trial Court the court-fee was payable by the plaintiff on two reliefs of injunctions valued at Rs. 280/- which required a court-fee of Rs. 28/-. The appellant himself had in the previous appeal paid a court-fee of Rs. 21/- which was in respect of two distinct reliefs. A preliminary objection

was raised by the plaintiff respondent before the Senior Subordinate Judge that the appeal was insufficiently stamped and, therefore, liable to be dismissed on that ground alone. This objection prevailed and the appeal was accordingly dismissed. Hence the present second appeal.

5. The only submission made by Mr. A. L. Bahri, learned counsel for the appellant, is that the lower appellate Court was bound under the law, in terms of Order 7, Rule 11, Code of Civil Procedure, to have afforded an opportunity to the appellant to correct the valuation within a time to be fixed by Court and it was only on his failure to do so that the appeal could be dismissed. It is urged that Order 7, Rule 11 of the Code applies to appeals as well by virtue of Section 107 of the same Code. Section 107 is in the following terms:—

"107. (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

It is further contended that in any case the appellate Court could have, in the exercise of its discretion under Sec. 149, Code of Civil Procedure, allowed the appellant some time to make good the deficiency in court-fee. Reliance in this connection has been placed by the learned counsel on a Single Bench judgment of the Patna High Court reported as *Mahabir Ram v. Kapildeo Pathak*, AIR 1957 Pat 111. It has been held there that the provisions of Order 7, Rule 11, are applicable to appeals also and that where the memorandum of appeal is insufficiently stamped, the Court must afford the appellant an opportunity of making good the deficiency of the court-fee, and that a memorandum of appeal cannot be rejected summarily on the ground that it is insufficiently stamped. This authority fully supports the appellant and to the same effect are some of the decisions of Bombay, Calcutta, Rajasthan and Travancore-Cochin High Courts.

6. There is indeed a conflict of opinion on the question as to whether the provisions of Order 7, Rule 11 in terms apply to appeals or not. A Division Bench of the Lahore High Court in *Balwant Singh v. Jagjit Singh*, AIR 1947 Lah 210, has,

however, held that they are not applicable to appeals and it is a matter of discretion with the Court under Section 149 of the Code, whether time for payment of the deficit court-fee should be extended or not. The same is the view held by a Full Bench of the Allahabad High Court in a case reported as *S. Wajid Ali v. Mt. Isar Bano Urf Isar Fatma*, AIR 1951 All 64 (FB). It may be that by virtue of Section 107, an appellate Court has the same powers as an original Court in respect of plaintiffs but that does not imply that Order 7, Rule 11 becomes applicable in terms to appeals. I must follow the Division Bench judgment of the Lahore High Court which, I may say with all respect, lays down the correct law. The only provision of law under which an appellate Court can extend time is Section 149 of the Code which vests a discretion in the Court in this regard. It is, of course, true that the discretion has to be judicial and not arbitrary. Where a Court is satisfied that the mistake in not paying a proper court-fee was a bona fide one, it is bound to allow the deficiency to be made good within a time prescribed by it. In the instant case, the appellate Court has rightly come to the conclusion that the mistake was not bona fide. The appellant himself raised an objection that the plaintiff had not paid proper court-fee as the two reliefs were involved and had the plaintiff made up the deficiency. He himself earlier filed an appeal paying court-fee on the same basis but in the present appeal, he chose to pay less court-fee for reasons best known to him. The court of first appeal was, therefore, justified in dismissing the appeal on the ground that it was insufficiently stamped, and not allowing any more time to the appellant to make up the deficiency.

7. The appeal has also abated. Matu Ram died on 16th February, 1962, and an application to bring his legal representatives on the record was made on 1st June, 1962, which was after the period of 90 days. The explanation given for the delay in making the application is that the appellant was living at Jullundur and Matu Ram died in Kaithal, District Karnal. The appellant claims that he got authentic information from the Municipal Committee, Kaithal, by a letter dated 26th May, 1962, and it was then only that he made an application to implead the legal representatives of the deceased on 1st June, 1962. There is a gap of more than six days between the receipt of the information and filing of the application in this Court which is not explained. It is admitted before me that the parties are related to each other. I cannot believe that the petitioner did not know about the death of Matu Ram being his relation. It appears that to cover his

delay, he wrote to the Municipal Committee, Kaithal, for information about the death of the plaintiff so that he could be armed with a written information and rely on the same to represent that the delay was not wilful. There is inherent evidence in his affidavit which belies his statement and I am not prepared to believe that he was not aware of the death of Matu Ram. The appeal must therefore be held to have abated.

8. For the foregoing reasons, the appeal stands dismissed with no order as to costs.

Appeal dismissed.

AIR 1970 PUNJAB & HARYANA 276
(V 57 C 39)

R. S. NARULA, J.

Amar Singh, Petitioner v. Jagdish and others, Respondents.

Civil Revn. No. 245 of 1969, D/- 23-9-1969, from order of Sub. J., 1st Class, Karnal, D/- 1-2-1969.

Civil P. C. (1908), O. 1, R. 3 — Lease and subsequent sale of property — Suit for pre-emption — Plaintiff disputing the genuineness of the lease, alleging that lease and sale are part of the same transaction — Lessee can be joined as co-defendant with the vendor and vendees.

In the suit for pre-emption where the property in suit is alleged to be in possession of a third person who claims as a lessee, and the genuineness of whose lease is disputed by the plaintiff alleging that the lease deed and subsequent sale-deed are part of the same transaction, then the lessee can be joined as a co-defendant with the vendor and the vendees under O. 1, R. 3. AIR 1947 Nag 229, Rel on; AIR 1950 Ajmer 11 (1) & AIR 1964 Tripura 16, Disting. (Para 7)

The object of Rule 3 of Order 1 is to avoid multiplicity of suits and needless expense to the parties if it could be avoided without embarrassment to the litigants concerned and the Court. In order to justify the joining of more than one person as defendants, it is not necessary to show that all the defendants are interested in all the reliefs and transactions comprised in the suit. Nor can it be said that no one can be joined as a defendant unless some specific relief is claimed against him. Joining of pro forma parties as defendants is well known. If the plaintiff is able to prove that the sale and the lease, though executed on two different dates, really form part of one single transaction, and it is further found that the plaintiff is entitled to be substituted as a vendee in place of defendant vendees it will probably be open to the

plaintiff to avoid the lease if he can prove that the same is either invalid or is in reality non-existent and is a mere farce. To direct the plaintiff to strike out the name of the lessee from such suit, and to drive the plaintiff to a second round of litigation against the lessee in case of the plaintiff's success in the suit for pre-emption, will be to encourage the very thing which is sought to be discouraged by Rule 3 of Order 1. Even if no specific relief is claimed against the lessee it will be fair that he remains a party to the suit if the plaintiff wants a finding as to the genuineness or validity of the impugned lease-deed, as it would be contrary to the principles of natural justice for the trial Court to record any finding in connection with that matter without having the alleged lessee before the Court. (Para 6)

Cases Referred: Chronological Paras

(1964) AIR 1964 Tripura 16 (V 51),

Kshetra Mohan v. Mohamad

Sadir

(1950) AIR 1950 Ajmer 11 (1) (V 37),

Dolatram Singhi v. S. Amar-

chand Sarda

(1948) AIR 1948 Nag 32 (V 35)=

ILR (1947) Nag 288, Rambhau

Wamanrao v. Ganesh Deorao

(1947) AIR 1947 Nag 229 (V 34)=

ILR (1947) Nag 124, Marutirao

Govindrao v. Nathmal Jodhraj 4, 5, 7

N. C. Jain, for Petitioner; Munishwar Puri and R. N. Narula, (for No. 7), for Respondents.

JUDGMENT:— The brief facts leading to the filing of this petition for revision of the order of the trial Court may first be surveyed, in order to appreciate the solitary jurisdictional question of law on which arguments have been addressed at the hearing of this case. For facility of reference, I will call the parties to this litigation by their titles in the Court of the Subordinate Judge.

2. Mst. Nihali defendant No. 1 sold the land in dispute to Man Singh and his three brothers defendants Nos. 2 to 5 by a registered sale-deed, dated June 6, 1967 for Rs. 18,000/-. Two days before the sale, i.e., on June 6, 1967, Nihali executed a registered lease-deed in respect of the land which forms the subject-matter of this litigation, in favour of Amar Singh defendant No. 6, who has been stated by the counsel for the plaintiffs-respondents to be the father-in-law of the vendees. Jagdish son of Sadhu filed a suit for possession in the purported exercise of his right of pre-emption against the vendor and the vendees, and also impleaded therein Amar Singh defendant No. 6, the alleged lessee. Subsequently, Lakshmi Chand (plaintiff in the other suit) also filed a suit for possession of the same land in exercise of his right of pre-emp-

tion. Lakshmi Chand also impleaded Amar Singh petitioner as a defendant to his suit.

3. In paragraph 4 of the plaint of the suit filed by Jagdish, it was stated as below:—

"That with a view to harm and deprive the plaintiff of his superior right of pre-emption, defendant No. 1 with collusion and consent of defendants Nos. 2 to 5 vendees, and Shri Karta Ram, their father, hit upon a device and executed a bogus and fabricated lease-deed in favour of defendant No. 6 for a period of Kharif 1967 to Rabi 1987, on a nominal rent of Rs. 300/- per annum, and this lease-deed was got executed and registered on June 6, 1967, i.e., only two days before the execution and registration of the sale-deed."

In paragraph 7 of the plaint it was further pleaded:—

"That the lease-deed executed by defendant No. 1 in favour of defendant No. 6 is not binding on the plaintiff on the following grounds:—

(i) that in fact no lease was given by defendant No. 1 in favour of defendant No. 6. The document is a forgery and fabricated one and got executed by defendants Nos. 2 to 5 in favour of defendant No. 6, father-in-law of Prem Singh vendee, with the sole object of defeating the right of pre-emption;

(ii) that the possession has not passed to the lessee and all is only a made up affair;

(iii) that the lease and the sale formed part of the same transaction, and so the plaintiff is not bound by it."

In paragraph 4 of the written statement of the vendees (defendants 2 to 5), the allegation made in paragraph 4 of the plaint was denied, and it was added that defendant No. 1 had validly executed a lease-deed before the execution of the sale-deed, and the lease-deed would expire in 1987. The averments made in paragraph 7 of the plaint were denied, and it was alleged that the lease-deed was valid, and had been duly executed by the vendor prior to the sale, as she was incapable of managing her own affairs. It was added that the plaintiff in the present suit had no right to challenge the lease. It was further stated that possession of the land in dispute was with the lessee, and that the lease and the sale were separate transactions. In a preliminary objection raised in the written statement of Amar Singh defendant No. 6, it was urged that the suit was not maintainable in its present form, as regards the lease-deed in his favour. The specific objection was:—

"The plaintiff who wants to step into the shoes of defendant No. 1 should first get the lease-deed set aside and then file a suit for pre-emption."

4. By his order, dated February 1, 1969, the Subordinate Judge, First Class, Karnal, repelled the preliminary objection raised by Amar Singh and relying on the judgment of Puranik J., in *Marutirao Govindrao v. Nathmal Jodhraj*, AIR 1947 Nag 229, held that the plaintiff-pre-emptor should not be driven to a separate suit, and he should be allowed to challenge the impugned lease in this suit for pre-emption itself. It is against the above-said order of the trial Court that the present revision petition has been filed by Amar Singh defendant No. 6.

5. Mr. N. C. Jain vehemently argued:

(i) that the plaintiff has no locus standi to challenge the genuineness and the validity of the lease-deed without first succeeding in the pre-emption suit, and stepping into the shoes of the vendor; (This is reverse proposition as compared with the preliminary objection).

(ii) that no relief having been claimed against defendant No. 6, the dispute as to the lease executed in his favour should not be allowed to be brought into the pre-emption suit, and should be left to be fought out in a subsequent litigation, in case the plaintiff succeeds in proving his right of pre-emption and is able to obtain a decree for possession of the land;

(iii) that the judgment of the Nagpur High Court in *Marutirao Govindrao's case*, AIR 1947 Nag 229, is based on the peculiar feature of Section 183 of the Berar Land Revenue Code, inasmuch as there is no corresponding provision in the Punjab Pre-emption Act; and

(iv) that if no distinction between the Nagpur case and the present case can be found out, the judgment of Puranik, J. in the Nagpur case does not lay down the correct law.

6. Rule 3 of Order I of the Code of Civil Procedure lays down:—

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

One of the conditions precedent for the application of Rule 3 is that the right to relief must have arisen in respect of or out of the same act or transaction, or series of acts or transactions. Whereas the plaintiff has specifically urged that the lease and the sale are part of the same transaction, this allegation has been denied by the defendants. No decision on that part of the issue between the parties has yet been given by the trial Court. The object of Rule 3 of Order 1 is to avoid multiplicity of suits and needless expense to the parties if it could be avoided.

ed without embarrassment to the litigants concerned and the Court. It is settled law that in order to justify the joining of more than one person as defendants, it is not necessary to show that all the defendants are interested in all the reliefs and transactions comprised in the suit. Nor am I aware of it having ever been laid down that no one can be joined as a defendant unless some specific relief is claimed against him. Joining of pro forma parties as defendants is well known. If the plaintiff is able to prove that the sale and the lease, though executed on two different dates, really form part of one single transaction, and it is further found that the plaintiff is entitled to be substituted as a vendee in place of defendants Nos. 2 to 5, it would probably be open to the plaintiff to avoid the lease if he can prove that the same is either invalid or is in reality non-existent and is a mere farce. It has not been disputed that even if the petitioner is excluded from the array of defendants, a suit for possession would be maintainable against him on the ground that no valid lease of the land in dispute has in fact ever been created in his favour by defendant No. 1, after the plaintiff succeeds in the pre-emption suit, and becomes the owner of the property by depositing the rest of the pre-emption money. To direct the plaintiff to strike out the name of defendant No. 6 from the present suit, and to drive the plaintiff to a second round of litigation against the present petitioner in case of the plaintiff's success in the suit for pre-emption, would be to encourage the very thing which is sought to be discouraged by Rule 3 of Order 1 of the Code of Civil Procedure. If the plaintiff had not impleaded defendant No. 6 and if defendant No. 6 had come forward to be made a party to the suit for pre-emption, the application of the defendant would not have normally succeeded as he is certainly not a necessary party to the suit for pre-emption. The provision made in Rule 3 of Order 1 of the Code is merely enabling and does not cast an obligation on a plaintiff to implead defendants against whom different reliefs may be claimed even if no specific relief has been claimed against defendant No. 6. As such it is but fair that he should remain a party to the suit if the plaintiff wants a finding as to the genuineness or validity of the impugned lease-deed, as it would be contrary to the principles of natural justice for the trial Court to record any finding in connection with that matter without having the alleged lessee before the Court.

7. In *Marutirao Govindrao's case*, AIR 1947 Nag 229 (supra), the plaintiff-pre-emptor had impleaded the lessee of the land in suit as a co-defendant with the vendor and the vendees. The allega-

tion of the plaintiff was that the lease-deed was bogus and had been obtained from the original vendor collusively with a view to clogging the plaintiff's right of pre-emption. The defendants including the lessee argued before the trial Court that the lessee was not a necessary party to the suit. The trial Court held that the genuineness or otherwise of the lease-deed could not be gone into in the pre-emption suit. A petition for revision against the order of the trial Court was allowed by Puranik, J. on the ground that sub-section (2) of Section 183 of the Berar Land Revenue Code permits the Court to examine the transaction and fix a fair consideration for the interest sought to be pre-empted. It was held that inasmuch as the plaintiff was asking the Court to examine the transaction of sale, and there were recitals in the sale-deed regarding the lease-deed, it was open to the Court to examine the correctness of those recitals. In the present case Mr. Jain states that the sale-deed does not make any mention of the lease-deed. Learned counsel for the respondents were not in a position either to admit or deny that allegation. Neither the sale-deed nor any copy thereof has been shown to me. Even if it is presumed that there is no recital about the lease-deed in the sale-deed, it is still open to the plaintiff to allege and prove that the sale-deed and the lease-deed, though executed on separate dates and on separate papers, in fact form one transaction. The plea of real price being much less has also been taken in this case. Puranik, J. held in *Marutirao Govindrao's case*, AIR 1947 Nag 229 that the learned Judge was not aware of any law which prevents the Court from trying a suit as laid, and that the plaintiff was entitled to have the question as to the actual possession of the property cleared up in the pre-emption suit itself instead of the plaintiff being driven to file another suit. It was held that the alleged lessee was in these circumstances necessary party to the suit as the inquiry sought to be made by the plaintiff into the validity of the lease could not be held in the absence of the alleged lessee. Nor am I able to see any material distinction between the Berar case and the present case on the question of the relevant legal provision. Sec. 183 of the Berar Land Revenue Code has not been shown to me. But from whatever was stated about that provision in the judgment of the High Court, it appears that the provision of Section 25 of the Punjab Pre-emption Act which authorises the Court to determine whether the price at which the sale is stated to have taken place has been fixed in good faith or not, and in case of a finding in the negative to fix the market-value as the price for the purposes of the suit, is in

pari materia with Section 183 of the Berar Land Revenue Code. Mr. Jain has not been able to show to me any law prohibiting the joining of the lessee as a co-defendant with the vendor and the vendees in the suit for pre-emption where the property in suit is alleged to be in possession of a third person who claims as a lessee, and the genuineness of whose lease is disputed by the plaintiff. I think it would be unfair to the plaintiff to drive him to a separate suit for possession after succeeding in the suit for pre-emption. If, however, the plaintiff fails in the pre-emption suit, the alleged lessee would not suffer in any manner except to the extent of the costs incurred by him in defending this suit for which there is ample provision in the Code to compensate him.

8. Mr. Jain relied on the judgment of the learned Judicial Commissioner, Ajmer, in *Dolat Ram Singhi v. S. Amarchand Sarda*, AIR 1950 Ajmer 11 (1). In that case *Atma Charan, J. C.*, held that in a suit for pre-emption the mortgagee of the land in suit is not a necessary party. It was observed that the mortgagee could be produced as a witness. According to the finding recorded by the learned Judicial Commissioner, there was no triable issue between the mortgagee and the pre-emptor in *Dolat Ram Singhi's* case, AIR 1950 Ajmer 11 (1). It was the admitted case of both parties that the market value of the equity of redemption was Rs. 2000/-. No relief had been asked for in the plaint against the mortgagee. The only dispute related to the court-fees payable on the plaint because of the impleading of the mortgagee, and that was also an incidental matter. It was in those circumstances that the learned Judicial Commissioner held that the mortgagee was not a necessary party to the suit. The facts of the Ajmer case are clearly distinguishable from the case before me. In fact the judgment of *Puranik, J.* of the Nagpur High Court appears to be on all fours. For the reasons already recorded by me I am in respectful agreement with the view expressed by *Puranik, J.* The judgment of the Judicial Commissioner of Tripura in *Kshetra Mohan v. Mohamad Sadir*, AIR 1964 Tripura 16, relates to a reverse case. A person wanted to be impleaded as defendant to a suit for specific performance on the basis of an anterior title to the property said to have been in existence before the agreement for specific performance was entered into. It was observed that such a person did not come either under Section 27(b) or (c) of the Specific Relief Act, and the plaintiff could not obtain any specific relief against such a person. That being the case, it was held that such a person could not insist upon the plaintiff making him a party thereby converting the suit for specific performance into one on title and

introduce matters in the suit which are quite foreign to obtain the relief prayed for therein. I have already observed that the provision contained in Rule 3 of Order 1 of the Code of Civil Procedure is for the benefit of the plaintiff, and merely enables a plaintiff to implead any person who is permitted by that rule to be arrayed as a defendant, but the said provision does not entitle any person to insist on becoming a party to a suit even if the plaintiff does not desire to implead him.

9. Messrs. *Munishwar Puri* and *R. N. Narula* Advocates for the two plaintiffs referred to the judgment of *Padhye, J.* in *Rambhau Wamanrao v. Ganesh Deorao*, AIR 1948 Nag 32. Joinder of certain defendants was allowed in that case as it was found to be perfectly unobjectionable as it would not have rendered the suit in any way vexatious or harassing to the defendants. The facts of that case are distinguishable and the judgment of *Padhye, J.* is not of any direct and real assistance to the respondents though it does tend to support their case.

10. Mr. Puri lastly argued that the order of the trial Court does not amount to "a case decided" within the meaning of Section 115 of the Code of Civil Procedure, and that, therefore, this petition for revision against that order is not competent. In the view I have taken of the merits of the controversy, it is unnecessary to go into this academic question. As at present advised, I am inclined to think that if it could be shown that the trial court has no jurisdiction to proceed with the suit against the defendant-petitioner in the present litigation, the order of the trial Court holding to the contrary would have amounted to "a case decided" within the meaning of Section 115.

11. For the reasons already recorded by me, I am of the opinion that no exception can be taken to the order of the trial Court allowing the suit to proceed without striking out the name of defendant No. 6 from the array of defendants. This revision petition, therefore, fails and is dismissed with costs.

Petition dismissed.

AIR 1970 PUNJAB & HARYANA 279
(V 57 C 40)

RANJIT SINGH SARKARIA AND
S. C. MITAL, JJ.

Amarjit Singh Sohan Singh, Appellant
v. The State, Respondent.

Criminal Appeal No. 134 of 1967, D/-
17-11-1969, from order of Addl. S. J.,
Jullundur, D/- 11-1-1967.

Penal Code (1860), S. 300 Exception I
— Grave and sudden provocation.

CN/CN/B57/70/MLD/P.

Deceased, unemployed and addicted to drinking demanding money from accused, his son — Accused declining saying that he had no money to give to the deceased to be wasted in drinking — Deceased in immediate presence and hearing of his wife, hurling foul abuse that the accused must provide him with money, no matter if he had to get his mother prostituted for raising it — Accused on hearing the foul abuse immediately inflicting blows with knife — Held, the abuse of the foulest kind hurled by the deceased in the circumstances of the case, was grave and sudden enough to entitle the accused to the benefit of Exception 1 to S. 300. Consequently the offence committed by him was one under S. 304, Part (I), (1878-80) ILR 2 Mad 122 & AIR 1962 SC 605, Rel. on. (Para 12)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 605 (V 49) =

1962 (1) Cri LJ 521, K. M. Nana-

vati v. State of Maharashtra II

(1878-80) ILR 2 Mad 122=1 Weir

302, Empress v. Khogayi II

Bahadur Singh, for Appellant; M. P. Singh Gill, Asst. Advocate General, Punjab, for Respondent.

R. S. SARKARIA, J.: This is an appeal by Amarjit Singh, who has been convicted for murder of his father, Sohan Singh, by the learned Additional Sessions Judge, Jullundur, and sentenced to imprisonment for life.

2. The facts of the prosecution case, as they emerge from the record, are as follows:—

Sohan Singh deceased was out of employment. He was addicted to drinking. He was living in the same house along with his son, Amarjit Singh appellant, and his wife, Udham Kaur, at Dalewal. Amarjit Singh was, however, employed as a worker in the Workshop of one Shankar Singh at Goraya.

3. On April 23, 1966, at about noon, the deceased pressed the appellant to give him some money. The appellant declined, saying that he had no money to give to the deceased to be wasted in drinking. The deceased hurled a foul abuse, to the effect that the accused should raise money by getting his mother prostituted and then provide the same to the deceased. This the deceased said in the presence of his wife, Udham Kaur, D.W. 1, who was in the house cutting some vegetables. On hearing this foul abuse, the appellant immediately gave three blows with the knife, Exhibit P-1, to the deceased on the left upper arm, the left side of the back and the right side of the chest. Injury No. 3 had penetrated the right lung. On receiving these blows, Sohan Singh injured ran out. The witnesses, namely, Udham Kaur, wife of the deceased, Pargan Singh, brother of the

deceased, and Pakhar Singh Sarpanch caught hold of the accused. Pakhar Singh snatched the bloodstained knife, Exhibit P-1, from Amarjit Singh accused. Sohan Singh after going out a few paces, dropped dead. Leaving Bakhsha Singh, P.W. 3, to guard the dead body, and Amarjit Singh appellant in the custody of Pakhar Singh Sarpanch, P.W. 2, Pargan Singh, went to Police Station, Phillaur, 6 miles away, and lodged the First Information Report, Exhibit P-D, at 1 P.M. on the same day. After recording this report, Sub-Inspector Lachman Singh reached the spot, took over the custody of the accused and the bloodstained knife, Exhibit P-1.

4. After completing the investigation, the Police challan-ed Amarjit Singh in the Court of the Judicial Magistrate First Class, who, after a preliminary enquiry, committed him for trial to the Court of Session, with the aforesaid result.

5. Pargan Singh, P.W., was examined by the Committing Magistrate. He, however, died before the trial. His statement, therefore, was duly transferred to the Sessions record under Section 33 of the Evidence Act. The prosecution also examined Pakhar Singh, P.W. 2, another eye-witness, at the trial. Pargan Singh and Pakhar Singh, P.Ws., narrated more or less, the same story, in the witness-box, which has been set out at the commencement of this judgment.

6. At the trial, Amarjit Singh accused, examined under Section 342, Criminal Procedure Code, admitted that he had caused the injuries with the knife, Exhibit P-1, to his father, but set up these two pleas:

(a) That the deceased was about to strike him with knife, and that thereupon he snatched that knife from the deceased and struck the latter with it in the exercise of his right of private defence.

(b) That it was the filthy abuse hurled by the deceased to the effect that "the accused should provide the former with money at any cost even if it is to be raised by prostitution of the accused's mother", that gave him grave and sudden provocation, as a result of which, the accused whilst deprived of the power of self-control, gave blows to the deceased with a knife with which the accused's mother was cutting vegetables nearby.

7. The accused examined his mother, Udham Kaur, D.W. 1, who has, in her evidence, fully supported both the pleas set up by her son. The learned trial Judge has disbelieved Udham Kaur with regard to the plea of self-defence; and, we think, rightly. The facts concerning this plea were never put to Pargan Singh, P.W. The plea of self-defence therefore, is an after-thought. Udham Kaur was in a very unfortunate situation. She had lost

her husband. She did not want to lose her bread-winner, son, and thus be left beggared and resourceless on the scrap-heap of society.

8. But Udham Kaur's testimony could not be — and has not been — disbelieved with regard to the misbehaviour of the deceased and the filthy abuse uttered by the deceased. Considering the plea (b), the learned trial Judge observed:—

"Though the deceased was at fault to some extent in abusing his son, but these circumstances were not such which in a village could give grave and sudden provocation to the accused. In villages abuses in the names of mothers and sisters are hurled by people without realising what they mean. If a father who was head of the family used abusive language, the son was bound to tolerate. There was no occasion for grave and sudden provocation. If the accused had not been the son of the deceased, then the learned counsel could say that there were no reasons, why he should have tolerated the abuses of another person, but in this case even this stand cannot be taken."

It will be seen that the trial Court has not rejected that version of the accused and his mother which constitutes the factual basis of plea (b). Indeed, sufficient foundation of this plea existed even in the F.I.R. and the evidence of Pargan Singh, P.W. The trial Judge has only held that these circumstances could not constitute grave and sudden provocation for the purpose of Exception I to S. 300, Penal Code because—

(i) in villages abuses in the names of mothers and sisters are hurled by people without realising what they mean; and
(ii) the son was bound to tolerate the abusive language used by the father, who was the head of the family.

9. The learned counsel of the State before us, also, has, supporting the above reasoning, argued that among villagers filthy abuses are commonly used as meaningless expletives, and therefore can never, in a case concerning them, amount to grave and sudden provocation within the said Exception. We are unable to agree with this reasoning. Firstly, no abstract generalisation can be made that foul abuse in the case of villagers, between a father and son, can never amount to grave and sudden provocation. It is a matter of common knowledge that Punjab villagers are very sensitive in such matters. A foul abuse with reference to the mother or sister, without any other motive, often provokes the villager abused to violent crime, including murder. Under the Indian Penal Code, even foul words may amount to grave and sudden provocation. The authors of the Code have observed:

"It is an indisputable fact, that gross insults by word or gesture have as great

a tendency to move many persons to violent passion as dangerous or painful bodily injuries; nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary the circumstance that a man resents an insult more than a wound is any thing but a proof that he is a man of peculiarly bad heart."

10. Secondly, this was not a case of simple foul abuse given by a father to upbraid his erring son. On the contrary this was a case of a profligate and alcoholic father pestering his bread-earning son for money to be wasted in immoral and dissolute pursuits by the former. The past conduct of the non-earning father in coming home daily drunk and also stuffed with poppy heads, was already a standing and continuous source of provocation to the son whose meagre earnings were hardly sufficient to meet the barest needs of the family. The resentment that was building up in the mind of the son as a reaction to the continuous provocative conduct of the father spread over the past one month or so, had reached the breaking point shortly before the occurrence when the drunken father set upon the son with a torrent of horrible oaths to extort money for his immoral habits. The abuse that the son must provide him with money, no matter if he had to get his mother prostituted for raising it, was the last straw—a match-stick to a charged keg of gunpowder. Any normal reasonable son in such circumstances on hearing the filthy abuse in the immediate presence and hearing of his mother, would have been inflamed to violent passion against the father.

11. If any authority is needed on the point, reference may be made to *Empress v. Khogayi*, (1878-80) ILR 2 Mad 122. It was laid down there that when it is said that the provocation must be 'sudden' it is implied that it should have all immediately preceded the homicide in point of time. A person may by repeated or continuous provocation arouse another to a state of mind when the provocation 'immediately preceding the act is only the last straw. This authority was approved by the Supreme Court in *Nanavati's case* AIR 1962 SC 605 wherein it was laid down that the state of mind of the accused, having regard to the earlier conduct of the deceased, may be taken into consideration in judging whether the subsequent act would be a sufficient provocation to bring the case within the Exception.

12. Thus, from whatever angle the matter may be looked at, the abuse of the foulest kind hurled by the deceased in the circumstances of this case, was grave and sudden enough to entitle the appellant to the benefit of the said Exception. Consequently, the offence com-

mitted by the appellant was one under Section 304, Part (I). In the result we would partly allow this appeal, alter the appellant's conviction into one under Section 304, Part (I), Penal Code and reduce his sentence to five years' rigorous imprisonment.

13. S. C. MITAL, J.: I agree.

Order accordingly.

AIR 1970 PUNJAB & HARYANA 232
(V 57 C 41)

FULL BENCH

MEHAR SINGH, C. J., P. C. PANDIT
AND R. S. NARULA, JJ.

Mahant Gurmukh Singh, Petitioner v. The State of Punjab and others, Respondents.

S.C.A. No. 329 of 1968 and Civil Misc. No. 3005-C of 1968, D/- 28-11-1969, for leave to appeal to Supreme Court against judgment of Full Bench, D/-18-3-1968.

(A) Limitation Act (1963), S. 12 (3) and Art. 132 — Application for special leave to appeal to Supreme Court under Art. 133 (1) of Constitution — Limitation — Application for copy of judgment filed by party on 18th April, 1968 — Copy prepared by office of Court on May 23, 1968 — Party not collecting copy on that date for want of funds — Copy collected thereafter on August 27, 1968 — Party held was not entitled to add the whole period upto August 27, 1968 to the normal period of limitation under Art. 132 — It could only add the period between date of its application and date of preparation of copy by office of Court. AIR 1968 SC 960, Disting. (Para 3)

(B) Limitation Act (1963), S. 5 and Art. 132 — Application by party for leave to appeal under Art. 133 of Constitution — Application filed beyond limitation — Plea of non-availability of amount for obtaining copy of judgment prepared to the knowledge of party alleged — Party held not entitled to benefit of S. 5 or special latitude. AIR 1964 Punj 154, Rel. on. (Para 4)

Cases Referred: Chronological Paras

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| (1968) AIR 1968 SC 960 (V 55)=
1968 Cri LJ 1132, State of U. P.
v. Maharaja Narain | 3 |
| (1964) AIR 1964 Punj 154 (V 51)=
1964 Ctr LJ 23, Punjab State v.
Gopal Singh | 2 |
| (1935) AIR 1935 Lah 682 (V 22)=
ILR 17-Lah 621, Mathela v. Sher
Mohammad | 3 |
| (1934) AIR 1934 Mad 306 (V 21)=
ILR 57 Mad 560 (FB), Thirumala
Reddi v. Anavemareddi | 3 |
| (1922) AIR 1922 PC 352 (V 9)=49
Ind App 307, Pramatha Nath Roy
v. William Arthur Lee | 3 |

AN/AN/A29/70/RGC/M

Puran Chand, for Petitioner; B. S. Dhillon, Advocate-General, Punjab, for Respondents.

R. S. NARULA, J.:— This order will dispose of Civil Miscellaneous No. 3005/C of 1968, and Supreme Court Application 329 of 1968. The Supreme Court Application has been filed under Art. 133(1)(a) and (c) of the Constitution in respect of our judgment, dated 18th March, 1968, whereby we dismissed Civil Writ 1925 of 1964.

2. Civil Miscellaneous 3005/C of 1968, has been filed under Section 5 of the Limitation Act for condoning the delay in submitting the Supreme Court Application. The first contention of Mr. Puran Chand, learned counsel for the petitioner, is that the application for leave to appeal to the Supreme Court has been filed within time as he is entitled to add to the normal period of limitation the entire time which actually elapsed between the date on which he made the application for a certified copy of our judgment in the writ petition, and the date on which he actually obtained the certified copy. It is not disputed that under sub-sec. (2) of Section 12 of the Limitation Act, 1963, the petitioner is entitled to add to the normal period of limitation (sixty days prescribed under Article 132 of the Schedule to the Limitation Act) "the time requisite for obtaining a copy" of our order in the writ petition. The application for certified copy was submitted by the petitioner on April 18, 1968. It is the common case of both sides that the copy was prepared by the office of the Court by May 23, 1968, but when the petitioner wanted to collect the copy, he found that he did not have enough funds to pay for it. Time was taken by the petitioner from May 23, 1968, till August 27, 1968, for arranging for the money requisite for obtaining the copy. On the last mentioned date he paid for the copy and obtained it. The petition under Art. 133 of the Constitution was filed by him on September 20, 1968, but was returned by the office to produce the certified copy of the order to enable the Registry to verify limitation. The petition was then re-filed on October 9, 1968. Having been found to have been filed beyond time, the petition was returned on that very day. It was ultimately resubmitted on October 15, 1968 along with the miscellaneous application.

The contention of the learned counsel for the petitioner is that he is entitled to add to the normal period of sixty days, the whole of the period between April 18 and August 27, 1968. If the whole of this period could be added under Section 12(2) of the Limitation Act, the petitioner's application for leave to appeal to the Supreme Court would indeed be within time. Mr. B. S. Dhillon, the learn-

ed Advocate-General for the State of Punjab, has contended that the petitioner is entitled to add 36 days (the period between April 18, 1968, and May 23, 1968) to sixty days and he should have filed the application under Article 133 of the Constitution on or before June 22, 1968. Even if it could be argued that the Court was in vacation on the last date of limitation, the petitioner could have availed of the provisions of Section 4 of the Limitation Act, and should then have filed the application on July 8, 1968, i.e., on the re-opening day of the Court. The claim of the petitioner to add time right up to August 27, 1968, has been hotly contested on behalf of the respondents.

3. Mr. Puran Chand has argued that the Supreme Court has held in *State of U.P. v. Maharaja Narain*, AIR 1968 SC 960, that a litigant is entitled to the entire time actually spent by him in obtaining the copy and not only the time which was required by the Court for preparing the copy. We have carefully gone through the judgment of the Supreme Court in *Maharaja Narain's case*, AIR 1968 SC 960, and are unable to agree with Mr. Puran Chand that any such proposition of law has been laid down by their Lordships of the Supreme Court as is sought to be canvassed before us by the learned counsel.

In the case of *Maharaja Narain*, AIR 1960 SC 960, the Supreme Court had set aside and reversed the order of the Allahabad High Court dismissing the State's appeal against acquittal on the ground that though it was within time after adding the period actually spent in the preparation of the certified copy of the lower Court's order filed with the appeal, it was still out of limitation as the State was entitled to a much lesser time which had been taken by the State in obtaining another copy of the same order of the trial Court. The view adopted by the Allahabad High Court was undoubtedly supported by a decision of the Lahore High Court in *Mathela v. Sher Mohammad*, AIR 1935 Lah 682. In that case also it had been held that the time requisite means simply time required by the appellant to obtain a copy of the decree, assuming that he acted with reasonable promptitude and diligence, and that the time requisite for obtaining a copy is the shortest time during which copy would have been obtained by the appellant, and has nothing to do with the amount of time spent by him in obtaining the particular copy which he chose to file with the memorandum of appeal. While accepting the State's appeal against the decision of the Allahabad High Court, their Lordships of the Supreme Court overruled the Lahore view. No such thing happened in the instant case. The question as to whether the time between the

date on which the certified copy is in fact ready for delivery to the knowledge of the applicant, and the date on which he actually takes delivery of the copy, should or should not be treated as time requisite for preparing the copy never came up for consideration before the Supreme Court in *Maharaja Narain's case*, AIR 1968 SC 960. On the other hand, it is apparent that their Lordships of the Supreme Court did not differ from the view taken by the Judicial Committee in *Pramatha Nath Roy v. William Arthur Lee*, 49 Ind App 307 = AIR 1922 PC 352. In that case, the Judicial Committee had held that the applicant was not entitled to deduct the time lost due to his own laches, and that the time which need not have elapsed, if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order, could not be regarded as 'requisite' within the meaning of sub-section (2) of Section 12. Their Lordships expressly approved of the view taken by a Full Bench of the Madras High Court in *Tirumala Reddi v. Anave-mareddi*, ILR 57 Mad 560 = AIR 1934 Mad 306 (FB) to the effect that the words "time requisite for obtaining a copy of the decree, sentence or order" in Section 12(2) of the Limitation Act mean the time beyond the party's control occupied in obtaining the copy which is filed with the memorandum of appeal, and not an ideal lesser period which might have been occupied if the application for copy had been filed at some other date.

The judgment of the Supreme Court is, therefore, of no avail to the petitioner. If the view sought to be canvassed by Mr. Puran Chand were to be accepted, it would have to be held, as suggested by the learned counsel, that if after coming to know that the certified copy is ready, the applicant sits at home for six months or a year, and actually chooses to collect the copy after the expiry of that period, he would be entitled to add even those six months or year to the time to which he is entitled for filing the appeal under Section 12(2) of the Limitation Act. This appears to us to be preposterous. We have, therefore, no hesitation in repelling this contention of Mr. Puran Chand, and in holding that the last date for filing the Supreme Court Application in this case was June 22, 1968, after availing of the normal period of sixty days provided under Article 132, and an additional period of 36 days under Section 12 (2) of the Limitation Act. The Supreme Court Application was, therefore, filed far beyond time when it was submitted to this Court for the first time on September 20, 1968.

4. Counsel then submitted that we should extend the time for filing the application under Article 133 of the Constitution up to September 20, 1968, by

holding that the applicant was prevented by sufficient cause from filing it any earlier. The only cause which is mentioned in the miscellaneous application is expressed in the following words:—

"That as the charges of the certified copy were more than Rs. 200/-, the petitioner was not able to arrange such a big amount and could only get the copy on August 27, 1968, and the petitioner deserves to be allowed time from the date of application till the date of delivery and if this time is allowed, then the application is within time."

The above quoted averment in the miscellaneous application does not really amount to an explanation for the delay, but is a plea in support of the first submission made by counsel. Even otherwise, we are unable to hold that if an applicant is not able to collect a certified copy for about three months after it is ready to his knowledge because he had to arrange for money to pay the costs of the copy, it would amount to a sufficient cause for delay in filing the petition within the meaning of Section 5 of the Limitation Act. A Division Bench of this Court consisting of Dula, J. and my Lord P. C. Pandit, J. held in *Punjab State v. Gopal Singh*, AIR 1964 Punj 154, that whether the appellant happens to be the State Government and the reason given out for the delay in filing an appeal was that the delay had occurred because on the last day of the limitation, the appellant discovered that it did not have sufficient money to buy the necessary court-fee, but no explanation is forthcoming as to why such state of affairs was allowed to come into existence, the appellant is not entitled to the benefit of Section 5. Though in that case the Government official concerned could not necessarily be expected to pay the money required for court-fee from his pocket, and no latitude was allowed to the Government as no explanation was given for not putting the official concerned in funds within time, the position is worse in the present case.

Mere non-availability of funds for obtaining the requisite certified copy is, in our opinion, no ground for the extension of time under Section 5 of the Limitation Act. Once it is found that the Supreme Court Application was barred by time, the petitioner has also to explain as to what prevented him from filing the application for leave to appeal to the Supreme Court even after obtaining the certified copy of the judgment on August 27, 1968, till he actually filed it on September 20, 1968. Even a purported explanation for this delay is not forthcoming in the application of the petitioner or the affidavit supporting it. We are, therefore, unable to allow the application under Section 5 of the Limitation Act as there is no valid

ground whatever for extending the time under that provision of law.

5. Civil Miscellaneous 3005/C of 1968, is dismissed for the foregoing reasons. The application for extension of time having been dismissed, Supreme Court Application No. 329 of 1968, also fails and is dismissed as time-barred. Costs of the respondents in the S. C. A. and in the Civil Miscellaneous Application shall be borne by the petitioner.

6. MEHAR SINGH, C. J.: I agree.

7. P. C. PANDIT, J.: I agree.

Petition dismissed.

AIR 1970 PUNJAB & HARYANA 284
(V 57 C 42)

C. G. SURI, J.

Hardeep Singh Inder Singh, Appellant
v. Smt. Dalip Kaur, Respondent.

F. A. F. O. No. 93-M of 1968, D/- 19-9-1969, from order of Sub. J., 1st Class, Barnala, D/- 13-8-1968.

Hindu Marriage Act (1955), S. 9 — Wife withdrawing from society of husband along with children — Husband's petition for restitution of conjugal rights — Wife has to prove reasonable cause as contemplated by S. 9 (2) — Failure to prove — Husband entitled to decree.

A husband cannot be denied a decree for restitution of conjugal rights unless the wife proves just cause for staying away from the husband. What is just cause or reasonable excuse within Section 9 (1) Hindu Marriage Act is indicated in Sec. 9 (2). AIR 1967 Madh Pra 204 & 69 Pun LR 566 & 69 Pun LR 603 & AIR 1963 Andh Pra 312, Ref. to. (Para 5)

A mere allegation without proof by the wife in a husband's petition for restitution that she was not pulling on well with the mother-in-law and that she had been turned out of the house after being given a beating is not enough to disentitle the husband to a decree for restitution. Where the husband was justified in refusing to accede to wife's request to set up a separate house from his parents, there cannot be said to exist a just cause for the wife to live separately along with her children. If the wife was living separately without just cause, she was not entitled to maintenance and the failure of the husband to provide her and children with maintenance is not a ground for declining him a decree for restitution of conjugal rights against the wife. AIR 1959 Punj 162, Dist. (Paras 4, 6)

Cases Referred: Chronological Paras
(1967) AIR 1967 Madh Pra 204
(V 54) — 1967 MPLJ 154, Shyam-
lal v. Smt. Sarswati Bai 5
(1967) 69 Pun LR 566, Roshan Lal
v. Basant Kumari 5

KM/LM/F831/69/KSB/M

(1967) 69 Pun LR 603, Gurdip Kaur

v. Partap Singh

(1963) AIR 1963 Andh Pra 312

(V 50) = (1962) 2 Andh WR 434,

Annapurnamma v. Appa Rao

(1959) AIR 1959 Punj 162 (V 46) =

61 Pun LR 188, Gurdev Kaur v.

Sarwan Singh

Atma Ram, for Appellant; Tirath Singh,
for Respondent.

JUDGMENT:— Shri Hardip Singh has filed this appeal against the order dated 13-8-1968 of Shri Madan Lal Singhal, Sub Judge 1st Class, Barnala, whereby his petition under Section 9 of the Hindu Marriage Act, 1955, for restitution of conjugal rights against his wife Smt. Dalip Kaur alias Tej Kaur respondent was dismissed, leaving the parties to bear their own costs.

2. A marriage between the parties had been solemnized 10-11 years ago and they had lived together as husband and wife until about 10 months before the filing of the petition in March, 1967. Two male children had been born during the wedlock and they are at present in the custody of their mother. The parties have given different versions as to the reasons that led to their separation after they had lived together for about 10 years and had been blessed with two male children. According to the appellant, his wife had left the house with the children as she wanted him to set up a house separate from his parents and that he had declined to do so. The respondent's case is that her mother-in-law was harassing her all the time and used to threaten that she would prevail upon the appellant to marry again and that she had been turned out of the house after being given a beating. She offered to come back to her husband's house if he separated from his parents.

3. The pleadings of the parties had given rise to the following two issues:—

(1). Whether the respondent has withdrawn from the society of the petitioner without reasonable cause or excuse?

(2) Whether there is no legal bar to the granting of the petition?

The learned trial Judge had found, inter alia, that the respondent was not pulling on very well with her mother-in-law and that the appellant was compelling her to live in his parental house where it was difficult for the respondent to live in peace. The fact that the appellant had not sent his wife and children any maintenance or expenses for about 4 years had also influenced the decision. There was no clear finding that the wife had ever been beaten or otherwise cruelly treated. The respondent was, therefore, found to be justified in withdrawing from the appellant's society.

4. It is in evidence that the appellant's brothers have shifted to another village

and the appellant is helping his old parents in the cultivation of the ancestral land. He is the only one to look after them in their old age, and it cannot be said that there are no sufficient grounds for his failure to accede to the respondent's demand that he should set up a separate house. I can very well imagine that the relations between the respondent and her mother-in-law have not been very happy or cordial but in spite of that the respondent has lived in that house for very nearly 10 years and had borne the appellant two male children. There would be small bickerings whenever two persons have to live under the same roof and it is not every difference that should lead to the wrecking of the marriage or the future of the children. Even the spouses may go on having petty bickerings and quarrels for a lifetime and still make a thumping success of the marriage. Married life would be impossible without a spirit of give and take, and mutual adjustments and compromises. There is reliable evidence on record that there are no serious differences between the parties and that their differences can be patched up if a correct approach is made by the parties. The respondent's witness Mit Singh, R. W. 4 had asked her as to why she did not go back to her husband. She expressed her willingness if some one were to come to take her. She apprehended that the appellant would marry again. The respondent had even told that witness that in spite of the fact that her mother-in-law always fighting with her, she would willingly go back to her husband if somebody were to come to take her there. The appellant's witness Sital Singh admits that there have been differences between the respondent and her mother-in-law but the appellant has been making attempts to bring back his wife and children. He had filed an application before the Guardian Judge at Sangrur for the custody of the children under Sec. 25 of the Guardians and Wards Act but the Guardian Judge had dismissed that petition on 31-7-1968 on the ground that a petition under Section 9 of the Hindu Marriage Act was pending between the parties and that the matrimonial Court was seized of the matter and that the Guardian Judge need not, therefore, pass any orders at that stage. It had, however, been observed that if the matrimonial Court failed to make an order with regard to the custody of the children the appellant could approach the guardianship Court again sometimes later. There is no reliable evidence that the appellant had even beaten or cruelly treated his wife. He has sound reasons for living with his parents and helping them in the cultivation of their ancestral land in their old age. The appellant and his mother are likely to behave better after the respondent has made them

suffer the pangs of separation for more than 3 years. There are no sufficient reasons on which the respondent can justify her withdrawing from the husband's society.

5. In *Shyam Lal v. Smt. Sarswati Bai*, AIR 1967 Madh Pra 204, a Division Bench observed that the just cause entitling the wife for living separate must be grave and convincing and that legal cruelty has to be considered by keeping in view the physical and mental conditions of the parties, their age, environments, standards of culture and status in life. Standard of proof for matrimonial offences is the same as in criminal cases and the charge has to be established beyond reasonable doubt. A husband cannot be denied a decree for restitution of conjugal rights unless the wife proves just cause for staying away from the husband.

In *Gurdeep Kaur v. Partap Singh*, (1967) 69 Pun LR 603, Pandit J. held that it was difficult to hold as a broad proposition of law that simply because the husband was unable to give any explanation as to why his wife had left his house, his application for restitution of conjugal rights should be dismissed on that ground alone, even though he had been able to prove that his wife had withdrawn from his society without any reasonable cause. It was for the wife to prove and explain her defence that she had been turned out by her husband after she had been beaten. The precise reason why the wife left the house of the husband would be specially within her knowledge and it is for her to plead and prove those precise reasons.

Koshal J. had taken the same view in *Roshan Lal v. Basant Kumari*, (1967) 69 Pun LR 566, and the material portions of the ruling have been reproduced by the learned trial Judge in his judgment. The husband's appeal was accepted in that case even though the wife was held to have a say in the matter of her husband setting up a residence separate from his parents.

In *Annapurnamma v. Peddigari Appa Rao*, AIR 1963 Andh Pra 312, it was held that the reasonable excuse which could be successfully pleaded by the wife in defence of her husband's petition for restitution of conjugal rights would be one which would afford her a ground either for judicial separation or for nullity of marriage or for divorce. What is reasonable excuse under sub-section (1) is indicated in sub-section (2) of S. 9 of the Hindu Marriage Act, 1955. The learned trial Judge has not given any cogent reasons for ignoring this ruling of a Division Bench. He has not stated any authority in support of his observation that Section 9 (1) has to be read independently of Section 9 (2). In *Gurdev Kaur v. Sarwan Singh*, AIR 1959 Punj 162, different view had been taken by Grover, J. while observing as follows:—

"Where the husband is guilty of conduct which falls short of legal cruelty in the sense that it is not cruelty of the kind mentioned in Section 10 (1) (b) of the Hindu Marriage Act, but his misbehaviour or misconduct is such that the wife is fully justified in separating herself from him, the husband cannot succeed in his petition under Section 9 as it will not be possible for the Court to say that the wife has withdrawn herself from his society without reasonable excuse. In a case of this nature the petition shall fail not because of any defence set up by the wife under Section 9 (2) but it cannot succeed on account of the non-fulfilment of one of the essential ingredients of sub-sec. (1) of S. 9. Apart from the provisions of Section 9 (1) even if a proceeding is undefended it is obligatory on the Court to be satisfied under Section 23 (1) (a) that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief. This makes the position clearer that the Court is bound to take into consideration the conduct of the petitioner. If the petitioner has by his own misdeeds forced his spouse to leave him, he cannot be allowed to take advantage of his own wrong and ask for the assistance of the Court to perpetuate his own wrong doing."

The facts of the case cited were, however, different from the facts of our case. In the case cited it had been found that the wife was being kept in illegal confinement by the husband and that this amounted to cruel treatment even if it fell short of legal cruelty. Wrongful or illegal confinement was sure to have a harmful or injurious effect on the health of the wife. No such cruelty on the part of the appellant has been proved in this case by the respondent.

6. The appellant's failure to provide maintenance for the respondent and the children was due to the fact that she had not made any application for maintenance and was found to have independent income sufficient to support herself and the children. She was not entitled to any maintenance if she was living separately from her husband without any sufficient cause. She had made an application under Section 24 of the Hindu Marriage Act, 1955, during the pendency of this appeal and Pandit J. had dismissed that application on August 4, 1969. The appellant's failure to make any provision for the maintenance of his wife and the children cannot, therefore, be made a ground for declining him a decree for restitution of conjugal rights against his wife.

7. I, therefore, accept the appeal and grant the appellant a decree for restitution of conjugal rights against the respondent.

Parties are left to bear their own costs throughout.

Appeal allowed.

AIR 1970 PUNJAB & HARYANA 287 (V 57 C 43)

H. R. SODHI, J.

The Workmen of Fire Brigade Section of the Municipal Committee, Faridabad, Petitioner v. K. L. Gosain and others, Respondents.

Civil Writ No. 3470 of 1968, D/- 14-7-1969.

Industrial Disputes Act (1947), Ss. 2 (j), 2 (g) (ii) — Fire Brigade Service maintained by Municipal Committee is 'service' and also 'undertaking' within meaning of S. 2 (j).

A Municipal Corporation is as much an employer as a private person and there can be no manner of doubt that juristic persons are also covered by the expression "employer" as defined in Section 2 (g) (ii) of the Industrial Disputes Act, 1947. A Municipal Corporation is a public corporation and primarily a non-trading one since it has mostly governmental functions to perform within a specified territory. It is indeed a State in miniature. At the same time, it cannot be disputed that some of the activities of a Municipal Corporation may be analogous to a business or trade. It is not every activity of a Municipal Corporation in the performance of which if a dispute arises between the Corporation and its employees, it becomes an industrial dispute. Each case has to be decided on its own facts and circumstances keeping in view as to whether applying the various tests laid down by their Lordships of the Supreme Court in different cases, an activity is an industry and a dispute an industrial one. Even if it be held that "undertaking" to fall within the concept of "industry" must be an enterprise analogous to business or trade, there cannot be a dispute that Fire Brigade service is such an undertaking. It is not necessary that the activity must be one which is likely to bring profit before it can fall in the category of an industry. Fire Brigade service is a 'service' and also an 'undertaking' within the meaning of Section 2 (j) of the Act. In the definition of the expression "industry" as given in the Act, there are no limitations pre-fixed to the word "undertaking" which can be given a wider meaning. AIR 1960 SC 675. Rel on: AIR 1968 SC 554. Ref. (Para 7)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 554 (V 55) =
(1967) 2 Lab LJ 720, Madras
Gymkhana Club Employees'
Union v. Gymkhana Club

6, 7

(1960) AIR 1960 SC 675 (V 47) =
(1960) 1 Lab LJ 523, Corporation
of City of Nagpur v. Its Employees

6, 7

(1957) AIR 1957 SC 110 (V 44) =
(1957) 1 Lab LJ 8, Baroda Borough
Municipality v. Workmen

6

(1953) AIR 1953 SC 58 (V 40) =
(1953) 1 Lab LJ 195, D. N. Banerji
v. P. R. Mukherjee

6

L. D. Adlakha and S. K. Aggarwal, for
Petitioner; R. S. Mittal (for No. 3) and
K. L. Jagga, Asst. Advocate General
(Haryana), for Respondents.

JUDGMENT:— This writ petition raises an important question as to whether a Fire Brigade Service maintained by Municipal Committee, Faridabad, is an industry within the meaning of Section 2 (j) of the Industrial Disputes Act, 1947 (14 of 1947) (hereinafter called the Act), so as to give jurisdiction to the State Government, under Section 10, to refer a dispute between a Municipal Committee and its employees to the Industrial Tribunal for adjudication of the same. The facts which led to the writ petition are not in controversy.

2. The petitioners who are the workmen of the Fire Brigade section of the Municipal Committee used to be supplied free electricity and water in their quarters, according to the alleged terms and conditions of their service. The bills had, therefore, to be paid to the departments of electricity and water supply by the Municipal Committee, respondent 3, and the Fire Officer, Haryana, Chandigarh, respondent 2. These respondents did not pay the bills for some time with the result that water and electricity connections of the petitioners' quarters were cut off in the year 1965. The petitioners thus aggrieved moved the State Government by raising what they described to be an industrial dispute but the conciliation proceedings brought about under the Act produced no effect. The State Government then made a reference, under Section 10 of the Act, to the Industrial Tribunal, Haryana, respondent 1, vide Haryana Government Notification No. ID/FRD/206/C/52104, dated 6th December, 1967, in the following terms:—

"Whether the action of the management in withdrawing the free supply of electricity was justified and in order? If not, to what relief the workers are entitled and from which date?"

3. On the pleas raised by the workmen and the Municipal Committee, the following issues were framed by respondent 1, Industrial Tribunal, Haryana:—

(1) Whether the activities of the Municipal Committee which are relevant in the present case cannot be deemed to be an industry and as such the dispute in question is not an industrial dispute?

- (2) Whether the Fire Officer and the Municipal Committee contravened the provisions of S. 9-A of the Industrial Disputes Act? If so, what is its effect on the present reference?
- (3) Is the dispute in question not an industrial dispute for various reasons given in the written statement of the Municipal Committee?
- (4) Is the demand in question stale and belated? If so, what is its effect on the present case?
- (5) Whether the action of the management in withdrawing the free supply of electricity was justified and in order? If not, to what relief the workers are entitled and from which date?

4. It has been found by the Tribunal that the Municipal Committee was always willing to supply free electricity to the staff of the Fire Brigade which consisted of about 25 employees, and even passed a resolution on 2nd March, 1965, approving the payment of the electric bills of the Fire Brigade staff quarters and promising to pay the same in future as well, but the auditors raised an objection as a result whereof the petitioners had to be deprived of this amenity. In the opinion of the Tribunal the objection of the auditors was not very clear and intelligible but the Municipal Committee could not find its way to overcome the same. The Government, therefore, did not permit the Municipal Committee to pay the bills, and finally all the representations of the workmen were turned down in the year 1967. It was then that a demand notice was served by the workmen of the Fire Brigade on the Municipal Committee which led to the present reference.

5. In view of these findings, the Tribunal found no justification on the part of the Municipal Committee or the Fire Brigade Officer to deny the petitioners their right of free supply of electricity but felt compelled to refuse the relief to the petitioners because of its finding that the activity of the Municipal Committee in running the Fire Brigade service could not possibly be deemed to be an industry and the dispute arising was thus not an industrial dispute on which he could adjudicate. The expression "industry" has been defined in Section 2 (j) of the Act as under:—

"'Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen." The expression "employer" has also been defined in CL (ii), sub-section (g) of the same section and means—

"(ii) In relation to an industry carried on by or on behalf of a local authority,

the chief executive officer of that authority."

6. The Tribunal relied upon tests laid down by the Supreme Court in *Madras Gymkhana Club Employees' Union v. Gymkhana Club*, (1967) 2 Lab LJ 720 = (AIR 1968 SC 554), in order to come to the conclusion that the activity of the Committee in running the Fire Brigade service could not possibly be described as an industry, as according to it, Fire Brigade service does not fall in any of the categories viz. business, trade, undertaking, manufacture, or calling of employers as referred to in Section 2 (j). There is a direct authority of the Supreme Court dealing with Fire Brigade service and reported as *Corporation of City of Nagpur v. Its Employees*, (1960) 1 Lab LJ 523 = (AIR 1960 SC 675). This was not followed by the Tribunal because of some observations made by their Lordships in *Madras Gymkhana Club Employees' Union's case*, (1967) 2 Lab LJ 720 = (AIR 1968 SC 554). Relevant observations of the Supreme Court which seem to have impelled the Tribunal not to follow the direct authority on the point are as follows:—

"The word 'undertaking' must be defined as:

'any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade'. This is the test laid down in *Banerji case*, (1953) 1 Lab LJ 195 = (AIR 1953 SC 53) (vide supra and followed in the *Baroda Borough Municipal case*, (1957) 1 Lab LJ 8 = (AIR 1957 SC 110)). Its extension in the *Corporation case*, (1960) 1 Lab LJ 523 = (AIR 1960 SC 675); vide supra was unfortunate and contradicted the earlier cases."

7. A Municipal Corporation is as much an employer as a private person and there can be no manner of doubt that juristic persons are also covered by the expression "employer" as defined in Section 2 (g) (ii). A Municipal Corporation is a public corporation and primarily a non-trading one since it has mostly governmental functions to perform within a specified territory. It is indeed a State in miniature. At the same time, it cannot be disputed that some of the activities of a Municipal Corporation may be analogous to a business or trade. It is not every activity of a Municipal Corporation in the performance of which if a dispute arises between the Corporation and its employees, it becomes an industrial dispute. Each case has to be decided on its own facts and circumstances keeping in view as to whether applying the various tests laid down by their Lordships of the Supreme Court in different cases, an activity is an industry and a dispute an industrial one. In *Madras Gymkhana Club Employees Union's case*, (1967) 2 Lab LJ 720

- (1917) 1917 AC 352 = 86 LJBK 715,
 Yorkshire Rly Co. v. Highley 13
 (1912) 1912 AC 44 = 108 LT 961,
 Barnes v. Nunnery Colliery Co. Ltd. 6, 12
 (1909) 1909 AC 31 = 78 LJBK 31,
 Reed v. Great Western Rly Co. 14
 S. R. Bhandari, for Appellant; Vijay Mehta
 for Respondent No. 1; H. M. Lodha, for
 Respondent No. 2.

JUDGMENT: This appeal by the employer is directed against the judgment of the Workmen Compensation Commissioner, Jodhpur dated 15th May, 1967 allowing Rupees 7000 compensation to the widow of deceased Gordhansingh.

2. The material facts which have given rise to this appeal may be shortly stated thus. The deceased was employed as a driver on a truck of the appellant which used to carry petrol tank. The deceased reported to the appellant that the tank was leaking upon which the appellant got the tank partly filled with water at night and ordered the deceased to check it on the next morning. On the next morning i.e., on 10th November, 1963, the deceased entered the tank to see from where it leaked and lighted a match stick as a result of which it caught fire and the deceased received burns due to which he succumbed subsequently.

3. The evidence produced on behalf of respondent No. 1 was that the match box was supplied to the deceased by the appellant. But this fact was denied by the appellant in his deposition and in the opinion of the learned Commissioner it was doubtful that the appellant had given the match box to the deceased though no reasons are given for the aforesaid conclusion.

4. The learned Commissioner on the evidence found that the deceased was a workman, that the accident arose in the course of and out of his employment, that the deceased was getting Rs. 150 p.m. as wages, that the widow was not debarred from claiming compensation on account of her remarriage and that the compensation could not be awarded against the insurance company in these proceedings.

5. Learned counsel for the appellant contends:

1. that in the present case the accident did not arise out of and in the course of the deceased's employment and it occurred due to the 'added peril' that is the lighting of match stick within the petrol tank by him.

2. that the Commissioner ought to have held the insurance company i.e., respondent No. 2 also liable for compensation.

3. that after remarriage respondent No. 1 was not entitled to claim compensation because she no longer remained a dependent.

6. I will take up these contentions one by one. As for the first contention it is urged by the learned counsel that the deceased was employed as a driver at the appellant's

truck and it was no part of his duty to clean the tank or to detect the point of leakage. Even if it be held that the accident arose in the course of employment it cannot be held that it arose out of it because the deceased by lighting the match stick within the tank committed an act which no prudent person would have done in the circumstances and the said act was not necessary for the purpose of employment. Thus it was a case where the deceased by his own conduct brought about the accident. Reliance is placed on Gouri Kinkar Bhakat v. M/s. Radha Kishen Cotton Mills, AIR 1933 Cal 220; Devidayal Ralyaram v. Secy, of State, AIR 1937 Sind 288; Bhurangya Coal Co., Ltd. v. Sahebjan Mian, AIR 1956 Pat 299; Barnes v. Nunnery Colliery Co. Ltd., 1912 AC 44 and Stephen v. Copper, 1929 AC 570.

7. In order to appreciate the argument it would be useful to reproduce the relevant parts of Section 3 of the Workmen's Compensation Act (hereinafter called the Act.)

"3 (1). If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter.

Provided that the employer shall not be so liable—

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;

(b) in respect of any injury not resulting in death, caused by an accident which is directly attributable to

(i) the workman having been at the time thereof under the influence of drink or drugs or

(ii) the wilful disobedience of the workman to an order expressly given or to rule expressly framed, for the purpose of securing the safety of workman, or

(iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen."

8. It would appear from the above provision that if personal injury is caused to a workman by accident arising out of and in the course of his employment, the employer shall be liable to pay compensation except where the injury does not result in the total or partial disablement of the workman for a period exceeding three days and except in the case where injury results in death, the accident is directly attributable to the causes mentioned in sub-clauses (i), (ii) and (iii) of proviso (b). In order to claim compensation the employee has to show not only that at the time of the accident he was in fact employed on duties of his employment, but further that the immediate act

which led to the accident was within the sphere of his duties and not foreign to them. In case of death of an employee due to accident if it has arisen out of and in the course of his employment it is no defence to plead that there was wilful disobedience of any order or rule expressly given or framed for the purpose of securing the safety of the workman. Clause (b) of the proviso to sub-section (1) of Section 3 is limited to those cases where injury has not resulted in death. This is quite evident from the language of the section itself and if any authority is needed I may refer to *Thomas v. Ocean Coal Co. Ltd.*, 1932 All ER 458 where on the following facts that the workman was a hitcher in a coal mine, his duties being, *inter alia*, to help in getting full trams into and empty trams out of the cages. His proper place of work was on the loading, or full tram side of the pit bottom, but he was expected to help, in cases of emergency, in dealing with empty trams on the other side of the pit. On April 17, 1931, he crossed the pit bottom to see to the working of empty trams and then ran back across the shaft bottom towards his proper working side to be ready to receive a cage when it landed. So to cross the shaft bottom, was expressly prohibited by a regulation made under the Coal Mines Act, 1911. Before the workman could get fully across the shaft bottom the descending cage struck and killed him. On a claim for compensation by his widow, it was held on the construction of English Workmen's Compensation Act of 1925 that:

"To considering whether the case came within Section 1(2) of the Workmen's Compensation Act, 1925, it must first be ascertained, disregarding the prohibition contained in the regulation whether the workman's death was due to an accident arising out of and in the course of his employment; if it did, the effect of the prohibition in removing the accident from that category could be annulled if the later conditions in the sub-section as to the act being done by the workman for the purposes of and in connection with his employer's trade or business were fulfilled; in the present case the accident certainly arose out of the workman's employment and it also arose in the course of that employment since he had been engaged to work on both sides of the pit and desired to expedite that work; his contravention of the regulation did not put him outside the sphere of the employment, and so his act was done for the purposes of and in connection with the employers' business; and, therefore, his widow was entitled to compensation."

9. The view expressed in this case was approved later on in *Noble v. Southern Railway Co.*, 1940-2 All ER 333 and on the following facts that the deceased, a fireman employed by the respondents, was ordered to proceed from an engine-shed to a railway station. The permitted routes for this jour-

ney did not involve walking along the railway lines, and several warnings had been issued by the respondents to their staff for bidding them to walk along the lines unless they were using a permitted route. The deceased proceeded to walk along the lines, and was killed by a train; it was held that:

"As the evidence established that the deceased was acting for the purposes of, and in connection with, his employers' trade or business, and was acting within the sphere of his employment, the accident must be deemed to have arisen out of and in the course of his employment, although the act was in contravention of the employers' rule. The widow, was, therefore entitled to recover compensation."

10. However, as it is not the case of the appellant that the act of the deceased was in wilful disobedience of any express order or rule it is not necessary to pursue the matter further. But this much is clear that where injury has resulted in death the question about disobedience of any rule or order is not material so long as it can be held that the accident arose out of and in the course of the employment.

11. Here the contention of the learned counsel for the appellant is that it was the rash conduct of the workman in lighting the match stick within the empty petrol tank which caused the accident and, therefore, the employer cannot be held liable for compensation. He says that the workman by his own conduct 'added peril' and lost his life due to the accident. But if wilful disobedience of any express order or rule cannot be a good defence in case where injury has resulted to death how can mere negligence or rashness on the part of the workman arising out of and in the course of his employment be a good defence? In my opinion, negligence or rash conduct of the workman in cases where the accident arises out of and in the course of the employment, is immaterial. The question in such cases is to see whether what the workman did was really an improper way of doing what he was employed to do or was something outside the sphere of his employment. If the case falls under the first category, the employer is liable, while in cases falling under the second category, there will be no such liability of the employer. The case of *Gouri Kinkar Bhakat*, AIR 1933 Cal 220 is a case falling within the second category. There the learned Chief Justice came to the conclusion that the duties of the workman who was a piecer in the spinning department of a cotton mill did not include anything which required his getting down underneath the table and interfering with the tin rollers while they were in motion. The workman's story as to his dhoti being caught while he was standing by the machine was found impossible. In *Devidayal Balyaram's case*, AIR 1937 Sind 288 where a fitter who wanted some scrap to make nuts

and studs went under the machine to take it from the scrap-heap under the machine which when set in motion caused a permanent injury to his hand which rendered it almost useless. It was no part of the fitter's duty to go into the machine shop and search under the machine for pieces of scrap, and in fact fitters were prohibited from passing through the machine shop to the store to get scrap for the purpose of their work. It was held that:

"As the injury suffered arose out of an added peril to which the fitter had voluntarily and unnecessarily exposed himself, it did not arise out of and in the course of his employment and he was not entitled to compensation".

12. In *Bhurangya Coal Co's case*, AIR 1956 Pat 299 it was held that:

"The principle of added peril contemplates that if a workman while doing his master's work undertakes to do something which he is not ordinarily called upon to do and which involves extra danger he cannot hold his Master liable for the risks arising therefrom. This doctrine, therefore, comes into play only when the workman is at the time of meeting the accident performing his duty." However, on the facts of that case the defence of added peril was found to have no foundation. It was established in that case that the deceased workman had at that time gone from incline 24 to incline 25 to do something which was a part of his usual job and through a route not forbidden; and while he was on his way back from there he suddenly saw the rake of tubs coming up towards him. At that he tried to avoid the danger but the space there being narrow, the attempt failed.

In *Barnes's case*, 1912 AC 44 on the following facts that a boy employed at a colliery, noticing that an endless rope having a number of empty tubs attached to it was about to start from a level where his work was, jumped into the front tub with three other boys in order to ride to his work instead of walking as he ought to have done, and in the course of the journey his head came in contact with the roof of the mine and he was killed. It was a common practice for the boys to ride to their work in the tubs, but it was expressly forbidden and the prohibition was enforced as far as possible. Upon a claim by the father for compensation under the Workmen's Compensation Act, 1906, the County Court Judge found that the accident arose out of the deceased's employment, it was held that:

"There was no evidence to justify this finding, and that the death was caused by an added peril to which the deceased by his own conduct exposed himself, and not by any peril involved by his contract of service."

In the course of the judgment Lord Atkinson observed that:

"In these cases under the Workmen's Compensation Act a distinction must I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well be held in most cases rightly to be a risk incidental to his employment. Not so in the other case."

In the same judgment Lord Mersey observed that:

"He was not doing a permitted act carelessly, but he was doing an act which he was prohibited from doing at all."

The above observations, if I may say so with respect lay down the crucial test."

13. In 1929 AC 570 on the following facts that a farm servant was employed to drive a reaping machine drawn by two horses placed on either side of a centre pole and yoked to the machine by means of chains. While he was driving the machine one of the chains became detached from the backband of the near horse. The driver thereupon stopped the machine, but without putting the cutting blade out of gear, and attempted by walking along the pole between the horses to refix the chain. The pressure of his weight upon the pole made the horses start forward, and he fell from the pole on to the cutting blade and was seriously and permanently injured, it was held that:

"There was evidence to support the finding of the arbitrator that the risk taken by the driver was not incidental to his employment, but was an added peril due to his own voluntary conduct, and accordingly, that the accident did not arise out of the employment."

In that case Lord Shaw of Dunfermline after making the following observations that

"Of added peril and the cluster of cases around that phrase I would beg to be allowed to say that there are no inconsiderable dangers of an erroneous development of the law by making added peril a sole test and therefrom a settled and conclusive category of cases which are excluded from the 'remedial' operation of the Workmen's Compensation Act.

Granted an extra hazard, it is not enough to dub it an added peril and to follow the cases; the true inquiry may be only beginning. On the one hand a fundamental question is, was the course taken by the workman prompted by his own indolence or purely for his own convenience and not in the interests of the work, say, by effectiveness or dispatch? If so then the extra hazard is not only an added peril but a needless peril and an arbitrator is free to find that the accident did not arise out of the employment."

On the other hand, the conditions not merely of skilled labour, but of much simpler and more ordinary labour, over and over again present emergencies and unexpected difficulties, great and small, and Courts and arbitrators should be slow to reckon out of the employment unusual acts done or simple devices adopted to get the work forward and to meet emergent difficulties, the merit of a good workman is to show a dexterity both of hand and mind to overcome these and he may under-estimate the hazard of his efforts in the attempt to be both a time saver and a labour saver. But in my opinion the statute does not on a sound interpretation mean that an accident occurring in the course of such acts and with the hazard referred to did not arise out of the employment. The range of routine is not necessarily the measure of employment; reluctantly and with doubt agreed with the judgment. In the same judgment Lord Warrington of Clyffe quoted with approval the following observations of Lord Sumner in *Lancashire and Yorkshire Rly. Co. v. Highley*, 1917 AC 352 that:

"There is . . . one test which is always at any rate applicable, because it arises upon the very words of the statute and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard to suffer, or to do that which caused his injury? If yes, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment."

14. In this connection it will be useful to notice a few more decisions on the subject. In *Harris v. Associated Portland Cement Manufacturers Ltd.*, 1939 AC 71 on the following facts that

"The appellant's work involved his standing in water, and before doing so, he, like the other workmen similarly employed, tied sacking round the bottom of his trousers to keep them dry. It was part of his duty to see that the sacks after being so used were dried so that they could be available on the following day. It was the recognized practice to dry the sacks at or near an electric fan in a turbine in the motor room. While attempting on one occasion to place the sacking near the fan, which was revolving, the appellant's hand was caught by the fan and severed. On a claim for compensation in respect of this under the Workmen's Compensation Act the County Court Judge found that while the appellant, in seeking to dry the sacking was doing something in the course of his employment, he by putting the sacking in such close proximity to the fan incurred a peril which no workman without extreme rashness would have undertaken and there being nothing in the contract of employment which obliged him to put his hand within the turbine the act was outside

his employment and therefore that he was not entitled to compensation, it was held:

"that once it was found that the act which the appellant was seeking to do was within the scope of his employment, the question of negligence, great or small, in doing the act was irrelevant."

In that case Lord Atkin observed with reference to Stephen's case, 1929 AC 570

"On this finding of fact, which had to be accepted as conclusive, the applicant necessarily failed. The case did not raise the question of the degree of negligence in doing an employment act turning the act into something outside the employment, and I find nothing in the speeches delivered in this House to support that view. The fact is that the workman's negligence in doing his job is one of the most fruitful causes of injury; and, if it would in any degree preclude compensation, the benefits of the Act would be seriously impaired. In truth the negligence of the workman is as much a risk of his employment as the negligence of his fellow workmen. In my opinion if a workman is doing an act which is within the scope of his employment in a way which is negligent in any degree and is injured by a risk incurred only by that way of doing it he is entitled to compensation. One must of course bear in mind the work which he is employed to do, and the place in which he is employed to do it. Some confusion has been introduced into the cases by treating accidents which arose in out-of-employment places as though they were cases of negligence. Still more by the unfortunate misapplication of the expression, 'valuable enough in its right context, of 'added risk'. In a sense every man who does his appointed work negligently adds to the risks of his employment done carefully the risk of that employment done carelessly. In fact the 'added risk' might I think, more correctly be called a 'different risk', i.e., the risk to doing something which is not within his employment at all."

In the same case Lord Thankerton observed that:

"The Courts below appear to me, with all respect, to proceed on a misunderstanding of Lord Halsbury's dictum in *Stephen v. Copper*, 1929 AC 570 and a misapplication of the so-called doctrine of 'added peril'. I cannot agree that the question is one of 'fact and degree' of recklessness; in my opinion there must be a separable act as explained by my noble and learned friend. In my opinion, there was no evidence in the present case on which the arbitrator was entitled to find that there was such a separable act, and the appeal should succeed."

In the same case Lord Wright quoted with approval the words of Lord Macnaghten in *Reed v. Great Western Rly. Co.*, 1909 AC 31 that:

"The problem may be compendiously stated in the words of Lord Macnaghten in *Reed v. Great Western Rly. Co.*, 1909 AC 31 as being whether the man at the time when the accident happened was about his own business, not about the business of his employers."

This case clearly enunciates the meaning of the phrase 'added peril' and its application to cases arising under the Workmen's Compensation Act and lays down that if the act which the workman was doing was within the scope of his employment, the question of negligence greater or small in doing that act is irrelevant. The same view finds expression in *Blanning v. C. H. Bailey Ltd.*, 1942-2 All ER 562 where a workman, employed by the appellants, met with his death through receiving burns caused by his clothing catching fire as the result of his dropping a bottle of petrol near to a stove and the petrol becoming ignited. The petrol was apparently intended to be used by the workman for the purpose of cleaning his hands which became greasy as the result of his work. There was no purpose directly connected with the employment which necessitated the use of petrol. It was contended for the appellants that there was no evidence that the accident arose out of the employment; it was held that

"In the circumstances it was reasonable for the workman to have petrol with him for the purpose of cleaning grease from his hands, its use not being expressly or impliedly prohibited, and, therefore, the accident arose out of his employment".

15. This case, therefore, establishes that no matter how negligent or rash the workman's action, it arises out of the employment if it is within the scope of his duty as an employee.

16. The expression "arising out of employment" is not confined to the "nature of employment" but applies to the employment as such to its nature, its conditions, its obligations, and its incidents (vide Lord Shaw of Dunfermline in *Mrs. Margaret Thom or Simpson v. Sinclair*, 1917 AC 127. Therefore, to find whether the death was caused by added peril, the relevant enquiry to make is whether the thing was within the sphere of employment and incidental to it. Whether it was in the interest of the work of the employer and was simply done carelessly or negligently. If the answer to the above is in the affirmative, then the accident would be said to be out of and in the course of employment and the plea of added peril would fail. On the other hand, if the answer is in the negative and if it is found that thing was foreign to the scope of employment, i.e., something to which the workman voluntarily exposed himself not about the business of the employer but about his own business then it would not be out of employment and it would be a case of added peril.

17. The present case has therefore, to be judged in the light of the above principles. It is clear that the deceased was employed as a driver on the appellant's truck used for the purpose of carrying petrol in a tank. On the previous day he had reported to the appellant that the tank was leaking and so water was put in it for detecting the place from where it leaked. The deceased was asked by the appellant to enter the tank to see from where it leaked. Accordingly the deceased entered the tank which had no petrol in it, but had been partly filled with water and for the purpose of detecting the place from where it leaked, he lighted a match stick. The deceased was at the place of his work and did something in furtherance of the employer's work when the accident occurred. It may be that instead of lighting a match stick he should have used a torch to detect the place of leakage, but for the reason that the tank was empty and had been partly filled with water on the previous night, he might have little foreseen the risk involved. In these circumstances the utmost that can be said is that the deceased acted negligently or rashly, but it cannot be said that the act done was outside the sphere of his employment. The distinction has to be kept in view in cases where the injury by accident is due to a risk assumed independently of the employment and outside it, as distinguished from by an injury which is the result of a mere act of negligence. For the purpose of the appellant's business he had entered the tank to see from where it leaked and for that end also he lighted a match stick. I have, therefore, no doubt that the accident arose out of the deceased's employment and the act of lighting the match stick even if it be held as a rash or negligent act, will not debar his widow from claiming compensation.

18. As for the second contention the Act as appears from its preamble was enacted to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident. The term 'employer' has been defined in the Act and the insurance company does not come within the ambit of that definition. Therefore the Commissioner appointed under the Act will have no jurisdiction to award compensation to a workman against the insurance company unless the case falls within Section 14 of the Act which deals with the liability of the insurers when the employer becomes insolvent, where he has entered into a contract with any insurer in respect of any liability under this Act. Obviously Section 14 has no application in this case. Learned Counsel however, relies upon the provisions of Section 96 (1) and (2) of the Motor Vehicles Act. Under Section 96 (1) an insurer is deemed to be a judgment-debtor when under certain circumstances a decree is passed against the insured. But it

does not contemplate passing of a decree against the insurer himself. Section 96 (2) provides that the insurer shall not be liable under sub-section (1) unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings or in respect of any judgment so long as execution is stayed thereon pending an appeal. These provisions, in my opinion, do not help the appellant at all in his submission that the Commissioner under the Act is authorised to pass a decree against the insurance company even though it was made a party in the proceedings at the instance of the respondent No. 1. The contention has, therefore, no force and is rejected.

19. The last contention that the widow became debarred from claiming compensation on account of her remarriage has also no force because in the Act there is no such provision that after remarriage widow of the deceased would not be regarded as a dependent. Under Section 21 of the Hindu Adoptions and Maintenance Act, 1956, a widow remains a dependant, within the meaning of that section so long as she is not remarried. But the definition of the 'dependent' under the Act is not so restricted and the fact that she has remarried will not disentitle her to claim compensation under the Act.

20. Thus there is no force to this appeal and is hereby dismissed with costs.

Appeal dismissed.

AIR 1970 RAJASTHAN 118 (V 57 C 28)

L. S. MEHTA AND C. M. LODHA, JJ.

Kotah Match Factory Kotah, Appellant v. State of Rajasthan, Respondent.

First Appeal No. 92 of 1958, D/- 3-2-1969, against Judgment of Sr. Civil J., Jalpur, D/- 22-5-1958.

(A) Constitution of India, Article 299 — Scope — Article rules out implied contract between Government and a person.

The provisions of Article 299 are mandatory in character and contravention of these provisions would nullify the contract and would make them void and unenforceable. No State Government can be sued by a private individual where there is the breach of Article 299.

(Para 10)

Article 299 (1) is enacted not for the sake of mere form, but for safeguarding the interest of Government against unauthorised contracts. It is based on the ground of public policy and for the protection of the general public and the functionalities therein cannot be waived or dispensed with.

(Para 11)

Article 299 in effect rules out implied contracts between the Government and another person. Where, there is no contract, express or implied, between the Government and private person in accordance with the mandatory provisions of Article 299 (1) there can be no question of recovery of any money or damages from the Government.

(Para 12)

(B) Constitution of India, Article 295 — Recognition of claim made against former Indian States by successor State or Union — Proof of.

It is true that recognition of the claim made against the former Indian States by the successor State or the Union can be proved by the claimants either by express acknowledgment or recognition or may even be established on relevant facts and the circumstances which may lead to the inference of such recognition. Recognition of such a claim can be either express or implied and in the latter class of cases the inference as to recognition may be drawn legitimately from the facts and the circumstances which may reasonably support such an inference.

(Para 16)

(C) Civil P. C. (1908), Section 90 — New case — Suit against State of Rajasthan for recovery of certain amount due against former State of Kotah — Claim based on fresh agreement arrived at between parties on 18-11-1950 — Plaintiff not coming with positive assertion that his claim is based on recognition by Rajasthan State of past liability or erstwhile Kotah State — No issue on the point framed by Trial Court — At appellate stage, plaintiff cannot be allowed to raise his claim upon plea never put forward by him in course of trial. (Para 13)

(D) Evidence Act (1872), Section 123 — Document which embodies minutes of discussion between private party and State Minister — State can claim privilege under Section 123 — Expression "affairs of the State" — Meaning — (Words and Phrases — "Affairs of the State").

The document which embodies the minutes of the discussion between private party and State Minister and which indicates the advice given by the Minister is certainly protected under Section 123 of the Evidence Act. In suit against State if such a document is not produced and protection under Section 123, Evidence Act, is claimed, the Court cannot compel the State to produce it. At the time when the Evidence Act was enacted the words "affairs of the State" might have had a narrow conception. "Affairs of the State" then might have related to the matters of political or administrative character relating, for instance, to the national defence, public peace, security and good neighbourly relations. But on account of the changed conception of the functions of the State, the State in pursuit of its welfare activities which were in the past treated as purely commercial matters, is apt to claim

the privilege relating to the "affairs of the State" in accordance with Section 123 of the Evidence Act. AIR 1961 SC 493 Rel. on. (Para 14)

(E) Contract Act (1872), Section 2 — Recording of minutes of discussion between private party and State Minister — It does not suggest that a valid agreement has been arrived at between private party and the State in accordance with Art. 299 of Constitution — (Constitution of India, Article 299). (Para 15)

(F) Contract Act (1872), Section 70 — Scope and applicability — Conditions precedent — Claim for compensation under Section 70 is not founded upon contract but upon quasi-contract or restitution — Fact that contract has not been made as required by Article 299 is not material — (Constitution of India, Article 299).

From the language of Section 70, it is apparent that where a claim for compensation is made by one person against another under Section 70, Contract Act, it is not on the basis of any subsisting contract, between the parties. It is on the basis of fact that something was done by the party for another and the said work so done was accepted by the other party voluntarily. With respect to the claim made against the Government of a State under Section 70, Contract Act, it may be that in many cases work done or the goods delivered are the result of request made by some officer or the other on behalf of the State Government. In such a case the request so made may be ineffective or invalid for the reason that the officer making the request was not authorised under Article 299, if the said officer was authorised to make the said request, the request becomes inoperative as it was not followed by a contract executed in the manner prescribed by Article 299 of the Constitution. In either case the thing has been done without a contract and that brings in Section 70, Contract Act. (Para 16)

For invoking the provisions of Section 70 of the Contract Act the first condition is that a person has lawfully done something for another or has delivered something to him. The second condition is that in doing the said thing or in delivering the said thing, he must not have intended to act gratuitously. The third condition is that the person for whom something has been done or to whom something has been delivered must enjoy the benefit thereof. If all these conditions are satisfied, Section 70, Contract Act, would set in and it imposes upon the party concerned liability to make compensation or to restore the thing so done or delivered notwithstanding the fact that the contract had not been made as required by Article 299 of the Constitution. A claim for compensation under Section 70, Contract Act, is not founded upon any contract or tort but upon a third category of law, i.e., a quasi contract or

restitution. AIR 1962 SC 779, Rel. on; AIR 1956 SC 593, Disting. (Para 16)
Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1218 (V 55)=
1968 SCD 951, Mulchand v. State of M. P. 10, 16
(1967) AIR 1967 SC 203 (V 54)=
1966-3 SCR 919, P. B. Chowdhry v. State of M. P. 10
(1964) AIR 1964 SC 1658 (V 51)=
1965-1 SCJ 243, Amar Chand Butail v. Union of India 13
(1963) AIR 1963 SC 1685 (V 50)=
1964-3 SCR 164, Union of India v. A. L. Rallia Ram 10
(1962) AIR 1962 SC 113 (V 49)=
1962-2 SCR 880, Bhikraj Jaipuria v. Union of India 10
(1962) AIR 1962 SC 779 (V 49)=
(1962) Supp (1) SCR 876, State of W. B. v. B. K. Mondal and Sons 10, 16
(1961) AIR 1961 SC 493 (V 48)=
1961-2 SCR 371, State of Punjab v. Sodhi Sukhdeo Singh 14
(1956) AIR 1956 SC 593 (V 43)=
1956 SCR 451, Nagubai Ammal v. B. Shama Rao 16
(1954) AIR 1954 SC 236 (V 41)=
1954 SCR 817, Chaturbhuj Vithaldas Jassani v. Moreshwar Parashram 10
D. P. Gupta, for Appellant; B. C. Chatterji, for Respondent.

MEHTA, J.:— Kotah Match Factory brought an action for the recovery of Rupees 1,19,000 against the State of Rajasthan, on January 18, 1954, in the court of learned Senior Civil Judge, Jaipur City. The plaintiff averments were that the plaintiff was a partnership firm and carried on business of manufacturing matches at Kotah. On December 23, 1935, the former Kotah State agreed to give a refund of a part of the excise duty paid on the stocks of matches produced by the plaintiff and consumed within the State territory for a period of 20 years. Subsequently on March 10, 1941, the said State entered the excise pool with the then British Government of India. Thereafter on April 21, 1941, the said State ordered to pay Rs. 14,000/-, per annum to the plaintiff for future years. On August 31, 1942, that order was modified and it was decided by the said State to refund half the excise duty paid. Later on the above State offered to the plaintiff that from August 16, 1944, Rs. 10,000/-, per annum would be paid for the remaining future period. The plaintiff did not accept this offer. On the other hand, it claimed a sum of Rupees 2,21,049/6/-, together with interest thereon, being half the amount of Rs. 4,42,098/12/-, paid as excise duty by the plaintiff between October 1, 1940, and December 31, 1947, in accordance with the order, dated August 31, 1942.

Eventually, on November 18, 1950, it was agreed between the plaintiff and the suc-

cessor State of Kotah, i.e., the State of Rajasthan, that a sum of Rs. 10,000/- per annum would be paid by the State to the plaintiff with effect from the date on which the last payment was made (i.e., September 30, 1940), till September 30, 1950. In accordance with the terms of the agreement a sum of Rs. 1,00,000/- became due and payable to the plaintiff by the defendant. On May 21, 1953, the plaintiff served a notice on the State of Rajasthan in accordance with the terms of Section 80, Civil Procedure Code as the defendant failed to make payment despite the notice, the plaintiff is entitled to claim interest @ 6% per annum as damages and that amount came to Rupees 19,000/-. Thus, the money outstanding in favour of the plaintiff against the defendant came to Rs. 1,00,000/- as principal and Rs. 19,000/-, on account of interest. The cause of action accrued on November 18, 1950. The plaintiff, in the end, prayed that a decree for Rs. 1,19,000/- together with future interest @ 6% per annum in addition to costs of the suit be passed in its favour.

2. In its written statement, dated September 23, 1954, the State Government denied the existence of any agreement for giving a refund of the part of the excise duty paid by the plaintiff. The agreement allowing concession to the plaintiff was executed on August 17, 1937. The main provisions of the agreement were:—

(1) That a monopoly for manufacturing matches was granted till September 30, 1955;

(2) That duty was payable on the products of the factory as follows:—

(a) on export of matches outside Kotah State 3 pies per gross, and

(b) on imports from the factory to Kotah State one rupee, one anna and pies six per gross;

(3) That out of the duty, a rebate was payable to the factory at the end of each year at the rate of annas 12 per gross till September 30, 1938, and after that at the rate of annas 8 per gross.

It was admitted in the written statement that the former Kotah State joined the Government of India match-pool with effect from March 10, 1941. His Highness Maharaja of Kotah agreed to give to the plaintiff a subsidy of Rs. 5000/-, annually for a period not exceeding five years, which was later on (i.e., on April 21, 1941) raised to Rs. 14,000, per annum. This order was further modified on August 31, 1942, and the former Kotah State ordered to refund half the excise duty paid by the plaintiff in 1941-42. Later on, the terms were again changed with the approval of the plaintiff. On August 16, 1944, it was decided by mutual consent that the agreement, D/- 17th August, 1937, be cancelled with effect from March 14, 1941, and as consideration or compensation thereof, the following payments or provisions should be made:—

(i) an amount equivalent to the rebate that would have been payable to the factory according to Clause 8 of the agreement, dated August 17, 1937, since the date on which the last payment was made and upto 16th August, 1944;

(ii) the balance of compensation or consideration would be paid by instalment of Rs. 10,000/-, per annum during the time when the fresh grant to be made to the factory remained in force. The State would be entitled to make deduction from this amount @ Rs. 40/-, per day for the number of days that the factory remained closed without satisfaction or without adequate cause to the satisfaction of His Highness's Government; and

(iii) a fresh grant should be made to the factory.

The plaintiff, however, backed out of this agreement and continued making representations to the defendant after the merger of Kotah State with the United State of Rajasthan. It was also averted in the written statement that no agreement was made, as alleged by the plaintiff on November 18, 1950, to pay a sum @ Rs. 10,000/- per year, from the date on which the last payment was made till September, 1950. The State of Rajasthan neither took any decision in the matter on November 18, 1950, nor was any such decision conveyed to the plaintiff. No agreement, as alleged in the plaint, was executed by the State of Rajasthan in favour of the plaintiff. The defendant further pleaded in para No. 3 of the written statement that some discussion, no doubt, took place between the representatives of the plaintiff and the Minister of Industries and Commerce on November 18, 1950, and some advice was tendered by the Minister concerned, but the same cannot be said to be a decision or an agreement with the State of Rajasthan.

In para No. 4 of the written statement, the defendant contended that an amount of Rs. 1,00,000 or any other sum is not payable by the defendant to the plaintiff. The defendant also denied any cause of action alleged to have been accrued in favour of the plaintiff on November 18, 1950, as no Government order was passed, nor was any valid commitment made by the State. The plaintiff's suit according to the defendant is also not within time. The plaintiff's claim includes the amount of the pre-merger period also and on account of a change in sovereign, the defendant State of Rajasthan is not bound by any agreement which the former Kotah State might have made, as the same was never recognised by the present government. After coming into force of the Constitution of India, excise duties on goods manufactured in India were included in the Union list and the State of Rajasthan could not have validly entered into any agreement with the plaintiff. In the end, it was prayed by the defendant that the plaintiff's

suit should be dismissed in the absence of any alleged agreement, dated November 18, 1950.

3. On March 23, 1955, learned Senior Civil Judge, Jaipur City, framed appropriate issues. The plaintiff examined three witnesses, namely, Rajendra Kumar P. W. 1, Subhudra Kumar P. W. 2, and Bhanwarlal Sethi, P. W. 3. In its defence, the State Government produced one witness, Shri Mathura Nath, D. W. 1. By its judgment, dated May 22, 1958 the trial Court dismissed the plaintiff's suit with costs. The finding of the trial Court is that the plaintiff has not proved that an agreement had been arrived at between the parties in conformity with the provisions of Article 299 of the Constitution. The plaintiff based its claim on the agreement, dated November 18, 1950, and not on the previous liability of the Kotah State and, therefore, Article 6 of the covenant does not give right to a citizen to enforce it in a Court of law. As Article 6 of the covenant is an agreement between high contracting parties, a citizen cannot take advantage of it. Under Section 73 of the Contract Act, statutory recognition is given to the general rule that in the event of a contract the party which suffers by a breach thereof is entitled to recover from the party breaking the contract compensation for any loss or damages caused thereby to him, but that is not the plaintiff's case and, therefore, the plaintiff is not entitled to get interest.

4. Aggrieved against the above verdict, the plaintiff has taken the present appeal. Contentions of learned counsel for the appellant are:—

(1) That the trial Court went wrong in holding that there was no contract between the parties arrived at on November 18, 1950;

(2) that the State Government gave recognition to the past liability incurred by the erstwhile Kotah State and, therefore, State Government is liable to compensate the appellant on that account;

(3) that the trial Court wrongly held that the document, dated November 18, 1950, in possession of the defendant, is protected from disclosure in accordance with Section 123, Indian Evidence Act; and

(4) that the plaintiff is entitled to claim benefit under Section 70 of the Contract Act and that the State Government is bound to make compensation under that section.

As for the first point, regarding the existence of contract alleged to have been arrived at between the parties on November 18, 1950, the plaintiff has examined, three witnesses, namely, P. W. 1, Rajendra Kumar s/o. Bhanwar Lal Sethi, P. W. 2, Subhudra Kumar and P. W. 3, Bhanwarlal Sethi. The defendant examined D. W. 1 Shri Mathura Nath. P. W. 1 Rajendra Kumar has stated in the examination-in-chief that his father Bhanwarlal Sethi had had a talk with the Minister for Industries and Commerce, Shri Sidh Raj Dhadha and Shri Bhanwarlal

Sharma, Deputy Secretary Industries, on 18th November, 1950, in connection with the rebate to be paid to the Kotah Match Factory. A decision was taken that the Kotah Match Factory was entitled to receive rebate from the years 1940 to 1950 at the rate of Rs. 10,000/- per year. This agreement in writing had taken place on the same day and both Shri Sidh Raj Dhadha and Shri Bhanwarlal Sethi put signatures on the agreement. It was further decided that for future a new agreement should be reduced to writing in the changed circumstances between the Kotah Match Factory and the Government for the period 1950 onwards and a rebate at the rate of Rs. 10,000/- per year be allowed from 1950 to 1955, subject to the factory producing minimum output. In his cross-examination, the witness has categorically said that no document was executed on November 18, 1950, in the form of an agreement.

The document simply contained a reference of the discussion between B. L. Sethi and the Minister for Industries and Commerce, and the Deputy Secretary. The witness also stated in the cross-examination that he does not remember whether or not Secretary Industries and Commerce or the Deputy Secretary of the Department put his signature on the agreement. He further deposed that after November 18, 1950, no request was made to the Government in writing for supplying a copy of the said agreement to the plaintiff. The witness then said that when his father put his signature on the agreement, Shri Sidh Raj Dhadha was not present. The Deputy Secretary brought a paper signed by Shri Sidh Raj Dhadha, but Shri Dhadha did not sign it in his or his father's presence. The other paper on which the signature of his father was obtained was a carbon copy of the agreement, dated November 18, 1950, bearing the signature of Shri Sidh Raj Dhadha. The Deputy Secretary did not obtain the signature of Shri Dhadha on the carbon copy. From the evidence of P. W. 1 Rajendra Kumar, it is plain that no formal agreement was made between the parties on November 18, 1950. Only minutes of discussion were recorded. Had any such agreement been made, the representatives of the plaintiff would have immediately obtained a copy thereof or would have not kept quiet for a number of years without obtaining its copy.

5. P. W. 2 Subhudra Kumar has stated that signatures of Shri Sidh Raj Dhadha and Shri Bhanwarlal Sethi were obtained on the decision which had taken place as a result of the discussion between both the parties. The witness has, however, unequivocally stated that he cannot say whether the discussions which had occurred were reduced to writing in the form of proceedings or in the form of an agreement. The witness has further testified that Shri Sidh Raj Dhadha did not sign any agreement in his presence.

He also does not know whether or not the agreement was written on a foolscap paper. He does not remember how many lines the agreement embodied. Thus, P. W. 2 Subhuddra Kumar fails to give any positive evidence in regard to the agreement.

6. P. W. 3 Bhanwarlal Sethi, who is alleged to have conducted negotiation with the Minister in the matter in controversy, has stated that he had had some talks on his own behalf with the Minister and that he had no letter of authority on behalf of the Kotab Match Factory to hold such talks. The witness has further said that Shri Bhanwarlal Sharma, Deputy Secretary, Industries and Commerce, took down notes of the talks which had taken place in the matter. Signatures of the parties were not obtained on the notes. Both the witnesses and Shri Sidhraj Dhadha put their signatures on the matter which was got typed by Shri Dhadha. The witness has also said that Shri Sidhraj Dhadha did not sign any of the papers in his presence. No document was written on behalf of the Rajpramukh and no letter in writing was addressed for the issue of a copy of the said document. From the evidence of Shri Bhanwarlal Sethi also it is not evident that an agreement was duly executed on November 18, 1950, between the two parties.

7. The defendant examined Shri Mathura Nath, D. V. 1. He was Deputy Secretary, Industries Government of Rajasthan, Jaipur. He has stated that Shri B. L. Sharma had worked as Deputy Secretary, Industries in the year 1950. He has looked into all the relevant records. He could not come across any agreement alleged to have been arrived at between the parties. He could only find certain notes about the talks which had taken place between the parties. These notes were dated November 18, 1950. The witness has further deposed that the State has got no other document of November 18, 1950, except these notes and that neither any agreement was recorded on November 18, 1950, nor was the signature of Shri Bhanwar Lal Sethi obtained on any such document that day.

8. The above evidence does not show that the plaintiff has succeeded in proving the existence of an agreement alleged to have been arrived at between the two parties on November 18, 1950. To prove this fact the best evidence would have been that of Shri Sidh Raj Dhadha, Ex-Minister, Industries and Commerce, but, for the reason best known to the plaintiff, he has not been examined.

9. It will not be out of place to mention here that under Rule 34 of the Rules of Business, framed under Article 166 of the Constitution of India, it is provided that the Finance Department shall be consulted before the issue of orders upon all proposals, which affect the finances of the State and in

particular proposals involving an expenditure for which no provision has been made in the Appropriation Act. Rule 35 of the said Rules lays down that the views of the Finance Department shall be brought on the permanent record of the Department to which the case belongs and shall form part of the case. In this case it is nowhere found that the proposal of granting rebate to the plaintiff, involving appreciable financial commitment, was referred to the Finance Department. Unless that was done, it cannot be said that the proposal reached the final stage of maturity.

10. Article 299 (1) of the Constitution is in the terms following:—

"All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor (or the Rajpramukh) of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor (or the Rajpramukh) by such persons and in such manner as he may direct or authorise." (Note: The words "or the Rajpramukh" were omitted by the Constitution (Seventh Amendment) Act, 1956).

The provisions of Article 299 are mandatory in character and contravention of these provisions would nullify the contract and would make them void and unenforceable. No State Government can be sued by a private individual where there is the breach of the provisions of Article 299 of the Constitution: see *Bhikraj Jaipuria v. Union of India*, AIR 1962 SC 113. It was stated in that case that under Section 175 (3) of the Government of India Act, 1935, which is corresponding to the provisions of Article 299 of the Constitution of India, the contracts had (a) to be expressed to be made by the Governor (or Rajpramukh) or Governor-General; (b) to be executed on behalf of the Governor (or Rajpramukh) or Governor-General; and (c) to be executed by an officer duly appointed in this behalf and in such manner as the Governor (or Rajpramukh) or Governor-General directed or authorised. It was also held that the provisions of Section 175 (3) of the Government of India Act, 1935, were mandatory as the object of enacting these provisions was that the State should not be saddled with liability for unauthorised contracts. The evidence in that case showed that no contract was expressed to be made by the Governor-General and was not executed on his behalf. It was, therefore, held that the contract was not binding on the Union of India and the Dominion of India cannot be sued by the private individual for compensation for breach of contract.

The same principle was reiterated by their Lordships of the Supreme Court in *State of West Bengal v. M/s. B. K. Mondal and Sons*, AIR 1962 SC 779. It was held in

that case that the provisions contained in Section 175 (3) of the Government of India Act, 1935, corresponding to Article 299 of the Constitution, were mandatory in nature. The intention of Parliament in enacting Section 175 (3) was that the State should not be burdened with liability based on unauthorised contracts. The provisions were made in the public interest and so the word "shall" used therein must be held to make it obligatory and not directory. Further, the decision in *Chatturbhuj Vithaldas Jassani v. Moreswar Parashram*, AIR 1954 SC 236 was explained in that case and it was held that it should be confined to its own facts in the context of the Representation of the People Act. Their Lordships of the Supreme Court had had the occasion to consider the matter again in *Union of India v. A. L. Rallia Ram*, AIR 1963 SC 1685, and it was held on that case that so long as all the requirements of Section 175 (3) of the Government of India Act were fulfilled and were clear from the correspondence, Section 175 (3), did not necessarily require the execution of any formal document.

Again, in a later decision in *P. B. Chowdhry v. State of Madhya Pradesh*, AIR 1967 SC 203 it was observed that in view of Article 299 (1) of the Constitution there could be no implied contract between the Government and any other person, the reason being that if such an implied contract were allowed, that would in effect make Article 299 (1) useless, for then a person, who had a contract with Government, which was not executed at all in the manner provided in Article 299 of the Constitution could get away by saying that an implied contract might be inferred by the facts and circumstances of a particular case. Their Lordships further pointed out that if the contract between the Government and another person is not in compliance with Article 299 (1) of the Constitution, it would be no contract at all and could not be enforced either by the Government or the other person as a contract. In a recent decision, reported in *Mulchand v. State of Madhya Pradesh*, AIR 1968 SC 1218, his Lordship Ramaswami, J., speaking for the Court, held that the provisions of Section 175 (3) of the Government of India Act 1935, or the corresponding provisions of Article 299 (1) of the Constitution of India are characterised as mandatory and their contravention would nullify the contracts and make them void and that there is no question of any estoppel or ratification in such a case.

11. What was said in these cases with respect to Section 175 (3), Government of India Act, 1935, or the corresponding Article 299 (1) of the Constitution of India was that the provisions of Section 175 (3) and Article 299 (1) were enacted not for the sake of mere form, but for safeguarding the interest of Government against unauthorised contracts. They are based on the ground of

public policy and for the protection of the general public and these formalities cannot be waived or dispensed with.

12. In the light of the above discussion, the position in the present case is that there was no contract between the appellant and the Government as required by Article 299 of the Constitution of India. In view of the mandatory provisions of Article 299 (1) of the Constitution, no implied contract can be spelled out between the Government and the appellant, for Article 299 in effect rules out implied contracts between the Government and another person. Where, as here, there is no contract, express or implied, between the Government and the appellant in accordance with the mandatory provisions of Article 299 (1) of the Constitution, there can be no question of recovery of any money or damages from the Government. The view, therefore, taken by the trial Court that the suit money was not recoverable from the defendant cannot be said to be incorrect.

13. This brings us to the next point, raised on behalf of the appellant, namely, whether the State Government gave recognition to the liability incurred by the Kotah State. Learned counsel for the appellant submits that it did so. In support of his contention he cited *Amar Chand Butail v. Union of India*, AIR 1964 SC 1658, as also Article 295 of the Constitution. It is true that recognition of the claim made against the former Indian States by the successor State or the Union can be proved by the claimants either by express acknowledgment or recognition or may even be established on relevant facts and the circumstances which may lead to the inference of such recognition. Recognition of such a claim can be either express or implied and in the latter class of cases the inference as to recognition may be drawn legitimately from the facts and the circumstances which may reasonably support such an inference. It is hardly necessary to deal with the point elaborately. Here, it is not the plaintiff's case that the successor State recognized the appellant's claim against the erstwhile Kotah State.

The plaintiff approached the Civil Court with a definite case that a fresh agreement had been arrived at between the two parties on the basis of an agreement, dated November 18, 1950, and it was agreed between the two parties that a sum of Rupees 10,000/- per annum would be paid by the State of Rajasthan to the plaintiff from the date on which the last payment was made: vide para 3 of the plaint. In para 8 of the plaint the plaintiff has made it further clear that the cause of action accrued on November 18, 1950. The plaintiff has not come forward with a positive assertion that his claim is based upon the recognition by the Rajasthan State of the past liability of the erstwhile Kotah State. The plaintiff cannot now turn round and set up a new case and take the opposite party by surprise.

Such a claim was never asserted in the plaint, nor was the opposite party given an opportunity to refute it. No issue on the point was framed by the trial Court. The appellant, therefore, cannot be allowed to raise his claim upon a plea which was never put forward by him in the course of trial. In *Amarchand Butail's case*, AIR 1984 SC 1658 (supra), there was a certain claim outstanding against Himachal Pradesh. The Chief Conservator of Forests, who was also the Secretary to the Forest Department, Government of Himachal Pradesh, referred in detail to the history of the transaction between the appellant and the erstwhile State of Jubbah and be in clear and precise terms admitted the liability to pay the amount claimed by the appellant. The Chief Conservator of Forests further stated in his letter addressed to the Accountant-General that the only course left was to pay to the appellant the amount mentioned therein. He ended his letter by saying that he would be obliged if the payment of the said amount was authorised within the financial year 1951. Their Lordships of the Supreme Court held that there could be no doubt that the letter amounted to a complete recognition and acknowledgment on behalf of the Government of Himachal Pradesh to pay to the appellant the amount due to him from the Jubbah State. In the instant case there is nothing on the record to suggest that the State Government recognized or acknowledged its liability to pay to the appellant the amount due from the former Kotah State.

14. We now switch over to the third point, referred to by learned counsel for the appellant, namely that the trial Court fell in error by conferring upon the respondent right to claim privilege in respect of the document, dated November 18, 1950. The document was inspected by the trial Court on February 3, 1955, on an objection having been made by the plaintiff for its non-production and for defendant's claiming protection under Section 123 of the Evidence Act. The only objection that was made was that the affidavit did not show that it was filed by the Deputy Secretary with the permission of the head of the department, as envisaged by Section 123, Evidence Act. No objection was made on behalf of the appellant that the affidavit ought to have been filed by the Minister Incharge of the Industries and Commerce or by the secretary to the Government, Industries and Commerce Department. The contention of the appellant is that the affidavit submitted to the trial Court by the Deputy Secretary ought to have been under the signature of the Minister or the Secretary Incharge of the Department. Such an objection he ought to have taken in the course of the trial during the relevant time. His fresh objection as to the claim of privilege on the basis of this procedural defect is not now entertainable.

The document which embodies the minutes of the discussion and which indicates the advice given by the Minister is certainly protected under Section 123 of the Evidence Act and if such a document is not produced and protection under Section 123, Evidence Act, is claimed, the Court cannot compel the State to produce it. At the time when the Evidence Act was enacted, the "Affairs of the State" might have had a narrow conception. "Affairs of the State" then might have related to the matters of political or administrative character relating, for instance, to the national defence, public peace, security and good neighbourly relations. But on account of the changed conception of the functions of the State, the State in pursuit of its welfare activities undertakes to an increasing extent activities, which were in the past treated as purely commercial matters undertaken by the State are apt to claim the privilege relating to the "affairs of the State" in accordance with Section 123 of the Evidence Act; vide the *State of Punjab v. Sodhi Sukhdev Singh* AIR 1961 SC 493.

15. On the merits also we feel no doubt in rejecting this contention. Since it was necessary for us to consider whether or not the claim of the privilege had been rightly given by the trial Court, we directed learned counsel for the respondent to produce the said document before us for our inspection. Accordingly the document in question, as is available, has been produced before us. Having seen the document produced before us, we are satisfied that the claim for privilege made by the respondent was justified and may be characterised as bona fide. The document consists of nothing more than an office note indicating that certain discussion took place between the then Minister for Industries and Commerce and Shri Bhanwarlal Sethi. This discussion was reduced to writing. Recording of such minutes does not finally suggest that a valid agreement had been arrived at between the two parties in accordance with the provisions of Article 299 of the Constitution, nor does it suggest that the State categorically recognized the liability of the former Kotah State. In that view of the matter, non-production of the document in question does not materially affect the merits of the plaintiffs' case.

16. Learned counsel for the appellant, in the end, vehemently argued that if it was held that a valid contract had not been arrived at between the appellant and the State, the former is entitled to claim compensation or damages under Section 70 of the Contract Act. Section 70 of the Contract Act is in the terms following:—

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to

the former in respect of, or to restore, the thing so done or delivered."

From the language of Section 70, it is apparent that where a claim for compensation is made by one person against another under Section 70, Contract Act, it is not on the basis of any subsisting contract, between the parties. It is on the basis of fact that something was done by the party for another and the said work so done was accepted by the other party voluntarily. With respect to the claim made against the Government of a State under Section 70, Contract Act, it may be that in many cases work done or the goods delivered are the result of request made by some officer or the other on behalf of the State Government. In such a case the request so made may be ineffective or invalid for the reason that the officer making the request was not authorised under Article 299, or if the said officer was authorised to make the said request, the request becomes inoperative as it was not followed by a contract executed in the manner prescribed by Article 299 of the Constitution. In either case the thing has been done without a contract and that brings in Section 70, Contract Act: see AIR 1962 SC 779. For invoking the provisions of Section 70 of the Contract Act the first condition is that a person has lawfully done something for another or has delivered something to him. The second condition is that in doing the said thing or in delivering the said thing, he must not have intended to act gratuitously. The third condition is that the person for whom something has been done or to whom something has been delivered must enjoy the benefit thereof. If all these conditions are satisfied, Section 70, Contract Act, would set in and it imposes upon the party concerned liability to make compensation or to restore the thing so done or delivered notwithstanding the fact that the contract had not been made as required by Article 299 of the Constitution. A claim for compensation under Section 70, Contract Act, is not founded upon any contract or tort but upon a third category of law, i.e., a quasi-contract or restitution: vide AIR 1968 SC 1218 (supra).

In the present case the plaintiff did not raise the plea for compensation under Section 70 of the Contract Act in its plaint, nor was any issue framed, nor were the parties given an opportunity to lead any evidence on the point. A person who seeks restitution has a duty to prove that he did something for another person or delivered something to that person and that thereby he did not intend to act gratuitously, and that the other person had enjoyed the benefit thereof. The case of the appellant is only with respect to rebate or the refund of certain money in the excise duty, based upon an agreement dated November 18, 1950. Learned counsel for the appellant adverted to Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593.

In that case it was observed that evidence let in on issue on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though not specific issue has been framed thereon and adduced evidence relating thereto.

The Supreme Court case has got no bearing on the facts of the present case. In the Supreme Court case the parties had full knowledge that the question of *lis pendens* was raised in the pleadings and that the defendant went to trial with full knowledge that the question of *lis pendens* was in issue and had an ample opportunity to adduce evidence thereon. Here, the parties had not gone to the trial on the question of compensation under Section 70 of the Contract Act. If the contention of the appellant is allowed to prevail at this stage, it would amount to taking the opposite party by surprise. The above authority, therefore, is of no assistance to the appellant. Thus, the last contention of the appellant is also devoid of substance.

17. For these reasons, we hold that there is no merit in this appeal, which is accordingly dismissed with costs.

Appeal dismissed.

AIR 1970 RAJASTHAN 125 (V 57 C 29)
KAN SINGH, J.

Ratanlal, Petitioner v. The Chairman, Regional Transport Authority, Bikaner Region, Bikaner and others, Respondents.

Civil Writ Petn. No. 209 of 1969, D/- 27-2-1969.

Motor Vehicles Act (1939), Sections 44 (3) (b), 45, 63 and 64A — Resolution by State Transport Authority taking upon itself functions of Regional Transport Authority in relation to inter-statal route — Does not go counter to scheme of Sections 44, 45 and 63.

The resolution by which the State Transport Authority have taken upon itself the functions of the Regional Transport Authority in relation to an inter-statal route does not go counter to either the scheme of Section 44 or Section 45 or Section 63 of the Act for that matter. (Para 8)

It is clear that in sub-section (3) of Section 44 of the Act the Legislature has not confined the term "region" or "regions" only to regions lying within one State. It is, therefore, legitimate to infer that in Section 44 sub-section (3) when it is said that the State Transport Authority may perform the duties of the Regional Transport Authority

city in respect of any route common to two or more regions, the State Transport Authority, is entitled to discharge the functions of the Regional Transport Authority in relation to a route which lies in two regions lying in different States as well. The term "any" occurring before the term "route" in Section 44 (3) (b) signifies that the power is exercisable in respect of any route which runs into two or more regions. Here the term "any" is descriptive of the term "route" and its purpose is to embrace all kinds of routes be they of any class whatsoever. (Paras 7, 9)

It cannot be said that if the State Transport Authority were itself to act as the Regional Authority, an applicant will be losing the remedy of a revision under the statute. In the first place, this power of taking over the functions of the Regional Transport Authority has been given to the State Transport Authority only in respect of routes which run in two or more regions and, therefore, Section 64-A will undoubtedly operate in respect of routes lying within one region only where the matter has been dealt with by the Regional Transport Authority of that region. There is nothing wrong if a party is not left with the remedy of a revision if the matter comes to be dealt with by the State Transport Authority itself. Revisional jurisdiction is created with a view to enabling superior authorities to correct the errors of inferior authorities and if the matter is dealt with by a superior authority, in the first instance there may be no necessity of making provision for a revisional authority.

(Para 5)

B. L. Maheshwari, for Petitioner.

ORDER.— By this writ petition the validity of a resolution of the State Transport Authority, Jaipur (Annexure-8) is questioned. I may read that resolution:

"In exercise of the powers under Section 44 sub-section (3) (b) of the Motor Vehicles Act the State Transport Authority Rajasthan resolves that with effect from the date of the publication of this resolution in the Official Gazette (1) the State Transport Authority shall hereafter grant all types of permits, renewals, transfers etc., on Inter-Regional and Inter-Statel routes. In respect of these routes S. T. A., shall perform all the duties, hitherto being performed by the Regional Transport Authorities.

(2) All types of permits on Inter-Statel routes shall be countersigned by the S. T. A."

Sd/- Inder Singh Shekhawat

Secretary

State Transport Authority,
Rajasthan, Jaipur."

The petitioner contends that this resolution is bad, because according to the provisions of Section 44 (3) of the Motor Vehicles Act, 1939, hereinafter to be referred as the "Act", the State Transport Authority could not have taken upon itself the functions of the Regional Transport Authority in relation to an inter-statal route. Section 44 empowers

the State Government to constitute, for the State, a State Transport Authority to exercise and discharge the powers and functions specified in sub-section (3) thereof and it shall in like manner constitute a Regional Transport Authority to exercise and discharge throughout such areas referred to as regions as may be specified in the notification in respect of each Regional Transport Authority. Sub-section (3) which is the main provision that falls to be considered reads as follows:—

"Sub-section (3). A State Transport Authority shall give effect to any directions issued under Section 43, and subject to such directions and save as otherwise provided by or under this Act shall exercise and discharge throughout the State the following powers and functions, namely:—

(a) to co-ordinate and regulate the activities and policies of the Regional Transport Authorities, if any, of the State;

(b) to perform the duties of a Regional Transport Authority where there is no such Authority and, if it thinks fit or if so required by Regional Transport Authority, to perform those duties in respect of any route common to two or more regions;

(c) to settle all disputes and decide all matters on which differences of opinion arise between Regional Transport Authorities; and

(d) to discharge such other functions as may be prescribed."

2. Sub-section (3) of Section 44 makes it incumbent on the State Transport Authority to give effect to any directions issued under Section 43 of the Act. It is only subject to such directions and save as otherwise provided that the State Transport Authority has to exercise its powers and functions laid down in clauses (a) to (d) of that sub-section. Generally, the State Transport Authority has to act as a co-ordinating authority to regulate the activities and policies of the Regional Authorities. Clause (b) enables the State Transport Authority to perform certain functions of the Regional Authorities under the stated conditions. In my view, this sub-section (b) could be broken as follows:—

(1) The State Transport Authority shall exercise and discharge throughout the State the powers and functions by performing the duties of a Regional Transport Authority where there is no such authority.

(2) If the State Transport Authority thinks fit, or if so required by a Regional Transport Authority, to perform those duties in respect of any route common to two or more regions.

3. The second part can be further subdivided as follows:—

(a) If the State Transport Authority thinks fit it can perform those duties (by which is comprehended the duties of the Regional Transport Authority) in respect of any route common to two or more regions; and

(b) the State Transport Authority shall, if so required by the Regional Authority to perform those duties in respect of any route common to two or more regions,

4. According to the plain reading of the sub-section there are three contingencies under which the State Transport Authority will be taking upon itself the normal functions of the Regional Transport Authority. The first contingency is when there is no Regional Transport Authority functioning in any region. There the Legislature has not left a vacuum and when there is no Regional Transport Authority, the State Transport Authority, will fill the vacuum and discharge the duties of the Regional Transport Authority. It has to be remembered that the purpose of enacting Section 44 is to erect the apparatus for the discharge of various statutory functions created by the Act. Therefore, it is legitimate to infer that as soon as there is no Regional Transport Authority available in any region its place will ipso facto be taken by the State Transport Authority. The second contingency is where the State Transport Authority thinks fit to perform those duties in respect of any route common to two or more regions and then it can rightly take upon itself such duties. Here again, it has to be remembered that the State Transport Authority, which is created for the entire State, plays the role of a co-ordinating body and it may very well think in a given situation that the co-ordination will be better advanced by taking upon itself the functions of the Regional Transport Authority in relation to a route which runs through more than one region. The third contingency is when a request has been made by a particular Regional Transport Authority.

5. Learned counsel for the petitioner contended that this construction will militate against the scheme of the Act. According to learned counsel, under section 64-A of the Act the State Transport Authority has been created as the Revisional Authority and, therefore, if the State Transport Authority were itself to act as the Regional Authority, an applicant will be losing the remedy of a revision under the statute. Having considered this matter carefully I am not persuaded to accept this contention. In the first place, this power of taking over the functions of the Regional Transport Authority has been given to the State Transport Authority only in respect of routes which run in two or more regions and, therefore, Sec. 64-A will undoubtedly operate in respect of routes lying within one region only where the matter has been dealt with by the Regional Transport Authority of that region. There is nothing wrong if a party is not left with the remedy of a revision if the matter comes to be dealt with by the State Transport Authority itself. Revisional jurisdiction is created with a view to enabling superior authorities to correct

the errors of inferior authorities and if the matter is dealt with by a superior authority, in the first instance there may be no necessity of making provision for a revisional authority.

6. Learned counsel then submitted that sub-section (3) of Section 44 does not deal with inter-statal routes and, therefore, the State Transport Authority could take over functions of the Regional Transport Authority in relation to routes lying within two regions of the same State only. In this connection learned counsel referred me to Sections 45 and 63 of the Act. Section 45, according to learned counsel, makes a distinction between routes which lie in two regions of the same State and routes which lie within different States. This is so, but that, in my opinion, does not afford any help in the matter. Section 45 may be reproduced for appreciating this aspect of the matter:

"Section 45. General provisions as to applications for permits. Every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles:

Provided that if it is proposed to use the vehicle or vehicles in two or more regions lying within the same State, the application shall be made to the Regional Transport Authority of the region in which the major portion of the proposed route or area lies, and in case the portion of the proposed route or area in each of the regions is approximately equal, to the Regional Transport Authority of the region in which it is proposed to keep the vehicle or vehicles:

Provided further that if it is proposed to use the vehicle or vehicles in two or more regions lying in different States, the application shall be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business."

7. It is true, in the case of a route lying in two regions of the same State the application has to be made before a Regional Transport Authority in which the major portion of the route or area lies and in the case of an inter-statal route the application has to be made before the Regional Transport Authority of the region in which the applicant resides or has his principal place of business. The difference in the procedure regarding the filing of applications is on considerations of convenience, but what is remarkable in this section is that the so-called inter-statal route is not described as such. On the other hand, the only distinction as brought out in this section is that one category of routes are known as routes in two or more regions lying within the same State, and the other category of regions are known as two or more regions lying in different

States. It is, to my mind, obvious that whenever the Legislature wanted to confide the provision to regions within the same State, it has chosen to say so in express terms. Likewise, whenever the term "Regions" was meant for regions lying in different States, the Legislature has taken care to say so. If in this light sub-section (3) of Section 44 is read then it is clear that in sub-section (3) of Section 44 of the Act the Legislature has not confined the term "region" or "regions" only to regions lying within one State. It is, therefore, legitimate to infer that in Section 44 sub-section (3) when it is said that the State Transport Authority may perform the duties of the Regional Transport Authority, in respect of any route common to two or more regions, the State Transport Authority, in my view, is entitled to discharge the functions of the Regional Transport Authority in relation to a route which lies in two regions lying in different States as well. In other words, the State Transport Authority can discharge the functions of the Regional Transport Authority in relation to a so-called inter-statal route which necessarily lies within the two regions of different States.

8. The material portion of S. 63 reads as follows:

"Section 63. Validation of permits for use outside region in which granted. — (1) Except as may be otherwise prescribed, a permit granted by the Regional Transport Authority of any one region shall not be valid in any other region, unless the permit has been countersigned by the Regional Transport Authority of that other region and a permit granted in any one State shall not be valid in any other State unless countersigned by the State Transport Authority of that other State or by the Regional Transport Authority concerned:

Provided that a private carrier's permit granted by the Regional Transport Authority of any one region with the approval of the State Transport Authority, for any area in any other region or regions within the same State shall be valid in that area without the counter-signature of the Regional Transport Authority of the other region or of each of the other regions concerned.

(2) A Regional Transport Authority when countersigning the permit may attach to the permit any condition which it might have imposed if it had granted the permit, and may likewise vary any condition attached to the permit by the Authority by which the permit was granted.

(3) The provisions of this Chapter relating to the grant, revocation and suspension of permits shall apply to the grant, revocation and suspension of counter-signatures of permits.

Provided that it shall not be necessary to follow the procedure laid down in Sec. 57

for the grant of counter-signatures of permits, where the permits granted to any one State are required to be countersigned by the State Transport Authority of another State or by the Regional Transport Authority concerned as a result of any agreement arrived at between the States.

.....

This section provides for counter-signatures of permits for vehicles running on routes lying in more than one region. If the route lies in more than one region of the same State, the counter-signature is to be done by the Regional Transport Authority of the other region and if the routes lie in more than one region of two different States, then the counter-signature may be given by the State Transport Authority or the Regional Transport Authority of that State. Clothing of both the State Transport Authority of the State as well as the concerning Regional Transport Authority is clearly suggestive of the fact that in the matter of inter-statal routes the Legislature has clearly contemplated the discharging of functions of the Regional Transport Authority by the State Transport Authority. It is true, where there is an agreement of reciprocity between the two States for the counter-signatures the procedure of Section 57 of the Act need not be followed, but that has nothing to do with the performance of functions of the Regional Transport Authority by the State Transport Authority in the matter of permits over a route running in two different States. Therefore, the resolution Annexure 8, does not, in my opinion, go counter to either the scheme of Section 44 or Section 45 or Section 63 of the Act for that matter.

9. Before parting with the case I may notice one more submission of the learned counsel that the word "any" occurring before the word "route" in clause (b) of sub-section (3) of Section 44 is significant and it shows that it is only in a particular situation that the State Transport Authority can deal with the grant of permits over a route common to two or more regions. I regret, I have not been able to appreciate the submission. The term "any" occurring before the term "route" signifies, to my mind, that the power is exercisable in respect of any route which runs into two or more regions. Here the term "any" is descriptive of the term "route" and its purpose is to embrace all kinds of routes be they of any class whatsoever.

10. Thus, I do not find any force in the writ petition which I hereby reject in limine.

case, AIR 1965 SC 1564 that the two essential ceremonies for solemnizing a marriage between the parties to that case were: (i) invocation before the sacred fire, and (ii) Saptapadi. The Court reached the further conclusion, on the basis of available materials on the record, that these two ceremonies had not been celebrated. It is on the basis of these two findings of fact that the Court held that no valid marriage had been celebrated between Bhaurao and Kamalbai, his alleged second wife. Likewise, the Supreme Court held in the case of Kanwal Ram AIR 1966 SC 614 (supra) that a marriage is not proved unless the essential ceremonies required for its solemnisation are proved to have been performed, and that the evidence of the witnesses called to prove the marriage ceremonies showed that the essential ceremonies had not been performed. It would follow that the two appellants before the Supreme Court were acquitted on the distinct finding, arrived at from the evidence on record, that the essential ceremonies constituting the marriage had not been proved as a matter of fact. It was not held in either of the two cases, I may humbly emphasise, that the ceremony of Saptapadi must, in all events, be proved by direct evidence and by no other means.

8. The last case relied upon by Shri Chakraborty in support of the point urged by him is that of Phankari reported in AIR 1965 J & K 105. Some passages in that authority undoubtedly lend weight to the view canvassed by Shri Chakraborty. For example, it is stated in para 14 that it is incumbent on the prosecution to prove at least those ceremonies which have been recognized by the statute as being necessary to make the marriage complete and binding. The High Court appears to have been greatly influenced in reaching the conclusion that when the ceremony of Saptapadi is not shown to have been performed the marriage cannot be said to be complete, by its interpretation of section 50 of the Evidence Act. It was held, vide para 14 of the judgment, that the provisions of section 50 call for a strict proof of the marriage where marriage is an essential ingredient of a criminal offence. However, as stated earlier, the proviso to S. 50 has a limited scope, it being that the opinion, expressed by conduct, as to the existence of relationship shall not be sufficient to prove a marriage in a prosecution under section 494 I. P. C. The true import of this proviso is that opinion evidence in criminal cases of the nature mentioned in the section shall not be sufficient by itself to prove a marriage. This proviso does not rule out other forms of admissible evidence to

prove the marriage. Such other evidence may take the shape, or be of the nature, apart from direct evidence, of circumstantial evidence or even presumptive evidence. These two varieties of evidence for proving marriage are not shut out by the two authorities of the Supreme Court cited by Shri Chakraborty either expressly or by implication; therefore, it is open to the Court to reach a finding about the factum of marriage on the basis of combined reading of all varieties of admissible evidence including the opinion evidence of the nature mentioned in the main body of Section 50 of the Evidence Act.

9. This brings us to the examination of the evidence in proof of the complainant's contention that a regular and formal marriage had been celebrated between Rabindra and Anjali on 28th of October, 1959. I may mention at the outset that Rabindra Bhattacharjee, the revision petitioner, is not only M. A. but he holds the degree of P. R. S., Panchatirth and Saptashatri. He is, as is evident from his surname, a high caste Brahmin. He was aged 44 on 20th of March, 1963, when he was examined by the trial Court under Section 342 Cr. P. C. Hence, he was about forty and half at the time of his alleged second marriage. At that time he was employed as a senior lecturer in a college at Agartala. In view of his mature age, high academic qualifications, rich experience as a man of affairs, and his admittedly valid first marriage with the complainant in July 1954, he was expected to know what ceremonies are essential for solemnizing a marriage between Brahmins of high caste in which category he and Anjali Bhattacharjee fall. As far back as 7th of October, 1957, notice Ext. P-1 was served by Rabindra through the Advocate Shri Jagadindra Nath Bhattacharjee of Calcutta on Prativa asking her to take up residence with him (Rabindra) within a week from the date of receipt of notice, else steps shall be taken to get the marriage dissolved. Rabindra then sought the permission of the Tripura Administration for taking a second wife. Along with the application addressed to the Administration, he happened to send a copy of the declaration Ext. P-15, dated 15-12-1957, indicating apparently that Prativa had agreed to her husband going in for the second marriage. On receipt of that application together with the enclosure, a Deputy Secretary to the Tripura Administration addressed the letter Ext. P-2 to Prativa enquiring if she had any objection to offer against the permission sought by her husband. Prativa immediately challenged the authenticity of the declaration. Shri Bhattacharjee scrupulously avoided making so much as a reference

to this correspondence exchanged between his client and the Government or between the Government and the petitioner during the course of arguments in this Court. Evidently, it must be for the reason that he could not assert that the petitioner had subscribed any declaration of the nature mentioned above. Therefore, I feel safe in holding, in agreement with the Courts below, that this declaration had been fabricated by Rabindra, who, it appears, was anxious to take a second wife even if he had to wash his hands off of all scruples.

10. The accused placed reliance on the telegram Ext. D-9, booked from Calcutta on 23-9-1959 apparently in the name of one Satish, conveying to him the message that "Pratiba died cholera 21 Sept" to score the point that he believed bona fide on the date of his second marriage that his first wife Pratiba had died. It was suggested that Satish who booked this telegram is none but the father of Pratiba, Satish Chandra Chakraborty being his full name. This person deposed as P. W. 10 that he had never booked this telegram, nor there was any occasion for it because Pratiba was alive and not dead. The findings of the trial court and of the Sessions Judge that this telegram had also been fabricated by the accused Rabindra was also not challenged in this Court by Shri Chakraborty. All these pieces of documentary evidence cumulatively yield the conclusion, when examined in the background of estranged relations between the couple, that Rabindra was dead set to go in for the second marriage, whatever the cost. I believe that the telegram was fabricated by him to get over the reluctance, if any, of Anjali or her parents-in-law to hazard Anjalis' marriage with him when his first wife was alive. If he had any faith in the authenticity of the telegram and the genuineness of its contents, he would have rushed immediately to Calcutta, judged by common human behaviour and conduct, to participate in the funeral ceremonies of his wife and to take care of his only child Rantu who was hardly 4 years on the date the telegram was received. The complete indifference exhibited by the accused on receipt of the telegram is clearly indicative of the conclusion that he knew the worth as also the origin of the document.

11. We have the testimony of Shri M. K. Roy P. W. 3, a lecturer in the college at Agartala where Rabindra was employed in October, 1959, that he was a member of the marriage party at the time of Rabindra's marriage with Anjali, the daughter of the accused Gopal Chakraborty, that he was present at the time of the marriage, and that the marriage "was performed in accordance with

the Hindu Sastras." He deposed further that Rabindra was married to Anjali and that after the marriage when Rabindra returned to his house with Anjali he arranged the social function called 'Bairhat'. The witness was an invitee to that social function along with his other colleagues from the college. Another statement made by the witness was that he visited the house of Rabindra a number of times after his marriage with Anjali and he noticed that "Rabindra Babu and Anjali were living as husband and wife." None of these averments of the witness made on solemn affirmation was challenged during cross-examination. Taking into consideration the importance of the case as also the social status enjoyed by the complainant and the accused, if there were the slightest doubt about the factum or validity of marriage between Rabindra and Anjali, the defence counsel would have exhibited much assiduity in cross-examining the witness in minute details about the ceremonies that were gone through or non-performance of essential ceremonies that go to make for a valid marriage. The complete silence on the subject of marriage by the defence counsel during cross-examination of the witness is consistent only with the conclusion that the marriage or its validity was never challenged.

12. P. W. 2 Shri S. K. Choudhury is the Principal of M. B. Government College, Agartala, where Rabindra was employed as a senior lecturer in October, 1959. The witness affirmed that when Rabindra was serving in the college he took a wife and that after the marriage Rabindra invited him to a feast in celebration of that marriage. Rabindra and his wife Anjali, the witness added, also visited his house after the marriage. The only question put to the witness in cross-examination respecting the marriage was as to on what date it was celebrated. The witness was unable to provide the date. That was not abnormal because he had not attended the marriage and he happened to appear in the Court about 2 1/2 years after the marriage took place. His statements that Rabindra had taken Anjali as his wife, that after the marriage between them Rabindra had invited him to a feast in his house, and that the couple happened to visit his house after marriage were not challenged.

13. Shri A. K. Bhattacharyya (P. W. 5) is a lecturer in the college where Rabindra was employed. He stated in examination-in-chief that Rabindra had told him that he had married in October, 1959. This statement of the witness was also not challenged in cross-examination.

14. Ext. P-12 is a letter dated 4-2-1960 which Rabindra addressed the Chief

Commissioner, Tripura. The contents of the letter read as under:

"After receiving the death news of my former wife late Prativa Bhattacharyya M. A., who died on 21st September 1959, I married again on 28th October 1959, in accordance with the Hindu Shastras.

This is for your information".

15. I have already reproduced above the statement made by the accused Rabindra under section 342 Cr. P. C. He did not deny therein his second marriage with Anjali, though he affirmed that the reason for it was that he believed that his first wife was not alive.

16. The evidence marshalled above leaves no room for doubt that Rabindra had married Anjali on 28th of October, 1959, in accordance with the injunctions of Hindu Shastras and since it was not disputed before me that a valid marriage according to such Shastras can be solemnized only if the ceremony of Saptapadi is gone through in the presence of the sacred fire, I hold that a marriage ceremony complete in all respects had been gone through between Rabindra and Anjali on 28th of October, 1959. In reaching the conclusion I have taken note of the fact that there is no witness who has affirmed that the ceremony of Saptapadi had taken place. However, the circumstantial and opinion evidence coupled with the direct and unchallenged testimony of P. W. 3 Shri M. K. Roy and the unequivocal admission made by the accused in the document Ext. P-12 constitute sufficient evidence justifying the Court to presume that all ceremonies that were essential to bring about a valid marriage alliance between Rabindra and Anjali had been performed.

17. The expression "proved" is defined in section 3 of the Evidence Act in the following terms:

"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

This definition permits the Court to take into consideration all varieties of admissible and relevant pieces of evidence while adjudicating upon whether a particular fact is proved or not. The expression "after considering the matters before it" employed in the definition is of such wide amplitude as to justify the Court taking into consideration, besides the direct and the circumstantial evidence, the opinion evidence made relevant by section 50 of the Evidence Act, the pre-trial admissions of the accused, and the statement made by the accused, during the trial, under section 342 Cr. P. C. In the instant case, I cannot ignore

the facts that the accused had been planning for a period of about two years before 28-10-1959 to go in for second marriage, that he fabricated evidence to secure permission from the Government for taking a second wife and for carrying conviction with his second wife and her parents that his first wife had died, and that his counsel did not challenge the testimony of P. Ws. 2, 3 and 5 that he had gone into second marriage with Anjali in October, 1959. Hence, I affirm the finding of the trial Court and of the appellate Court that Rabindra had entered into a valid marriage with Anjali on 28-10-1959 and that that marriage is void only for the reason that it took place during the lifetime of the first spouse of Rabindra. I may usefully invite reference to the case of Emperor v. Mt. Soni, AIR 1936 Nagpur 13. The head-note (a) of the authority runs as under:

"In the trial of an offence under Section 494, Penal Code, it was alleged that S was the married wife of B. B stated that he married S about 10 years ago and two other witnesses stated that they were present at the marriage. S's uncle who had brought her up and arranged the marriage with B admitted that she was the married wife of B. There was also other evidence which was not challenged to show that B and S lived together as husband and wife and were believed to be legally married:

Held: that any prudent man would act upon the supposition that S was the legally married wife of B, hence the marriage of S with B should be deemed to be proved".

The proposition that emerges from this head-note negatives the contention of Shri Chakraborty that unless there is some dependable witness to testify that the ceremony of Saptapadi had been gone through, the marriage cannot be said to have been proved in law.

18. No other point was urged before me by Shri Chakraborty in support of the prayer made in the revision petition.

19. As a result of the conclusions recorded above, I confirm the conviction as well as sentence of Rabindra Bhattacharjee and dismiss the revision petition.
Revision dismissed.

AIR 1970 TRIPURA 35 (V 57 C 7)

R. S. BINDRA, J. C.

Barindra Kumar Chakraborty, Petitioner v. Ramesh Chandra Dev, Respondent.

Civil Revn. No. 24 of 1967, D/- 11-9-1969, against order of Addl. Sub. J., Tripura, D/- 19-5-1967.

JM/JM/E598/69/MVJ/E

Civil P. C. (1908), S. 115 (c) — Illegal or irregular exercise of jurisdiction — Trial Court not consolidating two similar suits — It is only error in exercise of jurisdiction — Cl. (c) is not attracted. AIR 1939 Pat 30 and AIR 1933 Pat 61, Diss.

Clause (c) of S. 115 has to be interpreted to mean that where the law has prescribed the manner in which a court shall exercise its jurisdiction and the court acts in disregard of those provisions, it acts illegally or irregularly in the exercise of its jurisdiction. Case law discussed.

(Para 3)

The first question that would arise for determination in such a case is whether the revision is maintainable. The question whether the court should interfere in the exercise of its revisional power would be considered after it has been found that the revision petition is maintainable.

(Para 4)

The trial Court has the jurisdiction to determine the question whether two suits before it should be consolidated or not and when it decides in favour of one it cannot be urged that any irregularity or illegality in exercise of its jurisdiction has been committed. All that can be said at the best is that the trial Court had committed an error in the exercise of its jurisdiction by refusing to consolidate the suit and such a case does not fall within the purview of Cl. (c). AIR 1939 Pat 30 and AIR 1933 Pat 61, Diss.; (1935) ILR 11 Cal 6 (PC) and AIR 1949 PC 156 and AIR 1953 SC 23, Rel. on.

(Para 3)

Cases Referred: Chronological Paras

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|---|---|
| (1953) AIR 1953 SC 23 (V 40) = | |
| 1953 SCR 136, Keshardeo v. Radha Kishen | 3 |
| (1949) AIR 1949 PC 156 (V 36) = | |
| 76 Ind App 67, Venkatagiri Ayyangar v. Hindu Religious Endowments Board | 3 |
| (1939) AIR 1939 Pat 30 (V 26) = | |
| 5 BR 21, Ramavtar Prasad v. Satdeo Lal | 3 |
| (1933) AIR 1933 Pat 61 (V 20) = | |
| 13 Pat LT 726, H. Hamid v. M. Abdul Ghani | 3 |
| (1885) ILR 11 Cal 6 = 11 Ind App 237, Amir Hasan Khan v. Sheo Baksh Singh | 3 |

J. C. Lodh, for Petitioner; H. N. Kar, for Respondent.

ORDER: Ramesh Chandra Dev filed Title Suit No. 1 of 1966 in the court of Additional Subordinate Judge, Tripura, against Barindra Kumar Chakraborty for certain relief respecting immovable property. On 4-4-1967, the latter filed Title Suit No. 9 of 1967 in the same court against Ramesh Chandra Dev for settlement of certain disputes respecting the same property. On 19-5-1967, before the summons was issued in the second suit,

Barindra Kumar moved an application in the first suit requesting that the two suits should be consolidated and tried together. Ramesh Chandra opposed that application and the court agreeing with him rejected the same on the short ground that since the second suit had just been instituted, it would not be proper to consolidate it with the earlier one which had reached the stage of recording of evidence. Aggrieved by that order, Barindra Kumar came in revision to this Court on 1-6-1967. The revision petition was admitted and the proceedings in suit No. 1 of 1966 were stayed.

2. Shri Jogesh Chandra Lodh, appearing for the petitioner, submitted that the instant case is covered by clause (c) of S. 115 of the Civil Procedure Code and that since the trial Court had acted with material irregularity in not consolidating the two suits though they related to the same property and raised identical issues, the revision petition is clearly maintainable and so must be allowed. Shri H. N. Kar, representing the respondent, however, urged vehemently that the case does not fall within the ambit of clause (c), and that at any rate this court should not interfere with the discretion which, as he said, had been properly exercised by the trial court. He brought to my notice the fact that suit No. 1 of 1966 having been stayed by this Court the other suit No. 9 of 1967 has now out-paced it, and on that basis he urged that it would be highly improper to consolidate them at this stage.

3. I am clearly of the opinion that the facts of case in hand are not covered by clause (c) of Section 115. That clause provides that the High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. This clause has been interpreted to mean that where the law has prescribed the manner in which a court shall exercise its jurisdiction and the court acts in disregard of those provisions, it acts illegally or irregularly in the exercise of its jurisdiction. In the case of Amir Hassan Khan v. Sheo Baksh Singh, (1885) ILR 11 Cal 6 (PC) it was held by the Privy Council that where the court has jurisdiction to decide the question which arose for determination before it and it decides the same, whether rightly or wrongly, it cannot be contended that it had exercised the jurisdiction illegally or with material irregularity. This view was affirmed by the Privy Council in the case of Venkatagiri Ayyangar v. Hindu Religious Endowments Board, AIR 1949 PC

156 and also endorsed by the Supreme Court recently in the case of Keshardeo v. Radha Kishen, AIR 1953 SC 23. Shri Lodh was unable to point out which provision of the law had been violated by the trial court while deciding the question whether or not the two suits should be consolidated. Therefore, I am not satisfied that the trial court had been guilty of any illegality or material irregularity in exercise of its jurisdiction. All that can be said, at the best, is that the trial court had committed an error in the exercise of its jurisdiction by refusing to consolidate the suit. Such a case, however, does not fall within the purview of clause (c) for the Privy Council observed in the case of Amir Hassan Khan, (1885) ILR 11 Cal 6 (PC) that, "whether they decide it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or irregularly". Undeniably, the trial court had the jurisdiction to determine the question whether the two suits should be consolidated or not, and since it was decided in favour of one it cannot be urged that any irregularity or illegality in exercise of its jurisdiction had been committed.

4. Shri Lodh relied on the decision in the case of Ramavtar Prasad v. Satdeo Lal, AIR 1939 Pat 30 to support the contention that the present revision petition is maintainable. I have examined the authority with the care that it deserves. It appears that the provisions of Section 115 were not examined and the petition was decided on the authority of a previous decision of the same Court AIR 1933 Pat 61, H. Hamid v. M. Abdul Ghani. The latter authority was not cited before me by Shri Lodh. It was held by the High Court in the case of Ramavtar Prasad that where it appears that there is sufficient unity or similarity in the matter in issue in two suits to warrant their consolidation and yet the trial court has refused to consolidate them, it is a fit case in which the High Court can interfere in its revisional jurisdiction. I regret my inability to subscribe to this view. The first question that would arise for determination in such a case is whether the revision is maintainable. The question whether the court should interfere in the exercise of its revisional power would be considered after it has been found that the revision petition is maintainable. Since the Patna High Court assumed that the revision petition was maintainable, it proceeded only to examine whether a case for interference in revision had been made out or not. Hence, my inability to take that decision as furnishing an authority for the proposition canvassed before me that order dated 19-5-1967 made by the trial court is open to challenge in a revision petition.

5. As a result, this petition fails and I reject it with costs. Advocate's fee Rs. 16.
Petition dismissed.

AIR 1970 TRIPURA 37 (V 57 C 8)

R. S. BINDRA, J. C.

Saroj Chanda, Petitioner v. Union of India and others, Respondents.

Writ Petn. No. 11 of 1969, D/- 18-7-1969.

(A) Constitution of India, Art. 226 — Delay and laches — Order under S. 292 of Tripura State Municipal Act superseding Commissioners — Order not challenged under the provisions of the Act within period of limitation prescribed — Order held, could not be challenged even by writ petition—(Municipalities — Tripura State Municipal Act (2 of 1349 T. E.), S. 292) — (Limitation Act (1908), Art. 120)—(Municipalities — Bengal Municipal Act (15 of 1932) S. 553).

The Administrator of the Union Territory of Tripura made an order under Section 292 of the Tripura State Municipal Act superseding a number of commissioners of the Municipality. The above order was not challenged by normal prescribed procedures within the statutory period of 6 years under Art. 120 of the Limitation Act. Similarly when such order of supersession was passed under S. 553 of the Bengal Municipal Act when that Act came to be applied to the area, it was also not attacked before the normal forum within time prescribed. The said orders were sought to be quashed in a writ petition filed after more than 10 years from the date of the order.

Held, that it was not open to challenge the impugned orders even by a writ petition when the normal period in which the petitioner could have challenged them in a civil court had run out. The outside limit within which an aggrieved party could come to the High Court by way of writ was the period prescribed by law for seeking the relief in question by the normal remedies from the tribunals including the courts. To hold otherwise would be to render S. 3 and other provisions of the Limitation Act otiose. AIR 1964 SC 1006, Foll.; AIR 1966 Punj 185 (FB), Dist. (Paras 3 and 5)

(B) Municipalities — Bengal Municipal Act (15 of 1932), Ss. 554 and 553 — Order of supersession under S. 553—Consequences of, mentioned in S. 554.

Consequences of an order under S. 553 superseding municipal commissioners are outlined in S. 554. According to sub-section (2) thereof, on the expiry of the period of supersession the State Government is left with only three alternatives, viz., (i) to extend the period of supersession, (ii)

IM/KM/E517/69/TVN/D

to reconstitute the Commissioners by a fresh general election, and (iii) to reconstitute the Commissioners by appointment for such period as it may consider necessary. (Para 5)

(C) Constitution of India, Art. 226 — Who can file writ petition — Mandamus and certiorari—Order superseding Municipal Commissioners under Bengal Municipal Act and Tripura State Municipal Act — Aggrieved party concerned is Commissioner and not the Municipal voter — Voter can, however, pray for holding of general election — (Municipalities — Bengal Municipal Act (15 of 1932), S. 553 — (Municipalities — Tripura State Municipal Act (2 of 1949 T. E.), S. 292). (Para 6)

(D) Municipalities — Bengal Municipal Act (15 of 1932), S. 24 (1) — First General election to the municipality under the Act — Government has the statutory right to fix date as suits its convenience — Court cannot direct holding of such elections fixing a date therefor. (Para 6)

Cases Referred: Chronological Paras

(1966) AIR 1966 Punj 185 (V 53) — ILR	
(1966) 2 Punj 38 (FB), Rajinder	
Parshad v. Punjab State	3
(1964) AIR 1964 SC 1006 (V 51) —	
1964-6 SCR 261, State of Madh.	
Pradesh v. Bhailal Bhai	3
M. Majumdar, for Petitioner.	

ORDER: In this writ petition filed under Article 226 of the Constitution of India by Saroj Chanda, a Municipal Voter, the reliefs prayed for are for quashing certain orders made by the Chief Commissioner of Tripura respecting the Municipal Commissioners of Tripura Municipality, for issuing a direction to the District Magistrate, Agartala, and the Executive Officer of Agartala Municipality not to act upon the impugned orders passed by the Chief Commissioner and for a writ in the nature of mandamus directing all the respondents, who are, besides the three respondents mentioned already, Union of India and Union Territory of Tripura, that they proceed in accordance with the provisions of law in the matter of holding elections of the Commissioners for the Agartala Municipality.

2. The facts bearing on the writ petition can be summarised in a few words. General election of Commissioners for the Municipality of Agartala was held on 5th of November, 1951, under the provisions of the Tripura State Municipal Act of 1949 T. E. (hereinafter referred to as the Tripura Act) when 18 Commissioners were elected and took office in course of time. As many as 16 of them resigned en bloc on 24-4-1955 and the other 2 had resigned a few days before that date. The Administrator of the Union Territory, in consequence, assumed charge of the municipality on 24-4-1955.

On the next day, 25-4-1955, the Administrator passed an order under Section 292 of the Tripura Act superseding all the 18 Commissioners for a period of one year. The supersession order was repeated each year for a period of one year under Section 292 of the Tripura Act until the Bengal Municipal Act of 1932 (hereinafter called the Bengal Act) was enforced in this Territory with effect from 15-8-1961, when the supersession orders were passed, as before, each year for a period of one year under Section 553 of the Bengal Act. The last of such orders was passed on 23-4-1969. The petitioner contends that all the supersession orders right from the first one dated 25-4-1955 and ending with the last dated 23-4-1969 are bad in law and so have to be quashed.

3. Accepting, without conceding, that the orders passed under the Tripura Act were bad in law, they are, in my opinion, beyond challenge because they were not assailed within the period of 6 years prescribed by Art. 120 of Limitation Act 1908. Shri Majumdar, the learned Advocate representing the petitioner, was unable to satisfy me that the orders which had not been challenged within the statutory period of limitation by normal prescribed procedure can be challenged by writ petition under Article 226 even after the expiry of that period. He cited the authority reported in Rajinder Parshad v. Punjab State, AIR 1966 Punj 185 (FB) in support of the contention that the period of limitation has no relevancy to writ petitions filed under Article 226. I have examined the report carefully but have not been able to find any support therefrom for the proposition that writs can be filed irrespective of the period which has run out since the cause of action arose.

The High Court, in the reported case, discussed only the question of delay in filing the writ petition and not the precise question of limitation which governs the writ petitions. Delay respecting writ petitions can be of two varieties: (i) delay which falls short of the period of limitation prescribed for challenging the right infringed in the ordinary courts by the normal procedure, and (ii) delay which goes beyond such prescribed period of limitation. In the Punjab case the delay that was under discussion fell under the first category. Therefore, that authority is unavailing to the petitioner for getting over the hurdle of limitation. In my opinion, the outside limit within which an aggrieved party can come to the High Court by way of writ is the period prescribed by law for seeking the relief in question by the normal remedies from the tribunals including the Courts. The contention of Shri Majumdar that an aggrieved party can come to the High Court in

writ irrespective of the period that may have run out from the date the cause of action arose would make Section 3 and other provisions of the Limitation Act otiose.

This view gathers support from the authority reported in *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006 where it was held that the provisions of the Limitation Act do not as such apply to the granting of relief under Art. 226 but the maximum period fixed by the Legislature as the time within which the relief by a suit in a civil court must be sought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable. In the light of these observations it is not open to the petitioner to challenge the orders issued by the Chief Commissioner under the Tripura Act, he having assailed them after the normal period in which he could have challenged them in the civil court had run out.

4. It is common ground between the parties that the term of a Commissioner elected under the Tripura Act was 4 years. Therefore, after 4 years from the date the 18 Commissioners took office, speaking prima facie, they ceased to be Commissioners of the Municipality. As such, even if the orders superseding the Commissioners are vacated the Commissioners may not be able to hold office. However, I restrain myself from examining this issue more deeply since I do not mean to rest this judgment on the finding that the office held by the 18 Commissioners cannot be resuscitated.

5. The orders of supersession under the Bengal Act were made in terms of Section 553. That section authorises the Chief Commissioner to supersede the Commissioners if, in his opinion the latter have shown their incompetency to perform or have persistently made default in the performance of the duties imposed on them by or under the Bengal Act or by any other law or have exceeded or abused their powers. The first order passed under this section is dated 13-4-62. In my opinion, that order can also not be challenged in a Civil Court as it is barred by limitation and so the prayer for quashing the same has to be negatived on the ground of delay. Consequences of supersession are outlined in S. 554 of the Bengal Act. According to sub-section (2) thereof, on the expiry of the period of supersession the State Government is left with only three alternatives, namely, (i)

to extend the period of supersession, (ii) to reconstitute the Commissioners by a fresh general election, and (iii) to reconstitute the Commissioners by appointment for such period as it may consider necessary. In face of this statutory provision, the quashing of the orders passed subsequent to the one dated 13-4-62 would not yield any practical dividend because the old Commissioners cannot be now brought back into office. The only alternative as envisaged by sub-section (2) of Section 554 can be that of holding the general election.

6. Writ petitions in the nature of mandamus and certiorari, it is well settled, can be lodged only by an aggrieved party. I am not satisfied that Saroj Chanda, the petitioner, is an aggrieved party for claiming the relief that the orders of supersession should be quashed. The really aggrieved parties respecting that relief are the Municipal Commissioners. Therefore, Saroj Chanda cannot claim the relief that the supersession orders should be vacated.

However, I agree that he is an aggrieved party respecting the prayer made for holding general election to the Municipality. But Section 24(1) of the Bengal Act, in my opinion stands in the way of this Court in granting that prayer. Section 24(1) of the Bengal Act provides that the first general election of the Commissioners of a Municipality under its provisions shall be held at such time as the State Government may prescribe. Since any election held hereafter shall be the first general election under the provisions of the Bengal Act, the Court cannot force the State Government to hold the election on any particular date. It is for the reason that fixation of the date of the first general election under the Bengal Act is left to the discretion of the State Government and not to that of this Court. The Government has the statutory right to fix such date for the general election as suits its convenience. While sitting in Writ Court I would be going beyond my jurisdiction if I were to force the hands of the Government to hold the election by a specified date.

7. For the reasons stated above, I hold that none of the prayers made by Saroj Chanda can be granted by the Court. Therefore, I reject the petition in limine.

8. Before parting with the case, I deem it right to mention here that Shri Majumder was highly critical of the attitude of the State Government for non-holding of general election for the Agartala Municipality. He stated further that the denial of Municipal franchise to the citizens of the town of Agartala offends against the spirit if not the letter of the Bengal Act. I subscribe to these sentiments and feelings of Shri Majumder and hope that the State Government shall take early steps for re-

moving the legitimate grievances of the citizens.

Petition dismissed.

AIR 1970 TRIPURA 40 (V 57 C 9)

R. S. BINDRA J. C.

Jethmal Bothra, Petitioner v. Bherudhan Parakh, Respondent.

Civil Revn. No. 17 of 1966, D/- 30-7-1969, against Order of Munsiff, Dharamnagar, Tripura, D/- 14-2-1966.

(A) Civil P. C. (1908), O. 21 R. 61 — Money due to judgment-debtor on attached bills — Money in possession of Government in trust for judgment-debtor — Claimant not in possession of such money — His claim to money should be disallowed.

Where the money due to the judgment-debtor under certain attached bills is in the possession of the Government in trust for the judgment-debtor and such money was not in the possession of the claimant on the date of attachment, R. 61 of O. 21 applies to the case and the claim should be disallowed by the Court. AIR 1959 Assam 167 & AIR 1952 Cal 768 Rel. on.

(Para 8)

A claim shall be allowed and property released from attachment if the objector or claimant has some interest in the property and the possession over the property on the date it was attached, as mentioned in rule 60, was not of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him; or if it was in possession of the judgment-debtor on the date of attachment. It was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person. The Court in this latter case can make an order releasing the property wholly or to such extent as it thinks fit. In these cases the question of title of the claimant or objector to the attached property would be a relevant factor.

(Para 7)

The claim shall be accepted and property released from attachment in terms of R. 60 if the claimant was in possession thereof on the date of attachment, even though he had no interest in the property. His possession would negative the claim to possession if made by the judgment-debtor and so R. 61 would not come into play.

(Para 7)

But where the property was in the possession of the judgment-debtor on the date it was attached or in possession

of some one holding in trust for him or as a tenant under him the claim made under R. 58 should be rejected by the Court in terms of R. 61. (Para 7)

(B) Civil P. C. (1908), Pre — Interpretation of Statutes — Precise and unambiguous words should be interpreted in their natural and ordinary sense — Intention of Legislature is best gathered from words used by it — Legislature must be presumed to have used the words in a rule or section deliberately and with a view to achieve some objective — A construction which will leave without effect any part of the language of statute should normally be avoided. (Para 5)

Cases Referred: Chronological Paras (1959) AIR 1959 Assam 167 (V 46).

Gauhati Bank Ltd. v. Rajendra Nath

[1952] AIR 1952 Cal 768 (V 39) = 88 Cal LJ 102, Tamluk Loan Office Co. v. Kedar Nath

A. M. Lodh, for Petitioner; A. K. Shyam Choudhury, for Respondent.

ORDER: In execution of his money decree, dated 11-3-1964, against Kamala Charan Nath, the decree-holder Jethmal Bothra secured attachment of certain bills, the money whereof was due to the judgment-debtor from P. W. D. authorities. Bherudhan Parakh filed objection against that attachment under Order 21, Rule 58, of the Civil Procedure Code contending that the judgment-debtor had no right, title or interest in the attached money in face of the power-of-attorney he (the judgment-debtor) had executed in his favour. The decree-holder traversed the claim of Bherudhan Parakh by pleading that he had neither any interest in, nor possession of, the attached money.

2. The executing court accepted the objection of Parakh and released the attached money on the findings that in terms of the power-of-attorney dated 1-9-1961, executed by the judgment-debtor in favour of Parakh he had agreed that neither he (judgment-debtor) nor any other person on his behalf shall be entitled to receive money due under the contracts taken by him from the Public Works Department and that that money shall be payable only to Parakh, and that there was sufficient consideration for the agreement made between Parakh and the judgment-debtor. It was also found by the executing court that it had been agreed between the parties that the power-of-attorney shall not be revocable under any circumstances.

3. Having felt aggrieved with the lifting of the attachment, the decree-holder has come up in revision to this Court.

4. Shri A. M. Lodh, appearing for the petitioner, has urged vigorously that the executing court had gone wrong in accepting the claim of Parakh on the basis

of title to the attached property inasmuch as such claims have to be adjudged purely on the footing of possession of the attached property to the entire exclusion of all considerations bearing on the title thereto. He submits further that the claim should have been rejected under rule 61 since it is patent that the P.W.D. authorities were holding the money in trust for the judgment-debtor and that Parakh was not in possession of the money on the date it was attached. Shri A. K. Shyam Choudhury, representing Parakh, supports the order of the executing court on the basis of the provisions of rule 59. That rule provides that the claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. It is the contention of Shri Choudhury that if an objector can prove either his interest in the property attached or possession over that property, his claim has to be accepted.

5. The first question that falls for determination, on the basis of stand taken by the parties' counsel, is whether the question of title to attached property has any relevancy to a claim made under rule 58. There appears to be consensus of authority that the question that requires determination respecting a claim made under rule 58 is whether on the date of the attachment it was the judgment-debtor or the objector who was in possession of the property attached.

This view, I venture to state, is apparently opposed to what is mentioned in rule 59 which indicates that even on the basis of some interest in attached property the claimant may score against the decree-holder. At the same time it is evident that rules 60 and 61, which respectively bear the marginal notes "Release of property from attachment" and "Disallowance of claim to property attached", speak only of possession and not of title. Rules 58 to 63 of Order XXI fall under the heading "Investigation of Claims and Objections". I think these six rules constitute a complete code between themselves respecting investigation of claims and objections arising out of and filed against the attachment of properties until the right of the defeated party in the executing Court is determined by a regular suit instituted under Rule 63. As such all the six rules, from 58 to 63, have to be read together to find out their exact meaning and scope.

Before proceeding further, I would like to observe that if the words of a statute are in themselves precise and unambiguous, they have to be interpreted in their natural and ordinary sense. A statute expresses the will of the Legislature and the intention of the Legislature

is best gathered from the words used by it. It is also well settled that a construction which will leave without effect any part of the language of the statute will normally be rejected. In view of these principles of interpretation, I believe, it may not be wholly correct to state that the fate of objections filed under Rule 58 has absolutely nothing to do with the title of the claimant to the property attached. As mentioned earlier, the phraseology of rule 59 does not countenance such an interpretation. If the interest of the claimant in the attached property had no relevancy to the objection filed by him, the Legislature would not have used the words "interest in... the attached property" in that rule, nor issued a directive to the claimant, as is evident from the same rule, to adduce evidence to establish his interest in the attached property.

It is an established principle of interpretation of statutes that the Legislature must be presumed to have used all the words in a rule or section quite deliberately and with a view to achieve some objective. I now proceed to indicate that the expression "interest in... the property attached" was designedly used and that it has vital value in determining the objection filed by a claimant.

6. It will help in explaining the point I want to make if rules 59, 60 and 61 are reproduced here for convenient reference. They run as under:

"R. 59. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

R. 60. Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

R. 61. Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim".

According to rule 60, the attached property shall be released at the instance of the claimant if it were proved that such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him. It shall also be released even if it was in the possession of the judgment-debtor at the time of attachment provided his possession was not in his own right but on account of or in trust for some other person.

This expression "other person", I would like to emphasise, is not synonymous with the "claimant" or "objector" seeking relief under rule 59. It can include persons other than that claimant or objector. There appears no compulsion from the words of rule 60 to hold the expression "other person" as conterminous with the "objector" or the "claimant". The property will also be released under rule 60 if it was in possession of the judgment-debtor partly on his own account or partly on account of some "other person". Here, too the expression "other person" has, in my opinion, identical connotation. It would, therefore, follow that in terms of rule 60 the objection may be accepted and the property released if the judgment-debtor or his trustee does not happen to be in possession even though the objector is not proved to be in possession of the property. If title to the property has no relevancy while deciding the objection filed under rule 58, and if the objection can be accepted and the attachment lifted under rule 60 even though the claimant or objector is not in possession of the property, then a really anomalous situation can arise.

To cite an instance. A files an objection to attachment under rule 59 without indicating his interest in the property and without asserting his possession over it. If such an objection is entertained, and nothing stated in rule 58 stands in the way of Court adopting such a course, the property may be released from attachment under rule 60 even if the judgment-debtor is not proved to be in possession of it if we accept the proposition canvassed by Shri Lodh on behalf of the decree-holder, namely, that fate of objections lodged under rule 58 has to be adjudged, in all eventualities, on the basis of possession to the entire exclusion of title. In such an hypothetical case, a mere stranger will have intervened in a litigation between the decree-holder and the judgment-debtor and created complications for both of them. I am, therefore, led to the inevitable and at the same time practical, conclusion that where the objector or claimant is not in possession of the attached property he can succeed under rule 60 if he can establish two points, namely, (i) that he has

an interest in the property attached, and (ii) that the property is not in the possession of the judgment-debtor or in the possession of some one holding in trust for or on behalf of the judgment-debtor.

This conclusion is reinforced by the opening words of rule 60 which demand that the property shall be released from attachment when it is not in possession of the judgment-debtor or in the possession of some one in trust for the judgment-debtor, only if the claimant or objector satisfies the court that the property was not in the possession of the judgment-debtor or in the possession of some one in trust for him 'for the reasons stated in the claim or objection.' These underlined (here in ') words clearly refer back to what is mentioned in rule 59. That rule, I may repeat, enacts that the claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. This interpretation of rule 60 gives full meaning to each and every word used in that rule as also in rule 59 and thereby satisfies another principle of interpretation of statutes, viz, that no word or letter used by the Legislature in any measure should be considered otiose.

7. In the preceding para, I have shown how the claimant can succeed on establishing his interest in the property and on proving the possession of some one other than the judgment-debtor over that property, provided this latter person does not hold the property in trust for the judgment-debtor. The claimant or the objector can also succeed if he can establish his possession over the property on the date it was attached. This conclusion emerges from the combined reading of rules 59 and 60. Rule 59 directs that the claimant may adduce evidence either respecting his interest in the property or his possession over it. In case his possession over the property is proved, then the claim to possession of the judgment-debtor, or for that matter of any other person, would not arise, and in such an event the objection would be accepted and property released from attachment.

Rule 61 states that if the property was in the possession of the judgment-debtor on the date of attachment, in his own right and not on account of any other person, or was in the possession of some other person in trust for him, the court shall disallow the claim. It is obvious that if the property is in possession of the judgment-debtor or in possession of some one in trust for him, it cannot be simultaneously in possession of the claimant and in such a case his claim shall be rejected on the basis of possession of

the judgment-debtor. In the circumstances contemplated by rule 61, the fate of the claim or objection filed under rule 58 shall be determined only on the basis of possession. The question of interest in the attached property of the claimant or objector assumes relevancy as also importance when release of property from attachment is being considered under Rule 60.

The conclusions recorded above can now be briefly summarised as under:—

(i) The claim filed under Rule 58 shall be rejected in terms of Rule 61 if the property was in the possession of the judgment-debtor on the date it was attached or in possession of some one holding in trust for him or as a tenant under him;

(ii) The claim shall be accepted and property released from attachment if the objector or claimant has some interest in the property and the possession over the property on the date it was attached, as mentioned in Rule 60, was not of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him; or if it was in possession of the judgment-debtor on the date of attachment, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person or partly on his own account and partly on account of some other person. In the last mentioned case, it shall be open to the Court to make an order releasing the property wholly or to such extent as it thinks fit;

(iii) The claim shall also be accepted and property released from attachment in terms of rule 60 if the claimant was in possession thereof on the date of attachment, even though he had no interest in the property. His possession would negative the claim to possession if made by the judgment-debtor and so rule 61 would not come into play.

It would be apparent that in the case mentioned at No. (ii) the question of title of the claimant or objector to the attached property would be a relevant factor.

8. This brings us to the consideration of the merits of the present revision petition. It is common ground between the contending parties that the money due under the attached bills was in possession of the Government on the date it was attached. There is also no dispute on the point that the money was due to the judgment-debtor in respect of some contract work done by him for the Government. Therefore, the money was in possession of the Government obviously in trust for the judgment-debtor. It is equally clear that the money was not in the possession of the claimant Parakh on the date of attachment. Hence, the case clearly falls within the purview of rule 61,

which, it can bear repetition to state, provides, inter alia, that where the property was, at the date it was attached, in the possession of some person in trust for the judgment-debtor, the court shall disallow the claim. This view gathers corroboration from the case of Gauhati Bank Ltd. v. Rajendra Nath, AIR 1959 Assam 167, and also from that of Tamluk Loan Office Co. v. Kedar Nath, AIR 1952 Cal 768. Hence, the executing court gravely erred in allowing the claim of Parakh. I would, therefore, accept this petition, set aside the impugned order, and reject the claim of Parakh. The petitioner Jethmal Bothra shall get costs of both the Courts from the objector Parakh. Advocate's fee Rs. 32/-.

Petition allowed.

AIR 1970 TRIPURA 43 (V 57 C 10)

C. JAGANNADHACHARYULU, J. C.

Jagat Chandra Marak and others, Appellants v. Ulfat Ali Bhuiya and others, Respondents.

Civil First Appeal No. 13 of 1961, 25-9-1968.

(A) Limitation Act (1908), Art. 142 — Possession of jotes — For determining possession, question of payment of rent for jotes is crucial — It is not material through whom or in whose name payment is made. (Para 10)

(B) Evidence Act (1872), S. 5 — Evidence of past events — Witnesses cannot be expected to speak to details of events which happened several years before they give their evidence. (Para 15)

(C) Evidence Act (1872), S. 114 — Entries in record of rights — Presumption that they are correct is rebuttable. AIR 1925 Cal. 404 (2) & AIR 1925 Cal. 799 & AIR 1927 Cal 210 & AIR 1929 Cal 255 Rel. on. (Para 20)

(D) Limitation Act (1908), Art. 120 — Right to sue when accrues — Adverse entry in record of rights — Right of affected party to sue accrues on date of infringement of his right on basis of such entry and not on date of knowledge of entry.

A mere adverse entry in a record of rights does not give rise to any cause of action. But, when the defendant causes an infringement of the right of the plaintiff by denying his title or dispossessing him from the property on the basis of such an entry, then the cause of action rises from the date of the infringement. The plaintiff's knowledge of the adverse entry does not start the period of limitation. Case law discussed. (Para 21)

(E) Limitation Act (1908), Art. 142 — Applicability — Where plaintiff pleads possession and dispossession, Article is applicable. AIR 1956 Assam 111 & AIR 1962 Madh Pra 31 Rel. on. (Para 22)

(F) Specific Relief Act (1877), S. 42 — Ascertainment of mesne profits — Suit for declaration of title, for possession and for mesne profits — Held, mesne profits had to be ascertained separately on petition under O. 20 R. 12 of Civil P. C. on obtaining possession — (Civil P. C. (1908), O. 20 R. 12). (Para 24)

Cases Referred: Chronological Paras

(1962) AIR 1962 Madh Pra 31 (V 49) — 1961 Jab LJ 480, Laxminarain Mulchand Kothari v. Vithaldas Kanhaiyalal 22

(1958) AIR 1958 SC 419 (V 45) — 1958 SCR 1295, K. S. Srinivasan v. Union of India 14

(1957) AIR 1957 Manipur 15 (V 44). Nongmaithem Gourmani Singh v. Mayengbam Ibungohal Singh 10

(1956) AIR 1956 SC 593 (V 43) — 1956 SCR 451, Nagubai Ammal v. B. Shama Rao 14

(1956) AIR 1956 Assam 111 (V 43). Gathi Koch v. Meharuddin 22

(1954) AIR 1954 SC 758 (V 41). Sheodhari Rai v. Suraj Prasad Singh 10

(1953) AIR 1953 Madh Bha 184 (V 40) — MLR (1952) Civ 19. Ramchandra v. Keshav Khanderao 14

(1943) AIR 1943 Cal 453 (V 30) — 47 Cal WN 662, Rani Harshamukhi Dasi v. Kshitindra Deb Roy 20

(1939) AIR 1939 Pat 548 (V 26) — 20 Pat LT 303, Godadhar Patra v. Bholanath Chaudhury 21

(1936) AIR 1936 Lah 37 (V 23) — 38 Pun LR 748, Ghulam Mohd. Khan v. Samundar Khan 21

(1933) AIR 1933 Oudh 283 (V 20) — 10 Oudh WN 365, Mt. Sukhdasi Kaur v. Fatch Bahadur Singh 21

(1929) AIR 1929 PC 286 (V 16) — 56 Ind App 388, Midnapur Zemindary Co. Ltd. v. Secy. of State 21

(1929) AIR 1929 Cal 255 (V 16) — 33 Cal WN 198, Adu Mondal v. Hiralal Mistry 20

(1928) AIR 1928 Lah 726 (V 15) — 109 Ind Cas 26, Budhu Ram v. Uttam Chand 14

(1927) AIR 1927 Cal 210 (V 14) — 31 Cal WN 135, Kiran Chand Roy v. Srinath Chakravarti 20

(1927) AIR 1927 All 597 (V 14) — 102 Ind Cas 172, Faujdar Singh v. Baldeo Singh 21

(1925) AIR 1925 Cal 404 (2) (V 12) — 78 Ind Cas 169, Sm. Rakimjam v. Amar Krishna Chaudhury 20

(1925) AIR 1925 Cal 799 (V 12) — 29 Cal WN 517, Ramanath Sant v. Official Trustee of Bengal 20

(1922) AIR 1922 Cal 251 (V 9) = 25 Cal WN 1022, S. K. Acharji Chowdhury v. Umed Ali Howladhar 21
(1921) AIR 1921 Cal 79 (V 8) = 21 Cal WN 175, Sk. Barkat Ali v. Basant Nunia 20

B. B. Gupta, J. C. Lodh and A. C. Chakraborty, for Appellants; M. R. Choudhury, J. K. Roy and B. Chakraborty, for Respondents Nos. 1 and 8.

JUDGMENT: This is an appeal filed by the defendants 1 (Jagat Chandra Marak, son of late Jangdan Garo), 2 (Gunamani Garo, wife of Jagat Chandra Garo), 5 (Aswini Kumar Deb Nath, son of late Ram Charan Deb Nath), 7 (Ananga Chandra Deb Nath, son of late Adhar Chandra Deb Nath), 12 (Raimani Devi, widow of late Adhar Chandra Deb Nath), 14 (Kunja Lata Devi, widow of late Nadiar Chandra Bhowmick), 16 (Haridas Deb Nath, son of late Ishan Chandra Deb Nath) and 17 (Indramani Saha, widow of late Dwarka Nath Saha) in Title Suit No. 24 of 1953 on the file of the Subordinate Judge, Tripura at Agartala against the judgment and decree therein declaring the title of the respondents-plaintiffs to jote Nos. 59, 72, 96 and 105 in Champmamurah mouja, Ishanchandranagar Pargana comprised by the plaint 'Kha' schedule, for delivery of possession of the same to the respondents and for payment of Rs. 1,500 towards mesne profits.

2. Cross-objections were filed by the respondents against the decree for Rupees 1,500 for mesne profits.

3. The case of the respondents, plaintiffs, briefly stated, is thus:

(a) The plaint 'Ka' schedule ryoti jote land, situate in Champmamurah mouja, within Ishanchandranagar Pargana, about 1 drone and 11 kanis in extent, belonged to one Kadar Ali. After him, two brothers by name Minnat Ali and Saheb Ali came to own the said land. As Saheb Ali died issueless, Minnat Ali became the sole owner of the land. Minnat Ali sold it to Harinath Garo Sardar of Champmamurah. The latter mortgaged the land to one Saiyed Ali for Rs. 500 under registered mortgage bond, dated 7-4-1338 T. E. Saiyed Ali transferred his mortgage interest under a registered deed of transfer dated 17-6-1341 T. E. in favour of Himmat Ali Bhuiya of Purba Gakulnagar village. The mortgagor Harinath Garo Sardar sold the plaint 'Kha' schedule land about 1 drone in extent, out of the hypotheca to the transferee-mortgagee Himmat Ali Bhuiya under a registered sale deed dated 4-10-1341 T. E. in full discharge of the mortgage debt.

(b) Himmat Ali thus became the owner of the plaint 'Kha' schedule land of about 1 drone. He was in possession and enjoyment of it until he died in 1343 T. E. After his death, his eldest son Ulfatali Bhuiya (first plaintiff-respondent) began

to manage his entire estate. In 1343 T. E., he learnt that, without the knowledge of his father Himmat Ali Bhuiya, Harinath Garo Sardar managed in 1341 T. E., about 2 months after he sold away the land to Himmat Ali Bhuiya, to have toujis posted in the names of his relations in the place of the original jotedars Minnat Ali and Saheb Ali. He got touji No. 59, for 1 kani, 7 gandas and 3 karas posted in the name of his minor son Manik Garo, touji No. 105 for 4 kanis, 3 gandas and 1 kara in the name of his son-in-law Devendra and touji No. 96 for 3 kanis and 11 gandas in the name of another son-in-law Jangdan Garo and touji No. 72 for 3 kanis, 18 gandas and 2 karas in the name of Himmat Ali. The first respondent raised disputes with Harinath Garo Sardar and the latter undertook not to make any claim through his son or sons-in-law to the toujis in question. The first respondent paid the land revenue in the names of Jangdan Garo, Devendra and Manik Garo. Himmat Ali Bhuiya paid the rent for jote No. 72 in his own name. The first respondent got the entries relating to toujis Nos. 59, 96 and 105 corrected in his own name with the knowledge of Manik Garo, Jangdan Garo and the heirs of Devendra. Later on, the first respondent paid the rents for toujis Nos. 59, 96 and 105 in his own name.

(c) Jangdan Garo, Devendra and Harinath Garo Sardar died. Taking advantage of their death and of the toujis standing in their names, their heirs filed a petition before the Collector, Sadar in 1359 T. E. for cancellation of the name of the first respondent against toujis Nos. 59, 96 and 105. They falsely represented that there was another person Harinath Garo, who was different from Harinath Garo Sardar, the vendor of Himmat Ali Bhuiya. The Collector passed an illegal order cancelling the name of the first respondent with reference to the said three toujis.

(d) The appellants and others formed into an unlawful assembly and forcibly dispossessed the respondents from the lands covered by toujis Nos. 59, 72, 96 and 105 on 9-3-1952 A. D. The first respondent filed a criminal case against them.

(e) So, the respondents filed the suit on 17-11-1953 for declaration of their title to the plaint 'Kha' schedule land, for recovery of possession of the same and for recovery of Rs. 1,500 towards mesne profits.

4. The contesting defendants filed written statements denying the plaint allegations. Their case is as stated below:

(a) Harinath Garo Sardar lived in Champpamurah. Jangdan Garo was the said Harinath Garo Sardar's sister's husband. Harinath Garo, the father of Jangdan Garo, was not a Sardar. He resided in the Garo hills and died there.

Jagat Chandra Garo was Harinath's daughter's son. Neither Harinath Garo Sardar nor anybody else sold the suit land to Himmat Ali.

(b) Jote No. 96 comprising an area of 3 kanis and 11 gandas stood in the name of Jangdan Garo, father of the first defendant-appellant. He enjoyed the land and, after his death, the first defendant-appellant and his deceased brother Jangma Garo enjoyed the land and the first defendant-appellant sold away the land subsequently to some of the supplementary defendants. The touji was posted in the name of the first defendant-appellant. Khatian was opened in 1340 T. E.

(c) Jote No. 59 comprising 1 kani, 7 gandas and 3 karas of land was acquired by the third defendant Manik Chandra Garo from his grandfather late Harinath Garo Sardar and in the year 1340 T. E. the jote was created in his name. But, he sold away the land to some of the supplementary defendants.

(d) In Jote No. 105, about 2 kanis of land belonged to the second defendant-appellant Gunamani Garo. She sold it away to some of the supplementary defendants including the seventh defendant Ananga Chandra Deb Bath (fourth appellant) under a registered sale deed dated 10-12-1952 A. D.

(e) The alienees from the above mentioned defendants 1 to 3 are thus in possession and enjoyment of the suit land covered by jote Nos. 59, 96 and 105. The respondents had neither title to nor possession of the land of the said toujis within the statutory period and the suit is barred by limitation.

5. On the above contentions, the learned Subordinate Judge framed the necessary issues and held that the respondents got title to jotes Nos. 59, 72, 96 and 105 that they were in possession and enjoyment of the same, but that were dispossessed on 9-3-1952 A. D. Accordingly he declared their title to the land covered by jotes nos. 59, 72, 96 and 105 and decreed that the respondents should get delivery of possession of the land covered by the jotes and held that the suit is not barred by limitation. He also passed a decree for Rs. 1,500 towards mesne profits. He dismissed the suit against defendant No. 4 Joynath Garo, who died during the pendency of the suit, as his legal representatives were not brought on record. Hence the appeal by the defendants 1, 2, 5, 7, 12, 14, 16 and 17 against the judgment and decree against them and cross-objections by the respondents attacking the finding of the learned Subordinate Judge regarding mesne profits.

6. The points which were argued and which arise for determination are:

(i) Whether the respondents have title to and possession of the plaint 'Kha' schedule land, of about 1 drone in extent, within the statutory period?

(ii) Whether the suit is barred by limitation?

(iii) To what mesne profits, if any, are the respondents entitled?

(iv) To what relief are the appellants entitled?

7 to 8. POINTS (i) AND (ii):—

(After considering the evidence, judgment proceeded:)

9. Thus, that Himmat Ali Bhuiya, the predecessor-in-title of the respondents, acquired title to and possession of the plaint 'Kha' schedule land of about 1 drone in extent is proved by Ext. P-1 registered sale deed dated 4-10-1341 T. E. The next question, that has to be considered, is whether the plaint 'Kha' schedule land consists of the 4 toujis Nos. 59, 72, 96 and 105 in dispute and whether the respondents were in possession and enjoyment of the same until they were said to have been dispossessed on 9-3-1952. There are the following circumstances, which go to prove the respondents' case.

(After narrating some of the circumstances in the rest of this para (8), and para (9), the judgment proceeded:)

10. Secondly, the respondents produced a number of tax receipts to show that Himmat Ali Bhuiya paid the land revenue for the 4 toujis in question and that, after his death, the respondents paid the same. Exts. P-4 (a) to P-4 (i) relate to jote No. 72 and they show that the land revenue for the said jote was paid by the respondents and their predecessor-in-title from 1343 T. E. Exts. P-4 (j) and P-4 (o) to P-4 (s) relate to jote No. 59 and they show that the respondents' predecessor-in-title and the respondents paid land revenue from 1344 T. E. Exts. P-4 (t) to P-4 (w) relate to jote No. 96 and they show that the respondents' predecessor-in-title and the respondents paid land revenue of the said jote from 1344 T. E. Exts. P-4 (k) to P-4 (n) are tax receipts relating to jote 105 and they show that the respondents and their predecessor-in-title had been paying the land revenue for the said jote from 1344 T. E. The payment of land revenue by Himmat Ali Bhuiya and by his successors-in-interest ever since Himmat Ali Bhuiya purchased the land under Ext. P-1 dated 4-10-1341 T. E. is a very strong circumstance which goes to show that the 4 toujis in question are covered by Ext. P-1, that they were delivered to Himmat Ali Bhuiya and that they had been in the possession and enjoyment of Himmat Ali Bhuiya and his successor-in-interest.

The learned Counsel for the appellants raised four contentions on this aspect of the case. His first contention is that the rent receipts were filed in the lower Court on 24-8-1960 long after the suit was

filed on 17-11-1953 and that, therefore, they were got up. A perusal of the receipts shows that they are all printed receipts. If really the receipts were got up, the appellants would have summoned for the accounts from the revenue authorities to show that the respondents did not pay the land revenue and that the receipts were got up. So, I do not find any substance in the contention that all the printed receipts Exts. P-4(a) to P-4(w) were got up. His second contention is that the appellants are tribals and simple folk that to protect them and their interests in the lands the erstwhile Maharajah of Tripura issued notifications in the gazette dated 7th Aswin, 1343 T. E. and 15th Agrahayan, 1353 T. E. prohibiting alienation of lands by the tribals in favour of non-tribals, that a similar provision was also made in S. 187 of the Tripura Land Revenue and the Land Reforms Act of 1960, that the appellants themselves paid the rents through Himmat Ali Bhuiya and the 1st respondent, Sardar of the village, and that, therefore, no importance should be attached to Exts. P-4(a) to P-4(w) rent receipts. That the contention of the learned counsel for the appellants that the appellants paid the land revenue through the respondents is an after-thought and untenable as is clear from the allegations made by D. W. 1, (the first defendant) in para 11 of his written statement, and by the 7th defendant in para 12 of his written statement. Therein they stated that the respondents did not pay any rent for any year and that if they produced any rent receipts they would only be paper transactions designed to create evidence in the suit. The evidence of D. W. 1 is that he himself paid the rents. If really the appellants paid the rents through the respondents, then they would have taken the receipts and kept them with themselves. So, the contention that the appellants themselves paid the rents through the respondents under the rent receipts Exts. P-4(a) to P-4(w) is wholly untenable.

The third contention of the learned counsel for the appellants is that the rent receipts show that rents were paid by the respondents in the names of Manik Garo for touji No. 59, Jangdan Garo for touji No. 96, Devendra Garo for touji No. 105 and that therefore the respondents cannot rely upon the payments. Touji No. 72 stands in the name of Himmat Ali Bhuiya and payments were made in his name. But, as the three toujis Nos. 59, 96 and 105 stand in the names of three different persons as evidenced by Ext. P-0 series khatian, necessarily the payments of rents had to be made in their names until mutation was effected in the name of the first respondent in the accounts. How the names of Manik Garo, Jangdan Garo and Devendra were improperly entered in the the khatians will be adverted to present-

ly. It is the question of actual payment of rent that is crucial and it is not material through whom or in whose name the payment was made.

The fourth contention of the learned counsel for the appellants is that the mere payment of rent, even if true, by the respondents for the 4 *toujis* in question does not show that the respondents had title to or possession of the same. He relied on *Sheodhari Rai v. Suraj Prasad Singh*, AIR 1954 SC 758 where it was held that payment of rent does not necessarily establish the relationship of landlord and tenant. But, a study of the judgment shows that the Supreme Court upheld the finding of the High Court that the fact of payment of rent by the defendants first party to the superior landlords as evidenced by the rent receipts produced by the defendants first party from their own custody was quite consistent with their having permissive occupation of the lands under an amicable arrangement with the defendants second party, without there being any relationship of landlord and tenant between the two sets of defendants.

In *Nongamaithem Gourmani Singh v. Mayengbam Ibungohal Singh*, AIR 1957 Manipur 15 the plaintiff deposited land revenue on behalf of the defendant's father whose name continued in the revenue papers. It was held that the plaintiff could not take advantage of his paying the revenue during a short period and that the defendant's continuous payment of the same throughout was a material circumstance in his favour. It is very significant to note in this connection that the appellants did not file even a single land revenue receipt to show that they ever paid land revenue for the *jotes* in question, until the suit was filed against them. If their case is true and they were really in possession of the suit *toujis*, they would have been able to produce at least a single receipt to show that they paid the land revenue for the *jotes* in question after the suit was filed. The contention of the appellants that they paid the land revenue before the suit summonses were served upon them is not of any weight inasmuch as the land revenue was paid after the suit was filed. Exts. D-11 and D-11 (a) to D-11 (d) are of no evidentiary value and cannot show that the appellants were in possession of the suit *jotes* before the respondents were dispossessed from them.

11 to 13. [After discussing the evidence the judgment proceeded:]

14. Fifthly, there is the admission of the appellants themselves that the 4 *jotes* in question are the lands covered by Ext. P-1. The Order-sheet of the suit maintained by the Subordinate Judge shows that he framed three additional

issues after hearing the lawyers for both the sides on 23-3-1961 and posted the suit to 27-3-1961 for arguments. Those issues are issues Nos. 10 to 12 mentioned by the Subordinate Judge in his judgment raising the question whether the suit land is identical with the land covered by *jotes* Nos. 59, 96 and 105 and whether the respondents have title to them and whether the names of the defendants were fraudulently entered in the *khatian* regarding the said *jotes*. Vide order No. 28 in the note sheet. Then the respondents filed a petition on 27-3-1961 stating that the question whether the suit land is covered by the said *jotes* did not arise, inasmuch as the defendants admitted that they sold away the lands in question, that there was no need for the lower Court to frame additional issues and that in case the additional issues were not deleted, then a Commissioner should be appointed to make local enquiry regarding the identity of the land and the *jotes* in question and to submit his report. Order No. 29 dated 27-3-1961 shows that the Subordinate Judge dismissed the petition on the ground that it was filed late after the evidence was recorded. As such, the contention of the appellants' counsel that the respondents themselves were in doubt regarding the identity of the land and that therefore they filed the petition for appointment of the Commissioner is not correct. The circumstances under which they filed the petition are quite different from those urged by the appellants' counsel.

The appellants-defendants (who were impleaded before the supplementary defendants were added) filed a petition dated 4-1-1955 and another petition dated 14-1-1955 in the lower Court stating that the lands involved in the suit were sold away to the persons mentioned in the schedules and that the sale deeds executed by the defendants were in the possession of the alienees. These two petitions thus contain an admission that the plaint 'Ka' schedule land comprised the 4 *jotes* in question. But, the contention of the appellants' counsel is that the clerk who wrote the petitions was reckless in writing them, that he made irresponsible admissions, which were gratuitous, and that no weight should be attached to them. He relied on *Budhu Ram v. Uttam Chand*, AIR 1928 Lah 726 and *Ramchandra v. Keshav Khanderao*, AIR 1953 Madh Bha 184 where it was held that a gratuitous admission can be withdrawn at any time and that, therefore, it is of little value. Also, he further relied on *Nagubai Ammal v. B. Shama Rao*, AIR 1956 SC 593 and *K. S. Srinivasan v. Union of India*, AIR 1958 SC 419 in support of his contention that an admission is not conclusive as to the truth of matters stated therein, that it is only a piece of evidence, the weight to be attached to which must

depend on the circumstances under which it was made and that it can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it has become conclusive by way of estoppel.

In the lower Court and in the present appeal as well, it is the common case of all the appellants that the lands in question were sold away in favour of the supplementary defendants by the defendants who were impleaded at first and that the lands are now in the possession and enjoyment of the alienee defendants-appellants. So, there is no question of any carelessness or irresponsibility on the part of the pleader's clerk who wrote the petitions. The admission made by the appellants is not a casual or a gratuitous one, inasmuch as it is the definite case of the appellants that the lands in dispute were sold away to the alienee defendants. So, the Court is entitled to rely on the petitions to show that the suit land namely, the plaint 'Kha' schedule land, comprises of the 4 Jotes in question, which are claimed by the appellants.

15. Then there is the oral evidence of P. Ws 1 to 9 who deposed that the 4 Jotes in question were in the possession and enjoyment of Himmat Ali Bhuiya and P. W. 1 after the former's death through their lessees.

(After considering their evidence the judgment proceeded:)

But, as pointed out by the learned Subordinate Judge, the witnesses could not be expected to speak to details of events which happened several years before they gave their evidence. The documentary evidence referred to above is more material in the present case than the oral testimony of P. Ws. 1 to 9, which suffers from vagueness to some extent.

16. Then, adverting to the case of the appellants their main plank is Ext. P-7 read with Ext. P-6 series. Ext. P-7 is a copy of the "sheet of mistakes in Champamurah village prepared under Rule 166 of the rules regarding Survey and Settlement on 19-10-1341 T. E." Column 4 reads that on verification it was found that the land mentioned in the columns 1 and 2 formerly appertained to old touji No. 64 standing in the name of Minnat Ali and others, that the said land was 8 kanis, 15 gandas and 3 karas in extent and that the toujidars Minnat Ali and Saheb Ali died. Column 4 further reads that the persons mentioned in column 3 were possessing the three items of land, that out of them 1 kani, 7 gandas and 3 karas covered by khatian No. 65/59 was possessed by Manik Garo, son of Harinath Garo Sardar on the strength of an oral purchase, that Harinath Garo Sardar, son of Gena Garo entered in Khatian no. 80 was

possessing 3 kanis, 18 gandas of the old touji on the strength of an oral purchase, that Jangadas Garo, son of Harinath Garo mentioned in khatian no. 105 was possessing 3 kanis and 10 gandas of land on the strength of an oral purchase and that it was necessary to assess "nazar" for purchases from the persons mentioned in the Khatians Nos. 66, 80 and 105. In columns 7 to 10 it was written that there was a custom of oral purchase among the tenants of the hills and that, therefore, the transfers appeared to be true. The endorsement bears the signature of Sri J. Ganguly, S. O. dated 19-10-41 T. E. Ext. P-6 khatian shows that jote no. 96, 3 kanis, 11 gandas was entered in the name of Jangadas Garo, son of Harinath Garo and column 11 therein reads that it was a purchase made out of old touji no. 64. Ext. P-6 (a) shows that touji no. 72 for 3 kanis, 18 gandas and 1 kara stood in the name of Himmat Ali Bhuiya. This is not of much importance here, as admittedly Himmat Ali Bhuiya was the owner of jote 72. Ext. P-6 (b) shows that touji No. 59, 1 kani, 7 gandas and 3 karas in extent stood in the name of Manik Chandra Baro, son of Harinath Sardar and that it was a portion purchased from out of old touji no. 64. Ext. P-6 (c) shows that jote no. 105 stood in the name of Debendra Garo, son of Manik Garo, that its extent was 4 kanis, 3 gandas and 1 kara and that it was purchased out of old touji no. 85. All the four toujis are prepared in 1340 T. E.

17. The contentions of the respondents' learned Counsel are two-fold. His first contention is that, according to the allegations made by the defendants 1 and 3 in paragraph 18 of their joint written statement, the market value of the suit lands was Rs. 20,000/- on the date of the plaint, that according to the said valuation each kani of land, which yields double crop, was at least more than 20% at the time of the alleged oral sales mentioned in Ext. P-7, that under section 12 of the old Tripura Registration Act corresponding to section 17 of the Indian Registration Act the transactions of sales were compulsorily registrable and that in the absence of registered sale deeds the alleged oral sales were invalid. The respondents valued the suit land at Rs. 6,000/-, while the defendants 1 and 3 stated that the suit land would be worth Rs. 20,000/- in 1954. The oral sales were alleged to have taken place in or about 1340 T. E. corresponding to 1930 A. D. at a time when nobody was willing to live in wild animal infested & jungly Tripura and cultivate the lands therein. There is no evidence as to the value of the suit lands in 1340 T. E. or 1341 T. E. It must be remembered that Himmat Ali Bhuiya, the father of the first respondent purchased the plaint 'Kha' schedule land

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